Case No. S227270

IN THE SUPREME COURT OF CALIFORNIA

TRI-FANUCCHI FARMS,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD, et al.

Respondent,

And

UNITED FARM WORKERS OF AMERICA, a labor union,

Real Party-In-Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F069419

ERRATA TO PETITIONER TRI-FANUCCHI FARMS' OPENING BRIEF ON THE MERITS, INCLUDING INADVERTENTLY OMITTED CITATIONS TO THE CERTIFIED RECORD OF PROCEEDINGS

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ISSUES ON REVIEW

As stated in our Petition for Review, the issues on review are as follows:

1. Whether, consistent with the principles of the Agricultural Labor Relations Act, an employer may challenge a union's status as the bargaining representative of its employees by raising a claim of abandonment based on the union's long-term twenty-four (24) year absence and disappearance from the scene, the union's long-term failure to carry out its duties for over twenty-four (24) years, and the union's lack of contact with the employees and the employer over an unreasonably long period of time.

2. Whether state courts should adhere to rulings of the Agricultural Labor Relations Board when to do so would eviscerate important Agricultural Labor Relations Act policy and fundamentally misconstrue the nature and legislative purpose behind such policy.

3. Whether the Agricultural Labor Relations Board should have applied applicable National Labor Relations Board precedent concerning union abandonment.

INTRODUCTION

In 1974, the California Legislature enacted the Agricultural Labor Relations Act ("ALRA" or "the Act") "to provide for collective-bargaining rights for agricultural employees." (Lab. Code, § 1140.2.) The ALRA

declares it is the policy of the State of California "to encourage and protect the right of agricultural employees to full freedom of association, self-organizations, and designation of representatives of their own choosing ... for the purpose of collective bargaining or other mutual aid and protection." (*Ibid.*) This Court has recognized "[a] central feature in the promotion of this policy is the [ALRA's] procedure for agricultural employees to elect representative 'for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.' [Citations.] " (*J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 8 ("*J.R. Norton*").)

In the present case, the United Farm Workers of America ("UFW") was elected by the agricultural workers at Tri-Fanucchi Farms ("Fanucchi") and certified by the Agricultural Labor Relations Board ("ALRB") to represent Fanucchi's employees for the purpose of collective bargaining. For over twenty-four (24) years, the UFW disappeared from the scene, failing to engage in any activity on behalf of Fanucchi's employees and neglecting its duties as certified bargaining representative. Due to the UFW's long-term and egregious abandonment of Fanucchi's employees, the purpose of the ALRA to provide collective bargaining rights for Fanucchi's agricultural employees was not fulfilled for decades. Fanucchi's employees did not elect the UFW to sit on their rights and do nothing for twenty-four (24) years, yet that is exactly what has occurred.

After twenty-four (24) years of neglecting Fanucchi's employees, the UFW now demands that Fanucchi has an obligation to negotiate with them on behalf of the employees with respect to current conditions of employment. The UFW asserts that by virtue of its archaic certification, it has perpetual standing to represent Fanucchi's employees.

After the UFW's failure to lift a finger to represent Fanucchi's employees for over two decades, Fanucchi refused to engage in bargaining with the UFW until it was determined by a court of law whether the UFW was the true bargaining representative of its agricultural employees due to its twenty-four (24) year absence. Specifically, Fanucchi contends that the UFW hads forfeited its status as certified bargaining representative of Fanucchi's employees as indicated by its over two-decade long absence from the scene and total inactivity on behalf of the Fanucchi employees. Fanucchi's position that its obligation to bargain with the UFW had been extinguished by the UFW's long term and total abandonment of the bargaining unit is supported by Agricultural Labor Relations Board ("ALRB") precedent (*Bruce Church, Inc.* (1990) 17 ALRB No. 19 ("*Bruce Church*"); *Dole Fresh Fruit Co.* (1996) 22 ALRB No. 4 ("*Dole Fresh Fruit*")), ALRA core legislative policy, existing case law, and common law rules of abandonment and waiver.

The ALRB and the court below found that despite its twenty-four (24) years of abandonment, the UFW was still the statutory bargaining

representative of Fanucchi's employees. Misled by appellate court decisions interpreting issues entirely dissimilar to the abandonment alleged by Fanucchi (*see Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1 ("*Montebello Rose*"); *F & P Growers Assn. v. Agricultural Labor Relations Bd.* (1985) 168 Cal.App.3d 667 ("*F & P Growers*")), the Board and the court below summarily rejected Fanucchi's defense to the obligation to bargain with the UFW ruling that once a union is certified as a bargaining representative of an employer's agricultural employees, the employer's duty to bargain with that union continues until the union is replaced or decertified through a subsequent election. (*Tri-Fanucchi v. Agricultural Labor Relations Bd.* (2015) 236 Cal.App.4th 1079, 1089-1090 [187 Cal.Rptr.3d 247], review granted Aug. 19, 2015, S227270.)

Much of this brief will be devoted to a detailed interpretation of the so called "certified until decertified" rule, and whether the rule prohibits an employer from being able to raise an abandonment or unclean hands defense to the duty to bargain under the factual circumstances of this case. The case law construing an employer's duty to bargain with a certified union did not anticipate or consider the factual circumstances under which a certified union would totally abandon the employees it was elected to represent for an unreasonably long period of time. Fanucchi maintains that an employer's continuing duty to bargain does not grant a union perpetual

standing as "certified bargaining representative." Furthermore, the unique aspects of the ALRA prohibiting employer interference with employee selection of representation of their choice are not threatened by permitting an employer to raise the abandonment defense.

The ALRB and the court below essentially held that certification is an all-purpose grant of continuous power to the union, save for its limited check via the decertification process. In doing so, they have ignored the legislative history and court decisions that preceded the enactment of the ALRA, such as *Englund v. Chavez* (1972) 8 Cal.3d 572. The governing principles of the ALRA and legal precedent show that the Board and the court below are wrong and it is bad policy and law to allow a union to abandon its duties for twenty-four (24) years.

STATEMENT OF THE CASE

A. Petitioner and the United Farm Workers Union

Petitioner Tri-Fanucchi Farms is a family-owned farming operation that has been operating in Kern County, California for decades. Petitioner maintains approximately thirty-five (35) year round employees and hires several hundred seasonal employees through various labor contractors. (Certified Record of the Proceedings, "CR" 22-23.)

In 1977, Fanucchi's agricultural employees elected the UFW to be their collective bargaining representative. After the UFW was certified as the employees' representative by the Board, the parties engaged in some

initial bargaining sessions. (CR 22-23.) After polling its employees and believing they no longer wanted the UFW to represent them, Fanucchi refused to bargain with the UFW in 1984 on the good faith belief that the UFW no longer had majority support. (CR 23.) The UFW brought an unfair labor practices complaint and the Board held in the UFW's favor. (*Ibid.*) The Board's findings were ultimately affirmed by the California Fifth District Court of Appeal in a nonpublished decision. (*Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.* (Nov. 21, 1987, F008776 [nonpub. opn.].)

In 1988, Fanucchi informed the UFW that it was willing to engage in bargaining and resume contract negotiations with the UFW. (CR 23.) The UFW responded that it would arrange bargaining dates as soon as its negotiator returned from vacation. (*Ibid.*) For reasons unexplained by the UFW, the UFW negotiator never responded and the UFW disappeared from the scene and no bargaining occurred for approximately twenty-four (24) years. (*Ibid.*)

The next time the UFW contacted Fanucchi was September 28, 2012, when the UFW sent a letter demanding that bargaining be restarted and requesting certain information from Fanucchi. (CR 439-440.) Fanucchi responded on October 19, 2012, advising the UFW that it believed the UFW's twenty-four (24) year absence resulted in an abandonment of its status as the employees' bargaining representative, that

Fanucchi was seeking judicial review of the issue, and that its refusal should be viewed as a "technical refusal to bargain" until such time as the issue of abandonment was addressed by the courts. (CR 441.) At this time, Fanucchi's current workforce did not know the UFW, did not select UFW to represent the workers' interests, and Fanucchi's employees had no reason to believe the UFW represented them due to the UFW's twenty-four (24) year absence.

B. The Proceedings Below

On March 7 and April 16, 2013, UFW filed charges with the Board on the grounds that Fanucchi had allegedly engaged in unfair labor practices by refusing to bargain and by refusing to provide information relevant to bargaining. (CR 1-6.) On September 5, 2013, the Board's general counsel ("General Counsel") filed a consolidated administrative complaint ("Complaint") against Fanucchi, arguing that Fanucchi's refusal to bargain and provide information constituted unfair labor practices in violation of the ALRA, Labor Code section 1153, subdivisions (1) and (e). (CR 7-12.) Additionally, the General Counsel requested the Board award make whole relief against Fanucchi pursuant to ALRA section 1160.3. (*Ibid.*)

Fanucchi filed an answer to the Complaint on October 8, 2013. (CR 91-96.) The Answer admitted to the underlying facts alleged in the Complaint, but maintained that UFW had forfeited its representative status

by completely abandoning the bargaining unit for twenty-four (24) years. (CR 94.) Fanucchi again asserted that its refusal to bargain was in good faith for the purpose of obtaining judicial review of the important labor relations issue of long-term union abandonment. (CR 96.)

Before the scheduled hearing by the administrative law judge ("ALJ") on October 21, 2013, the General Counsel submitted a motion in limine requesting that all evidence related to Fanucchi's abandonment defense be excluded on the basis that the defense is not recognized by Board precedent. (CR 123-128.) The ALJ granted the motion in limine, which he treated as a motion to strike or a judgment on the pleadings related to Fanucchi's abandonment defense and related equitable defenses. (CR 166-167.) Having rejected Fanucchi's asserted defenses to the duty to bargain, the ALJ addressed the merits of the Complaint, refused to allow Fanucchi to have an evidentiary hearing to cross-examine UFW subpoenaed witnesses regarding whether the UFW had completely abandoned its employees during the twenty-four (24) years, and held that Fanucchi's refusal to bargain and turn over information constituted unfair labor practices. (Transcript of Oct. 21, 2013 Hearing ("TR") 21:13-22:7; CR 158.) The ALJ also found that Fanucchi's refusal to bargain as a means of seeking judicial review was not justifiable in light of Board precedent, and thus awarded make whole relief against Fanucchi. (CR 161.)

On November 20, 2013, Fanucchi filed with the Board fifteen (15) "exceptions" to the ALJ's decision. (CR 388-421.) On April 23, 2014, the Board issued its decision[1] in agreement with the ALJ and finding that Fanucchi's refusal to bargain with the UFW and to provide information constituted violations of section 1153, subdivision (a) and (e). (CR 393-394.) The Board denied Fanucchi's contention that the UFW's complete abandonment was a defense to its duty to bargain, as well as similar equitable defenses based on the twenty-four (24) years of total inactivity by the UFW. (CR 395-400.) The Board also held that make whole relief awarded against Fanucchi was proper. (CR 403-405.)

On May 23, 2014, Fanucchi filed a petition for writ of review to the California Court of Appeal, Fifth District seeking review of the Board's decision in *Tri-Fanucchi Farms, supra,* 40 ALRB No. 4. On February 10, 2015, the Fifth District Court of Appeal issued a writ of review.

The Court of Appeal affirmed the portion of the Board's decision that rejected Fanucchi's defenses to the duty to bargain and held that Fanucchi had committed unfair labor practices for refusing to bargain with the UFW and refusing to provide information. The court deferred to the Board's position that past conduct by the UFW indicating abandonment – i.e. UFW absence, failure to carry out its duties, and lack of contact with

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[1] The Board's decision is reported at *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4.

the employees and the employer for more than twenty-four (24) years – did not create a legal basis for Fanucchi to refuse to bargain with the UFW. Adopting the reasoning of the Board, the Court of Appeal concluded that "the appropriate remedy for UFW's past dereliction was (and is) in the hands of the agricultural employees themselves. That is, if the employees do not wish to be represented by UFW, their recourse is to replace or decertify UFW by a new election pursuant to sections 1156.3 or 1156.7." (*Tri-Fanucchi Farms,* 236 Cal.App.4th at 1084.)

The Court of Appeal reversed the make whole relief award imposed by the Board against Fanucchi. The Court held that Fanucchi's advancement of the abandonment defense plainly furthered the purpose of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue, and thus the Board prejudicially erred when it ordered make whole relief against Fanucchi. (*Tri-Fanucchi Farms,* 236 Cal.App.4th at 1097-1098.)

Fanucchi filed a Petition for Review before this Court of the lower court's rejection of the abandonment and unclean hands defenses. The ALRB similarly filed a Petition for Review regarding the lower court's rejection of the make whole relief against Fanucchi. This Court granted both petitions on August 19, 2015.

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SUMMARY OF ARGUMENT

In enacting the ALRA, the California Legislature clearly expressed its intent that the underlying purpose of the Act is to enable agricultural employees to designate "representatives of their own choosing... for the purpose of collective bargaining or other mutual aid or protection." (Lab. Code, § 1140.2.) This Court has recognized that "[a] central feature in the promotion of this policy is the [ALRA's] procedure for agricultural employees to elect representatives 'for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.' [Citations.]" (*J.R. Norton, supra,* 26 Cal.3d at 34.) Thus, the ALRA anticipates that employees elect a representative of their own choosing for a purpose – to represent their interests in negotiations with their employer and to ameliorate their working conditions. Acknowledgement that a union can forfeit its representative status by abandoning its bargaining unit upholds the fundamental legislative purposes of the ALRA to promote collective bargaining and protect agricultural employees' "freedom of choice" to select a bargaining representative. (*See infra* A.1 and A.2.)

In alignment with the intent of the Legislature, the ALRB has recognized that a union has abandoned its status as certified representative status where the union is either unwilling or unable to continue its responsibilities to represent the employees. (*Bruce Church, supra,* 17

ALRB No.1 at 43, 44 [recognizing that although it does not utilize the doctrine of good faith doubt applicable under the NLRA, the Board "nevertheless retained the doctrine of abandonment as an exception to its usual 'certified until decertified' rule"].) Early Board precedent clearly acknowledged that an employer's obligation to bargain may cease when it can establish the certified union's total absence from the scene for a significant period of time. (*Bruce Church, supra,* 17 ALRB No.1; *Dole Fresh Fruit, supra,* 22 ALRB No. 4.) In both *Bruce Church* and *Dole Fresh Fruit,* the Board analyzed whether the employer had met its burden of demonstrating that the union had effectively stopped representing its employees altogether, as opposed to a lapse in direct negotiations for an extended period of time. (*Bruce Church, supra,* 17 ALRB No.1 at 10; *Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 13.) (*See infra* B.1.)

The Court of Appeal and the Board thus erred in summarily rejecting Fanucchi's abandonment defense by deferring to later Board holdings which inaccurately interpreted *Bruce Church* and *Dole Fresh Fruit* as holding that a union's absence, even for an extended period of time, does not constitute a waiver of rights. That deference was improper here because it is in plain conflict with prior Board precedent which, after examining the ALRA, concluded that an employer's bargaining obligation may cease with a showing that the union had effectively left the scene altogether. (*See infra* B.2.)

The limited existing case law construing the employer's duty to bargain with a certified union under the ALRA recognizes that factual circumstances may exist to extinguish an employer's obligation to bargain with a certified union. In *Montebello Rose, supra,* 119 Cal.App.3d at 24, the court applying NLRB precedent found that a rebuttable presumption exists that a union continues to enjoy majority status after its initial certification year. The recognition of a rebuttable presumption rule under the ALRA suggests that there may be some circumstances in which the employer may be permitted to show that the union has lost its representative status. Fanucchi maintains that the circumstances of this case, evidencing over two decades of total abandonment by the union of its representational duties to the employees that elected it, is sufficient to show the union has lost its representative status. (*See infra* C.)

The Court of Appeal and the Board maintain that rejection of the abandonment defense as presented in this case is consistent with the ALRA principle that an employer's duty to bargain with the originally certified union continues until that union is replaced or decertified by a subsequent election. However, the case law relied upon to support this argument does not hold that certification is an all-purpose grant of perpetual power to the union, save its limited check via the decertification process. In *F & P Growers, supra,* 168 Cal.App.3d at 676-677, the court examined the difference between the NLRA and ALRA, and rejected the employer's lack

of majority defenses on the basis that in enacting the ALRA, the Legislature sought "to prohibit the employer from being an active participant in determining which unit it shall bargain with." In the present case, Fanucchi has not asserted a loss of majority defense rejected by the courts and the ALRB. Fanucchi is asserting an abandonment defense, which is a different defense that has been recognized under the ALRA statutory scheme. (*Bruce Church, supra,* 17 ALRB No.1 at 10; *Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 13.) (*See infra* D.1 and D.2.) It is also based on applicable NLRA precedent which should have been applied pursuant to California Labor Code section 1148.

Forfeiture of rights by abandonment is a widely recognized legal principle that deserved recognition in this case. When the Board granted the UFW the privilege of representing Fanucchi's agricultural employees, it granted the union a monopoly right as a public trust. (*See Steele v. Louisville & Nashville R.R.* (1944) 323 U.S. 192, 200-203 [a labor union is a private entity to which the state, through certification, has granted monopoly power over employment opportunities].) However, that monopoly right, like any grant of exclusivity by the state, may be rescinded due to neglect or abandonment. (*County of L.A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 284 [holding that the privilege of a state-granted franchise lasts only so long as the holder meet the obligations in consideration of which the right was granted].) (*See infra* E.)

The Board exceeded its authority in summarily denying Fanucchi the opportunity to raise prior and total abandonment by the UFW as a defense to its obligation to bargain. The order of the ALRB should therefore be reversed, and the case remanded for the Board to allow Fanucchi the opportunity to demonstrate whether the UFW abandoned its employees during the twenty-four (24) year absence to support a defense to the obligation to bargain. (*See infra* F.)

ARGUMENT

A. A Union's Certification Status Can Be Abdicated Under the ALRA

The Board and the Court of Appeal's rejection of Fanucchi's abandonment defense was based on the principle that an employer's duty to bargain with a union certified to represent an employer's agricultural employees continues until that union is replaced or decertified by a subsequent election. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1091-1092.) The Court of Appeal adopted the Board's analysis, which centered on the employer's duty to bargain with a certified union, and failed to consider the situations in which a union can abdicate its status as certified bargaining representative. Pursuant to the Court of Appeal's opinion, an employer's continuing duty to bargain grants a union perpetual standing as "certified bargaining representative" regardless of the union's gross abandonment of

its responsibilities. This conclusion is inconsistent with the statutory provisions of the ALRA, ALRB precedent, NLRA precedent and case law.

1. Allowing an Abandonment Claim in the Context of this Case Upholds the Core Legislative Purpose of the ALRA

Acknowledgement that a union can forfeit its representative status by abandoning its bargaining unit upholds the fundamental legislative purposes of the ALRA to promote collective bargaining and protect agricultural employees' "freedom of choice" to select a bargaining representative. The Court of Appeal and ALRB opinions focused on the principle that an employer has a continuing duty to bargain with a certified bargaining representative, and completely failed to consider the impact of their ruling in the context of the ALRA's intended purpose – to encourage and protect the rights of agricultural employees. (Lab. Code, § 1140.2.) At the end of the day, it is the agricultural employees that suffer the consequences as a result of failing to recognize abandonment as a defense to bargaining.

In enacting the ALRA, the Legislature expressed its intent and the underlying purpose of the Act as to enable agricultural employees to designate "*representatives of their own choosing... for the purpose of collective bargaining or other mutual aid or protection.*" (Lab. Code, § 1140.2, italics added; *also see*, Lab. Code, § 1152.) The Legislature was clear that the ALRA "is adopted to provide for the collective-bargaining

rights for agricultural employees." (Lab. Code, § 1140.2.) As noted by this Court, "[a] central feature in the promotion of this policy is the [ALRA's] procedure for agricultural employees to elect representatives 'for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.' (*Id.*, § 1156, et seq.)" (*J.R. Norton, Co., supra,* 26 Cal.3d at 34.) The ALRA anticipates that agricultural employees will designate a representative of their own choosing to fulfill a purpose – to engage in collective bargaining on their behalf and provide them aid and protections. The ALRB itself has recognized that when a "certified labor organization rests on its bargaining rights...such neglect serves to erode and undermine the right to be represented that is granted to employees." (*Dole, supra,* 22 ALRB No. 4 at 17.) In short, the ALRA is meaningless unless union representation for agricultural employees comes to the bargaining table to negotiate post-election contracts.

It is clear that the employees' right under the ALRA to designate a representative for the purpose of collective bargaining is seriously jeopardized in the situation of long-term complete abandonment by the union[2]. As demonstrated in the present case, Fanucchi's employees elected

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[2] The Fanucchi bargaining unit is not the only unit that was abandoned by the UFW during the last twenty years. As demonstrated by the companion case *Gerawan Farming Inc. v. ALRB* (2015) 236 Cal.App.4th 1024 and the numerous ALRB opinions addressing this issue over the past

the UFW as their certified bargaining representative in 1977 with the anticipation that the UFW would represent them in collective bargaining and ameliorate working conditions. The UFW totally abandoned the employees that elected it by failing to remain active on their behalf and allowing negotiations at Fanucchi to remain dormant for twenty-four (24) years. Instead of asserting the agricultural employees' rights, the UFW completely abandoned Fanucchi's employees from 1988 to 2012.

Failing to recognize that the UFW has forfeited its status as the certified bargaining representative by virtue of its long-term, complete abandonment also threatens the important ALRA purpose of protecting the employees' right to a representative of their own choosing. In the present case, the union has intruded onto the scene after more than twenty-four (24) years of silence seeking to represent the employees in collective bargaining. The union is a stranger to the current employees. As this Court has recognized, "dilatory tactics after a representative election" undermine collective bargaining and necessarily "substantially impair the strength and support of a union." (*J.R. Norton, Co., supra,* 26 Cal.3d at 30.) It is highly likely that the negative effect of the union's long-term disappearance has

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decade, the UFW continues to allow negotiations to remain dormant for employees it was elected to represent without consequence or regard for the employees.

led employees to distrust the union and that employees do not want to be represented by it or any other union[3].

The Court of Appeal and the Board take the position that regardless of the union's long-term and complete absence from the scene, the ALRA places an affirmative burden on the employees to demonstrate the union is not the representative of their choosing by decertifying the union by a new election pursuant to sections Labor Code sections 1156.3 or 1156.7. (*Tri-Fanucchi Farms, supra,* 236 Cal.App.4th at 1083 ["if the employees do not wish to be represented by UFW, their recourse is to replace or decertify UFW by a new election pursuant to sections 1156.3 or 1156.7"].) The Board and the Court of Appeal's suggested remedy for Tri-Fanucchi's employees to dislodge the UFW by decertification election after its gross abandonment for over twenty-four (24) years is antithetical to the desire of the ALRA to encourage and protect the rights of agricultural employees.

The suggested remedy for employees to pursue a decertification election is absurd under the circumstances of long-term abandonment by a union. After the UFW's twenty-four (24) year absence from the scene, it is unlikely that the employees ever had knowledge they were represented by

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[3] The ALJ and the Board refused to enforce Fanucchi's subpoenas to the UFW regarding what the UFW had done on behalf of Fanucchi's employees, and whether there was any contact with Fanucchi's employees during the twenty-four (24) year absence. (*Pennex Aluminum Corp.* (1988) 288 NLRB 439, 442 [when judging whether the union has abandoned the unit, the contacts between the unit and the employees are "most meaningful"].)

the labor organization. At the same time the employees are trying to determine whether or not they want to seek decertification of a previously unknown union, the absentee union has already asserted itself as their certified bargaining representative and is strong arming their employer into negotiations allegedly on their behalf. This process is swift, and allows very little time for employees to become educated, let alone strategize about whether they want to move for decertification. Further limiting the employee's choice is the fact that the absentee union may invoke the Mandatory Mediation and Conciliation ("MMC") process within 90 days pursuant to Labor Code section 1164. As demonstrated by recent ALRB rulings interpreting the MMC, the absentee union need not engage in any timely and serious bargaining, or even engage in good faith negotiations, before asking the Board to impose a collective bargaining agreement. (*Gerawan Farming* (2013) 39 ALRB No. 17; *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5.)

The complex procedural requirements for union decertification place employees at a further disadvantage. (*See* 8 C.C.R. § 20390.) A petition filed by the employee must be accompanied by evidence of support of a majority of the employees currently employed by the bargaining unit. (8 C.C.R. § 20390 (b).) The petition also needs to include the petitioner employee's name, address and telephone number. (8 C.C.R. § 20390 (d)(1).) Further, the petitioner employee must deliver a copy to the union,

exposing the petitioner's personal information to the UFW and its supporters. (8 C.C.R. § 20390 (e); *see Simo v. Union of Needletrades, Industrial & Textile Employees* (2003) 322 F.3d 602 [demonstrating supporters of decertification efforts often suffer harassment by the incumbent union, its officials, and its supporters].) This is an onerous and unfair burden to put on the agricultural workers, especially since it was the union that abandoned them.

Additionally, there is no way of ensuring the employees that no longer wish to be represented by the UFW will have knowledge of their option to decertify the union or have access to advice to understand the procedural requirements of decertification. Merely informing employees of their legal rights can expose an employer to an unfair labor practice finding and thwart a decertification election. (*See, e.g. Peter D. Solomon and Joseph R. Solomon dba Cattle Valley Farms/Transco Land and Cattle Co.* (1983) 9 ALRB No. 65 [noting it is unlawful for an employer to implant the idea of decertification in the minds of employees who later pursued decertification, and for the employer to assist employees by referring them to free legal advice]; *Abatti Farms, Inc.* (1981) 7 ALRB No. 36 [same].) Further, the decertifying employees have no direct access to funding or resources to be able to disseminate information, organize a decertification drive, and petition for and hold an election. In contrast, the absentee union has access to funds, professional organizers, and a staff of lawyers

representing and working for them. The more accurate result is that employees will be railroaded by the absentee union they do not know or elect to represent them.

More consistent with the ALRA's goal to protect the rights of the agricultural employees to a representative of their own choosing would be to hold the absentee union as having abandoned its certification status as representative of the employees. If the current Fanucchi employees want to be represented by the UFW, the employees, with the assistance of the UFW organizers, can renew the UFW certification by an election. If the employees are satisfied with the UFW's representation, then they would swiftly reaffirm the UFW's status as its certified bargaining representative. It would allow employees to express their true desires. Such an election would ensure that the union had an adequate working knowledge of Fanucchi's workers, the working conditions, and Fanucchi's business operations. To this end, there can be no question that the agricultural employees will have a true say as to who is the representative of their choosing.

2. The History of the ALRA Demonstrates That Abandonment Is A Proper Defense

Failing to recognize abandonment as a defense to an employer's obligation to bargain with a certified union may result in the very consequence the Legislature sought to prevent when enacting the ALRA.

One of the purposes driving the enactment of the ALRA was to protect employee rights by prohibiting unions and employers from imposing a contract upon employees without their consent. (*See Englund v. Chavez, supra,* 8 Cal.3d 572, 597.) In *Englund v. Chavez* this Court refused to uphold collective bargaining agreements that were forced upon unwilling employees after being negotiated by a union that did not have the support of those employees. (*Id.* at 577-579.)

By not applying the abandonment defense in the present case, there is a threat that the concern expressed in *Englund v. Chavez* may actually occur as the union, through the MMC process, can bypass the employees and impose a contract upon the employees without their consent.

B. The ALRB Has Recognized That Abandonment By A Certified Union Is A Defense to An Employer's Obligation to Bargain

1. The Board Itself Has Recognized That A Union May Be Found to Have Abandoned its Representative Status Under the ALRA When It Has Effectively Left the Scene Altogether

Recognition of the abandonment theory in this case does not require this court to adopt an entirely new theory into the ALRA, but merely recognize the abandonment theory already found to exist by the ALRB. The Board has held that an employer's bargaining obligation may cease when a union is found to have totally abandoned the bargaining unit for a period of time.

The Board has repeatedly recognized that a union has abandoned its status as certified representative where the union is either unwilling or unable to continue its responsibilities to represent the employees. (*Bruce Church, supra,* 17 ALRB No.1; *Dole Fresh Fruit, supra,* 22 ALRB No. 4.) In analyzing abandonment, the Board usually considers the facts surrounding the union's alleged absence to determine whether it amounted to merely a hiatus in bargaining, or whether the union effectively left the scene all together. (*Ibid.*) As demonstrated herein, refusal by the ALRB and the lower Court to recognize abandonment under the facts of the union's long-term and complete absence from the scene in the present case was in error.

Board precedent clearly recognizes that an employer's obligation to bargain may cease when it can establish the certified union's total absence from the scene for a significant period of time. In its decision in *Bruce Church,* the Board recognized that although it does not utilize the doctrine of good faith doubt applicable under the NLRA, it "nevertheless retained the doctrine of abandonment as an exception to its usual 'certified until decertified' rule." (*Bruce Church, supra,* 17 ALRB No.1 at 43, 44.) In "clearly recognizing" the existence of the abandonment theory in the context of the ALRA, the Board in *Bruce Church* relied on its earlier holding in *Lu-Ette Farms* (1982) 8 ALRB No. 91, in which it stated: "Once a union has been certified, it remains the exclusive collective bargaining

representative of the employees in the unit until it is decertified or a rival union is certified, *or until the union becomes defunct or disclaims interest in continuing to represent the unit employees...*" (*Bruce Church, supra,* at 44, citing *Lu-Ette Farms, supra,* 8 ALRB No. 91 at 8 [emphasis added].) Stated another way, the Board explained that under the ALRA, the bargaining obligation may cease with "formal decertification, or, in essence, a showing that the Union had effectively left the scene altogether." (*Id.* at 10.)

Seeking to explain the interrelatedness between the concepts of defunctness, disclaiming interest, and abandonment, the Board turned to NLRA precedent. (*Bruce Church, Inc., supra,* 17 ALRB No.1 at 45, fn. 37.) The Board described the concept of defunctness, as originally used by the NLRB, "clearly has both the sense of disabled, implied by the primary meaning of defunct, *and of passivity or unwillingness to perform*, implied by the terms abandonment or disclaimer of interest." (*Ibid.* [emphasis added; internal quotations omitted], citing *Hershey Chocolate Corp.* (1958) 121 NLRB 901, 911.)

Ultimately, the Board in *Bruce Church* reviewed the record and determined that in that case there was no evidence indicating the union had disclaimed interest in, or was unwilling or unable to represent the bargaining unit. (*Bruce Church, supra,* at 10.) In reaching this conclusion, the Board stated "no evidence was presented to show the amount of

contact, or lack thereof, with unit employees, or to show that the Union has stopped representing employees in grievances or other nonbargaining matters." (*Ibid.*) The record in *Bruce Church* showed that despite the slow pace in which the union communicated with the employer and periods of union inactivity lasting between six months to one year, the union continued to represent the employees by presenting a complete proposal and wage package on their behalf, engaging in negotiation meetings with the employer, requesting a wage proposal from the employer, protesting wage changes, and filing unfair labor practices on the employees' behalf. (*Id.* at 45-50.) Additionally, in *Bruce Church,* the Board found that the employer had engaged in unfair labor practices during the time of alleged abandonment that undermined the union's representative status, and thus was disqualified from raising abandonment as a defense. (*Id.* at 50.)

The Board's analysis in *Bruce Church* demonstrates that an employer's bargaining obligation may cease under the ALRA upon "a showing that the Union had *effectively left the scene altogether.*" (*Id.* at 10 [emphasis added].) Although the Board concluded that the factual circumstances in *Bruce Church* did not justify a finding that the union was either unwilling or unable to represent the employees in question, it did leave open the question of whether another set of facts might justify such a finding.

The Board recognized the abandonment defense and made the same inquiry of whether the union was "totally absent from the scene" in *Dole Fresh Fruit, supra,* 22 ALRB No. 4. In *Dole,* the employer asserted that it was justified in withdrawing recognition and refusing to bargain with the UFW, the certified union, with regard to a sector of its employees involved in the production of table grapes, on the basis that the UFW had previously disclaimed or abandoned its interest in representing the employees. (*Id.* at 1 - 2.)

On the issue of abandonment, the Board noted that pursuant to the "distinct law that has developed under the ALRA, the proper question before the Board is whether Respondent has carried its burden of establishing that its duty to bargain has been extinguished by the Union's inability or unwillingness to represent the grape employees, on either...the date of the UFW's formal request to resume negotiations, *or at times prior thereto.*" (*Id.* at 10 [emphasis added].) Despite the Board's criticism of the Dole's decision to raise abandonment at the time the union came forward with its request to bargain after the alleged absence, the Board's analysis did not end there.[4] (*Id.* at 10.)

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[4] The ALRB and UFW have repeatedly argued that Fanucchi's abandonment defense became an impossibility when the UFW requested bargaining after its twenty-four (24) year absence because the UFW demonstrated its current willingness to represent the employees, citing *Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 10. However, that is not what the Board in *Dole Fresh Fruit* intended. If the Board was taking the position

Instead, the Board went on to examine the record and found that the facts "only serve to demonstrate the Union's continued interest in representing" the grape employees. (*Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 13.) Specifically, the Board focused on the interaction between the UFW and the grape employees during the time between Dole's acquisition of the grape operations in 1988 and the date Dole refused to bargain on the basis of abandonment in May 1994. The Board noted the following facts: (1) the UFW made separate formal requests to bargain on behalf of the grape employees in 1990, 1992, and 1994; (2) the UFW filed Notices of Intent to Take Access to engage employer's grape employees; and (3) the UFW sought a general wage increase for all grape workers in the region. (*Id.* at 13.) The Board concluded that the UFW "actually remained active on behalf of the grape employees, albeit by various means other than direct negotiations, and therefore was not 'totally absent from the scene.' (*Bruce Church, supra,* 19 ALRB No. 1.)" (*Ibid.*)

In a separate and distinct section of the Board's analysis in *Dole Fresh Fruit, supra,* 22 ALRB No. 4, the Board addressed concerns regarding "dormant" certifications[5] in which "the certified representative

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that the abandonment defense was a factual impossibility when the UFW requested bargaining after a long-term, total absence from the scene, its analysis would have ended at that inquiry.

[5] In its analysis, the Board undertook arguments raised by Dole that "the Board should recognize the concept of abandonment beyond that already present in Board case law, i.e., where certified labor organizations

does not appear to be actively representing employees for an extended period of time." (*Id.* at 7 – 18.) The Board's decision to separately address abandonment based on a union's "total absence from the scene," as opposed to a "hiatus in negotiations," demonstrates that the Board itself recognizes there is a line when a union's inactivity progresses from dormant to full-on abandonment. It is hard to imagine a factual scenario more fitting for recognizing abandonment than the UFW's total absence from the scene at Fanucchi's operations for more than twenty-four (24) years.

That distinction carries with it a world of difference – marking the line between union inactivity in bargaining context and union inactivity altogether. As demonstrated by *Bruce Church* and *Dole Fresh Fruit*, past union inactivity is a defense to the employer's obligation to bargain where a union totally disappears from the scene without remaining active on the employees' behalf or having contact with them whatsoever. Thus, where the Board has refused to recognize the abandonment theory is circumstances where although there is a *limited period of dormancy in bargaining*, evidence existed that the union *remained active on the employee's behalf by means other than negotiations.*

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become inactive by becoming defunct or by disclaiming interest in continuing to represent the bargaining unit." (*Id.* at 15.) The Board ultimately rejected Dole's claim, falling back on its rule that "representatives once certified remain certified until decertified by the Board." (*Ibid.*, fn. 7.)

In the present case, Fanucchi has consistently alleged that for twenty-four (24) years the UFW was *totally absent* from the scene at its operations and had *no contact whatsoever* with its agricultural employees. Fanucchi sought to introduce evidence and to prove that the UFW had not remained active on its employees' behalf during this period of time as the Board had permitted the employers in *Bruce Church* and *Dole Fresh Fruit* to do. (CR 72-78.) Instead, the Board flatly rejected Fanucchi's defense of abandonment, and held, that even if Fanucchi could prove that the UFW had no contact with its employees for twenty-four (24) years, total abandonment by a union for twenty-four (24) was not a defense to Fanucchi's duty to bargain. (CR 394-396.)

The Board clearly applied the wrong legal standard when it held that abandonment could not be based upon the facts presented in Fanucchi's case. In summarily rejecting Fanucchi's claim, it never allowed Fanucchi to make an evidentiary showing as to whether the UFW was totally absent from the scene during the twenty-four (24) years. The Board necessarily abused its discretion when it rejected Fanucchi's defenses without properly considering whether the UFW did in fact abandon the unit.

Critically, despite the fact that both the ALRB and Fanucchi had pointed out the Board's prior recognition of the abandonment theory, the Court of Appeal failed to address this precedent altogether. Instead, the lower court erroneously deferred to the Board's rejection of Fanucchi's

defense and concluded, that "Fanucchi was not entitled to refuse to bargain with UFW based on UFW's past failings or inactivity, and such conduct did not create a defense to bargaining, whether labeled as abandonment or otherwise." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1093.)

2. The ALRB's Strict Application Of The Abandonment Theory In Cases Post-*Bruce Church* and *Dole Fresh Fruit* Is Inconsistent With The ALRA

The Board's analysis in *Bruce Church* and *Dole Fresh Fruit* both recognized that the certified until decertified rule does not prevent raising the abandonment theory where the certified union is totally absent from the employer's scene for a period of time and has no contact with the employees during that period. (*Bruce Church, supra,* 17 ALRB No. 1 at 43 [Citing *Nish Noroian Farms* (1982) 8 ALRB No. 25: "While, because of the peculiarities in our statute, our Board does not utilize the doctrine of good faith doubt, it has nevertheless retained the doctrine of abandonment as an exception to its usual 'certified until decertified' rule."]; *Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 15 ["After reviewing the limitation of the statute, the Board concluded that it could not recognize the concept of 'abandonment' beyond that already present in Board case law, i.e., where certified labor organizations become inactive by becoming defunct or by disclaiming an interest in continuing to represent the bargaining unit."].)

Despite the Board's early precedent, in the cases following *Dole Fresh Fruit,* the Board arbitrarily began narrowing the circumstances under

which an employer could demonstrate abandonment. For example, in *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3 at 6 and *San Joaquin Tomato Growers, supra,* 37 ALRB No. 5 at 6, the Board cites *Bruce Church* as holding that "[o]nly two event aside from decertification in a Board election have been recognized as effective to terminate a certification: (1) a disclaimer by the certified union of its status as collective bargaining representative or (2) the certified union's 'defunctness,' i.e., its institutional death and inability to represent the employees." As demonstrated *supra*, the Board in *Bruce Church* never adopted such a restricted and narrow interpretation of "disclaimer" or "defunctness." In fact, the Board discussed the fact that the terms "disclaimer," "defunctness," and "abandonment" have been used interchangeably in NLRB and ALRB precedent, and in fact adopted the concept broadly enough to include evidence of "passivity or unwillingness to perform." (*Bruce Church, Inc., supra,* 17 ALRB No.1 at 45, fn. 37.)

The Board also distorted its prior holdings in *Bruce Church* and *Dole Fresh Fruit* as holding that a "Union's absence alone does not constitute a waiver of rights." (*Arnaudo Brothers, LP* (2014) 40 ALRB No. 3 at 9.) In the present case, citing *Dole Fresh Fruit,* the Board asserted that under the ALRA "the fact that a labor organization has been inactive or absent, even for an extended period of time, does not represent a defense to the employer's duty to bargain." (*Tri-Fanucchi, supra,* ALRB No. 4.)

Conversely, as demonstrated herein, the Board's holding in *Dole Fresh Fruit* clearly explained that there was a material difference between "absence in negotiations" (22 ALRB No. 4 at 12), as opposed to circumstances were the union was "totally absent from the scene." (22 ALRB No. 4 at 13.) Thus, the Board's repeated failure to allow employers to present evidence of the lack of contact and activity of the union on behalf of the employees by means other than direct negotiations is an abuse of discretion.

C. Existing Case Law Implies That There Are Circumstances In Which An Employer May Be Permitted to Show The Union Has Lost Its Representative Status

One of the few judicial decisions construing the employer's duty to bargain with a certified union under the ALRA is *Montebello Rose, supra*, 119 Cal.App.3d 1. In *Montebello Rose*, the question at issue was "whether an employer's duty to bargain with a certified employee representative continued beyond the initial certification year absent an extension of the certification period as provided in section 1155.2, subdivision (b) ..." (*Montebello Rose, supra*, 119 Cal.App.3d at 6.) The employer in *Montebello Rose* argued that it no longer had a duty to bargain with the union because the one-year certification period under Labor Code section 1155.2 had expired and no extension had been issued. (*Id.* at 23-24.) After an "intricate process of statutory construction and reconciliation" of the ALRA, the Fifth District Court of Appeal applying NLRA precedent held

that an employer's duty to bargain extended beyond the initial certification year. (*Id.* at 23-30.)

In reaching this conclusion, the Fifth District Court of Appeal in *Montebello Rose* heavily relied on the Board's analysis in *Kaplan's Fruit and Produce Co., Inc.* (1977) 3 ALRB No. 28 ("*Kaplan's*"), in which the Board decided that the employer's duty to bargain does not end after the certification year lapses. (*Montebello Rose, supra*, 119 Cal.App.3d at 25 - 27.) The Board's conclusion in *Kaplan's* rested on two main factors: NLRA precedent and agricultural policy. (*Ibid.*)

In reading the ALRA in light of NLRA precedent, the court decided to adopt NLRA precedent that after the expiration of the initial year of certification, there was a rebuttable presumption that a certified union continued to enjoy majority support. (*Montebello Rose, supra*, 119 Cal.App.3d at 24.) The court recognized that since no section of the ALRA negated this rule, the presumption of a union's continuing status would therefore be applicable to the ALRA. (*Ibid.*) The *Montebello Rose* court reached this decision despite the fact that the ALRA had different language regarding the certification process and provided for an extension of certification, whereas the NLRA did not. (*Ibid.*)

The *Montebello Rose* court emphasized the limited nature of its holding: "We therefore approve *Kaplan's* on the employer's duty to bargain

beyond the initial certification year." (119 Cal.App.3d at 29-30.)[6] The Board's analysis in *Kaplan's* was limited to whether or not the employer's duty to bargain lapses following the end of the certification year. (*Id.* at 2-7.) The Board in *Kaplan's* never discussed when the employer's obligation to bargain would cease other than in the context of the rebuttable presumption. The policy considerations discussed in *Montebello Rose* and *Kaplan's* further evidence that the analysis was limited to the employer's continued duty to bargain at the end of the certification year. (*Montebello Rose, supra*, 119 Cal.App.3d at 25-26.)

Nevertheless, the significance of the *Montebello Rose* case is that it acknowledged that a rebuttable presumption rule exists under both the ALRA and NLRA statutory schemes. (119 Cal.App.3d at 24.) Thus, pursuant to *Montebello Rose*, circumstances may exist that would permit an employer to demonstrate that the union has lost its representative status. Fanucchi contends that such circumstances exist in the present case where UFW totally abandoned the bargaining unit for twenty-four (24) years, during which time it completely disregarded all of its statutory obligations as bargaining representative under the ALRA.

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[6] Earlier in the opinion, the *Montebello Rose* court inaccurately summarized the Board's analysis in *Kaplan's Fruit* by asserting that the Board had held that the employer's duty to bargain "continues until such time as the union is officially decertified as the employee bargaining representative pursuant to the provisions of sections 1156.3 or 1156.7." (*Montebello Rose, supra*, 119 Cal.App.3d at 24.) However, as noted here, the court later clarified the narrow approval of *Kaplan's*.

D. The Court of Appeal Erroneously Deferred to *F & P Growers*, Whose Analysis Is Inapplicable To the Facts of the Present Case

Rather than recognizing the theory of union abandonment as a defense to the duty to bargain, the court below relied on the analysis of the California Fourth District Court of Appeal in *F & P Growers, supra*, 168 Cal.App.3d 667, which addressed the separate and distinct issue of whether an employer could refuse to bargain with a union it believed in good faith had lost its majority support.

In *F & P Growers*, the employer refused to continue bargaining with a union that had limited contact with its employees for approximately three years on the basis that "objective criteria revealed that a majority of employees in the bargaining unit no longer supported the UFW ..." (*F & P Growers, supra*, 168 Cal.App.3d at 670.) The employer argued that since the NLRA's rebuttable presumption rule had been found applicable to the ALRA, the NLRA loss-of-majority support defense was also applicable under the ALRA. (*Id.* at 672-677.)

The *F & P Growers* court rejected the employer's contention, and found that the loss-of-majority support defense to bargaining with a particular union was clearly inapplicable to the ALRA based on specific differences between the ALRA and NLRA. (*F & P Growers, supra*, 168 Cal.App.3d at 674-676.) The Court noted that the ALRA only allows an employer to bargain with a union that has won an election, as opposed to

the NLRA that permits the employer to bargain with any union that demonstrates by any means that it has majority status. Additionally, the ALRA does not allow employers to file election petitions regarding certification or decertification of a union, in contrast to the NLRA which allows employers to petition for an election. (*Id.* at 676.) The court in *F & P Growers* reasoned that these distinctions in the ALRA indicated "a purpose on the part of the Legislature to prohibit the employer from being an active participant in determining which unit it shall bargain with in cases arising under the ALRA." (*Id.* at 676-677.) Thus, the *F & P Growers* court concluded it would "not permit the agricultural employer to do indirectly, by relying on the NLRA loss of majority support defense, what the Legislature has clearly shown it does not intend the employer to do directly." (*Id.* at 677.)

1. The Abandonment Defense Asserted By Fanucchi Is Not Analogous To The Loss Of Majority Defense

The lower court mistakenly found Fanucchi's abandonment defense to be "clearly analogous" to the loss of majority defense asserted by the employer in *F & P Growers*, and summarily disposed of the issue. (*Tri-Fanucchi, surpa*, 236 Cal.App.4th at 1093.) The court concluded that "[i]n both cases, the employer refused to bargain with a previously certified union based on a factual development that allegedly resulted in a defense to bargaining." (*Ibid.*) The court's short sited approach completely overlooks

ALRB precedent recognizing that under the ALRA factual developments do arise that amount to a defense to bargaining, including union abandonment.

Fanucchi's abandonment defense is not analogous to the loss of majority defense scrutinized in *F & P Growers.* First and foremost, as discussed at length above, the Board has identified factual developments specifically related to union conduct that would support a defense to the employer's obligation to bargain: abandonment by the union in the form of a union's total absence from the scene. (*Bruce Church, supra,* 17 ALRB No. 1; *Dole Fresh Fruit, supra,* 22 ALRB No. 4.) The nature of these factual developments necessarily sets the abandonment defense apart from the loss of majority support defense which does not focus on the union's misconduct.

Abandonment focuses on the union's conduct, while lack of majority support focuses on the employer's observations of employee support, or lack thereof, for the union. The employer in *F & P Growers* asserted that it no longer had a duty to bargain because "objective criteria revealed that a majority of employees in the bargaining unit no longer supported the UFW." (*F & P Growers, supra*, 168 Cal.App.3d at 670.) In contrast, Fanucchi asserts that its duty to bargain with the union was extinguished by the union's gross abandonment in representing the employees. The concepts are not analogous because one permits the employer to be able to

rely on its good faith belief as to who the employee's chosen bargaining representative is, while the other depends exclusively on the union's conduct as evidence of its abandonment of the unit.

Additionally, Fanucchi's abandonment defense does not rely on the principles underlying the loss of majority support defense recognized under the NLRA. Fanucchi is not arguing that the union's total absence from the scene is evidence that the UFW has lost majority support of Fanucchi's agricultural employees. (*Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 9 – 10 [holding that the employer's "abandonment defense must fail to the extent that it relies on principles underlying loss of majority support claims under the NLRA"].) Fanucchi's abandonment claim is based on the "distinct law that has developed under the ALRA" which extinguishes an employer's duty to bargain where the employer establishes "the Union's inability or unwillingness to represent" the employer's agricultural employees on the date of the union's formal request to resume negotiations or at times prior thereto. (*Id.* at 10.)

Recognition of the abandonment defense in the context of this case does not amount to giving the employer influence in determining whether or not it will bargain with a particular union. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1093, citing *F & P Growers, supra,* 168 Cal.App.3d at 677-678.) In order to raise the claim of abandonment the employer must do so in the context of a defense to bargaining. The Board recognized early on

that under the ALRA a claim of union abandonment can only be raised by an employer as a defense to the obligation to bargain. (*Bruce Church, supra,* 17 ALRB No. 1 at 44 [Recognizing the claim of abandonment under the ALRA "appears to be primarily a defense weapon in the refusal to bargain context"].) In no way is permitting an employer to raise the defense of total union abandonment of the bargaining unit the equivalent of permitting an employer to assert its influence over the selection or deselection of the union. Facts demonstrating the UFW's total and complete abandonment of Fanucchi's agricultural employees, in the bargaining context and by all other means, cannot be linked to any conduct or unfair labor practices on the part of Fanucchi. In fact, the analysis does not include the employer, only the union's misconduct.

The lower court's extension of the court's holding in *F & P Growers* to the context of union abandonment shows a misapplication of the ALRA and Labor Code section 1148. After an exhaustive analysis of the differences between the NLRA and ALRA, the court in *F & P Growers* concluded "a purpose on the part of the Legislature to prohibit the employer from being an *active participant* in determining which union it shall bargain with in cases arising under the ALRA." (*F & P Growers, supra,* 168 Cal.App.3d at 676.) The court also noted that in light of peculiarities in the ALRA, "it does appear that the Legislature's purpose in enacting the ALRA was to *limit the employer's influence* in determining whether or not

it shall bargain with a particular union." (*Ibid.*) The *F & P Grower's* holding therefore does not imply that under the ALRA no factual scenario exists in which an employer may be able to raise a valid defense to the duty to bargain. The court's holding instead clarifies that the Legislature intended to prohibit the employer from being an active participant in the union representation procedure and to limit employer influence in determining whether to bargain or not with a particular union. (*Id.* at 676.)

2. Total Union Abandonment Was Not the Type of Employer Interference The Legislature Sought to Prohibit

Legislative history reveals that raising the defense of union total abandonment is not the type of employer interference that the Legislature sought to prohibit in enacting the provisions of the ALRA that differ from the NLRA. The so called "certified until decertified" rule derives from the ALRA provisions prohibiting agricultural employers from exercising discretion regarding whether to recognize a union and leaving recognition exclusively to the election procedures of the Board. (See *Nish Noroian Farms* (1982) 8 ALRB No. 25 at 13-14.) The history leading to the enactment of the ALRA demonstrates that these provisions were included in the statute to prohibit the type of employer interference described in *Englund v. Chavez* (1972) 8 Cal.3d 572. In that case, there was significant interference by the agricultural employers whereby the employers had actually recognized and negotiated collective bargaining agreements with

one of two competing unions prior to an election and without any attempt to ascertain whether their workers wanted to be represented by that union. (*Id.* at 578-579.) In contrast, Fanucchi's objection to bargaining with the UFW is based solely on its claim that the UFW, by total absence and inactivity on behalf of its agricultural employees for twenty-four (24) years, has forfeited its status as bargaining representative. In light of the history of employer interference leading to the enactment of the ALRA, the suggestion that the Legislature intended to prohibit employers from raising the abandonment defense is nonsensical as it is the union's conduct at issue.

Allowing an employer to assert a defense to bargaining on the basis that a particular union is no longer the bargaining representative of its employees due to its long-term, total abandonment of those employees does not amount to active participation or influence in the bargaining context that the Legislature intended to prohibit. In fact, by not applying the defense, the concern expressed in *Englund v. Chavez, supra,* will actually occur as the union, through the MMC process, can bypass the employees and impose a contract upon the employees without their consent.

E. Forfeiture of Rights by Abandonment is a Recognized Legal Principle That Should be Given Application in the Present Case

The ALRB, pursuant to the provisions of the ALRA, granted the UFW the exclusive public right to represent the rights on behalf of Fanucchi's agricultural employees. The UFW failed to discharge its

fundamental duties to the agricultural employees for twenty-four (24) years. The ALRB and lower court's holding that the UFW has not forfeited its status as the certified bargaining representative of Fanucchi's employees, despite total abandonment and inactivity on behalf of its employees, is inconsistent with the doctrine of state-granted public rights and common law.

A labor union is a private entity to which the state, through certification, has granted monopoly power, or franchise, over employment opportunities. (*See Steele v. Louisville & Nashville R.R., supra,* 323 U.S. at 200-203; *Gay Law Students v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 472 [analogizing a union's exclusive bargaining representative status to a state-granted franchise].) The state's grant exclusivity entrusts the union with corresponding obligations owed to the public. (*James v. Marinship Corp.* (1944) 25 Cal.2d 721, 731; *Pinsker v. Pac. Coast Soc'y of Orthodontists* (1974) 12 Cal. 3d 541, 551; ["Where a union has attained a monopoly of the supply of labor... such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations."].) A "union afforded monopolistic control over employment by law is not free to exercise its power arbitrarily." (*UFW v. Pasillas* (1982) 8 ALRB 103 at 9 [internal quotes and citations omitted].) As such, the Board has recognized that it has authority to limit

or revoke certification due to neglect or abuse by a union that it deems unacceptable. (*Ibid.*)

The grant of a public right such as a public monopoly or franchise is not absolute, and may be rescinded or limited due to a failure to meet the obligations in consideration of which the right was granted. As such, this Court has recognized that abandonment or forfeiture of these obligations will result in termination or revocation of the grant of these rights. (*County of L.A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 284 [holding that the privilege of a state-granted franchise lasts only so long as the holder met the obligations in consideration of which the right was granted]; *also see, County of Kern v. Pacific Gas & Electric Co.* (1980) 108 Cal.App.3d 418, 423 [recognizing that a public franchise may terminate on failure to provide services in consideration of the right for which it was granted].)

In addition, it has long been recognized under common law that rights may be forfeited by abandonment. This Court has recognized that an owner of an easement may lose it by abandonment if he failed to object for years to another's occupation of the property. (*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890-891; *also see* Code of Civ. Proc. § 321, *et seq.* [provides that an owner of land can lose property rights by adverse possession by failing to object to use by another after five (5) years].) The doctrine of abandonment and waiver has also been applied in the context of contractual rights. (*See John v. Fletcher Oil Co., Inc.* (1940) 38

Cal.App.2d 26, 30 [concluding that intent of the parties to mutually abandon contractual rights can be evidenced by the acts of the parties].) Further, the doctrine of abandonment applies to statutory and constitutionally recognized rights. (*See, e.g.* Code of Civ. Proc. § 583.420 [provides that a litigant who is exercising a constitutionally recognized right to seek redress through the courts loses the right to prosecute a civil action if the plaintiff delays for three (3) years].)

Despite the unique aspects of the ALRA, a union's status as exclusive bargaining representative is the grant of a public right, and as such, may be revoked. The foremost purpose of the ALRA is to "encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment." In furtherance of this purpose, the ALRA "creates a public rights statute which guarantees agricultural employees certain rights." (*Dole Fresh Fruit Co., supra,* 22 ALRB No. 4 at 17.) The Board has recognized that "situations in which the certified labor organization rests on its bargaining rights...erode and undermine the right to be represented that is granted to employees." (*Ibid.*) As such, the Board has held that where a union failed to "exercise a degree of diligence in seeking to enforce its representation rights" to the employees it was elected to represent, the union may be

"deemed to have waived them." (*Ventura County Fruit Growers, Inc.* (1983) 10 ALRB No. 45 at 24.)

Where, as here, the state bestowed upon the UFW a public grant of power and certain corresponding obligations twenty-four (24) years ago, and the UFW failed to vindicate those obligations, thus impairing the rights of the public the grant sought to protect, the UFW should be held to have abandoned its position as certified bargaining representative. In any other legal context, a right can be forfeited after one to five years. Therefore, the rights at issue here are clearly forfeited after twenty-four (24) years of abandonment.

F. The Board Exceeded Its Authority When It Summarily Rejected Fanucchi's Abandonment Defense

Although this Court has recognized the principle that an administrative agency is entitled to deference when interpreting policy in its field of expertise, that deference is limited. (*J.R. Norton, supra*, 26 Cal.3d at 29.) "A ministerial officer may not . . . under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute." (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 436 ("*Bearden*".) "[W]hen administrative rules or regulations 'alter or amend the statute or enlarge or

impair its scope,' they 'are void and courts not only may, but it is their obligation to strike down such regulations.' [Citations.]" (*J.R. Norton, supra*, 26 Cal.3d at 29.) Thus, a Board rule that "eviscerates important ALRA policy and fundamentally misconstrues the nature of and legislative purpose behind" ALRA policy should not be upheld. (*Ibid.*)

The Board exceeded its authority when it summarily refused to allow Fanucchi to present its abandonment defense to demonstrate that the UFW's total abandonment of its workers for twenty-four (24) years demonstrates is "unwillingness" or "inability" to represent its workers during that time. The Board's holding allows unions to abandon their statutory duties with impunity. This represents an abdication of the Board's self-admitted "obligation to ... be alert of situations in which the certified labor organization rests on its bargaining rights, as such neglect serves to erode and undermine the right to be represented that is granted to employees." (*Dole,* 22 ALRB No. 4 at 17.) As noted herein, the real victims are the employees that were abandoned by the union and had no idea the union even represented them.

The Board's blanket rule that past union absence or inactivity does not create an abandonment defense to the duty to bargain far exceeds the scope of the authority conferred to it by the Legislature. (*Bearden, supra*, 138 Cal.App.4th at 436 ["A ministerial officer may not . . . under the guise of a rule or regulation vary or enlarge the terms of a legislative

enactment..."].) Although the ALRA holds that an employer can only bargain with a union that has won an election and cannot file an election petition, the Board's general rules and strict interpretation far exceed the terms of the statute and the restrictions on employers in the context of bargaining. As such, this Court is obligated to strike down the ALRB's rule denying Fanucchi's abandonment defense to its obligation to bargain with UFW. (*J.R. Norton Co., supra,* 26 Cal.3d at 29 [courts have an obligation to strike down administrative rules that enlarge the scope of the legislative enactment].)

Pursuant to the Board's holding in this case, certified unions that have completely abandoned the bargaining unit they were elected to represent for decades are now permitted to invade and disrupt a stable and well developed relationship between the employees and their employer without employee input. The ruling also unfairly burdens the employees to decertify a union that the current workforce did not choose, and did not even know is their representative. The ALRB exists to protect the rights of workers, not a particular union. The ALRA, like the NLRA it is modeled after, is a legislative "grant of rights to the employees rather than ... a grant of power to the union." (*NLRB v. Mid-States Metal Prods., Inc.* (5th Cir. 1968) 403 F.2d 702, 704.)

If this Court determines that the Board abdicated its statutory obligations and exceeded its authority by refusing to recognize the

abandonment defense as asserted by Fanucchi, it should reverse judgment and remand the case to the Board. The Board should permit Fanucchi the opportunity to demonstrate whether the UFW abandoned its employees during the twenty-four (24) year absence to support a defense to the obligation to bargain.

CONCLUSION

For the foregoing reasons, the order of the ALRB should be reversed and the case remanded for further proceedings so that the ALRB can properly apply the abandonment defense. By recognizing the abandonment defense, the policy of the ALRA will be carried out as unions will be required to perform their statutory duties or face the consequence of losing the right to represent the employees the union abandoned.

Dated: November 17, 2015 **SAGASER, WATKINS & WIELAND PC**

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.520(c)(1))

Pursuant to California Rule of Court 8.520(c)(1), counsel for Petitioners hereby certifies that the number of words contained in this PETITIONER'S OPENING BRIEF OF THE MERITS, including footnotes, but excluding the Table of Contents, Table of Authorities, Issues on Review, and this Certificate, is 11,372 words as calculated using the word count feature of the computer program used to generate the brief.

Dated: November 17, 2015 SAGASER, WATKINS & WIELAND, PC

By: _____
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PROOF OF SERVICE

(Code of Civil Procedure § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 7550 North Palm Avenue, Suite 100, Fresno, California 93711.

On November 18, 2015, I served the following document described as **ERRATA TO PETITIONER TRI-FANUCCHI FARMS' OPENING BRIEF ON THE MERITS, INCLUDING INADVERTENTLY OMITTED CITATIONS TO THE CERTIFIED RECORD OF PROCEEDINGS**, on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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☒ **BY MAIL**: I deposited such envelope in the mail at Fresno, California. The envelope(s) was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presume invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 18, 2015, at Fresno, California.

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