IN THE SUPREME COURT OF CALIFORNIA

TRI-FANUCCHI FARMS, Petitioner, v. AGRICULTURAL LABOR RELATIONS BOARD, Respondent, and UNITED FARM WORKERS OF AMERICA, Real Party in Interest.	)	Case No. S227270 (Fifth District Court of Appeal; Case No. F069419)

AGRICULTURAL LABOR RELATIONS BOARD'S ANSWER BRIEF ON THE MERITS

J. ANTONIO BARBOSA, SBN 87829
Executive Secretary

PAUL M. STARKEY, SBN 109434
Special Board Counsel

SCOTT P. INCIARDI, SBN 228814
Senior Board Counsel

AGRICULTURAL LABOR
RELATIONS BOARD
1325 J Street, Suite 1900-B
Sacramento, CA 95814
Telephone: (916) 653-3741
Facsimile: (916) 653-8570

DATED: January 29, 2016
#1825

IN THE SUPREME COURT OF CALIFORNIA

TRI-FANUCCHI FARMS, Petitioner, v. AGRICULTURAL LABOR RELATIONS BOARD, Respondent, and UNITED FARM WORKERS OF AMERICA, Real Party in Interest.	)	Case No. S227270 (Fifth District Court of Appeal; Case No. F069419)

AGRICULTURAL LABOR RELATIONS BOARD'S ANSWER BRIEF ON THE MERITS

J. ANTONIO BARBOSA, SBN 87829
Executive Secretary

PAUL M. STARKEY, SBN 109434
Special Board Counsel

SCOTT P. INCIARDI, SBN 228814
Senior Board Counsel

AGRICULTURAL LABOR
RELATIONS BOARD
1325 J Street, Suite 1900-B
Sacramento, CA 95814
Telephone: (916) 653-3741
Facsimile: (916) 653-8570

DATED: January 29, 2016
#1825

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

The Agricultural Labor Relations Act (the "ALRA" or the "Act") was created by the California Legislature to protect the rights of California's agricultural employees. The core rights protected by the ALRA are the rights of agricultural employees to choose for themselves whether to be represented by a labor organization in dealings with their employers and, equally important, to be free of the interference of agricultural employers in the exercise of that choice. In furtherance of these interlocking policy goals, and in marked contrast to the National Labor Relations Act (the "NLRA"), the federal law on which the ALRA was modeled, the Legislature crafted the ALRA in such a way as to limit employer involvement in the process through which labor organizations are selected and removed as bargaining representatives.

The Legislature's restriction of employer involvement in decisions as to certification and removal of labor organizations means that, under the ALRA, a labor organization, once selected by employees through an election, may only be removed ("decertified") by employees through another election. An employer may not insert itself into the representation process by unilaterally withdrawing recognition from a certified labor organization based upon the employer's beliefs concerning employee support for the labor organization or the adequacy of representation

provided to employees by the labor organization. These principles have been applied and affirmed in decades of decisions by the Agricultural Labor Relations Board (the "ALRB" or the "Board") and judicial decisions.

In this case, the employees of Petitioner Tri-Fanucchi Farms ("Tri-Fanucchi") selected Real Party in Interest United Farm Workers of America (the "UFW") as their bargaining representative. Tri-Fanucchi's employees have never taken any action to decertify the UFW or replace it with another labor organization. Yet, when the UFW requested to bargain on the employees' behalf, Tri-Fanucchi flatly refused, contending that Tri-Fanucchi had the right to terminate its collective bargaining relationship with the UFW because, according to Tri-Fanucchi, the UFW had been inactive with respect to the bargaining unit for an extended period of time prior to requesting bargaining.

The Board, applying well-established precedent, found that, because Tri-Fanucchi's employees have not decertified the UFW, the UFW's certification remained intact, making Tri-Fanucchi's refusal to bargain an unfair labor practice. On appeal, the Fifth District Court of Appeal (the "Court of Appeal") agreed with the Board, finding that the Board's decision was consistent with how California courts have interpreted the ALRA.

Tri-Fanucchi now challenges the Court of Appeal's decision, but its arguments against that decision are without merit. The Board's precedent precluding employers from unilaterally withdrawing recognition from

certified labor organizations based upon claims that the organizations were inactive or absent for a period of time is a reasonable interpretation of the Act. That precedent rests on the foundation of the Legislature's clear intent to protect employee choice and eliminate employer interference in representation decisions. In furtherance of the legislative intent, the Board has held, with subsequent judicial approval, that labor organizations, once certified, remain certified until removed by employees through decertification. The Board has also held, again with judicial approval, that to allow an employer to withdraw recognition in the absence of decertification would be inconsistent with the Act, even if there were evidence that a majority of employees no longer desired representation. In this context, the Board's conclusion that an employer may not withdraw recognition based upon a contention that the certified labor organization was inactive for a period of time was clearly consistent with the Act. Indeed, the Legislature has effectively ratified the Board's holdings in this regard by declining to amend the Act in response to those holdings, although it has amended the Act in other respects.

Accordingly, the Court of Appeal was correct to uphold the Board's holding on Tri-Fanucchi's inactivity-based defense to the refusal to bargain allegations. Under the ALRA, it is employees who have the right to select and remove bargaining representatives. Despite Tri-Fanucchi's attempt to portray its actions as protective of employee choice, the essence of Tri-

Fanucchi's argument is that, because the employees have not chosen to do what Tri-Fanucchi thinks they should do, decertify the UFW, Tri-Fanucchi should be permitted to make that choice for them, effectively decertifying the UFW without the employees having any opportunity to have a voice in the matter. That result would be contrary to the fundamental principles that underlie the ALRA and this Court should affirm those principles by upholding the decision of the Court of Appeal and denying the petition for review.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

This case arises under the Agricultural Labor Relations Act. (Lab. Code, § 1140 et seq.) The ALRA sets forth certain rights of agricultural employees. Among these are the rights to "full freedom of association, self-organization, and designation of representatives of their own choosing" and "to be free from the interference, restraint, or coercion of employers . . . in the designation of such representatives . . ." (Lab. Code, § 1140.2.)

The Act gives employees the right to collectively designate a labor organization as their bargaining representative.[1] Upon the filing of a petition signed by the requisite number of employees, the ALRB will hold a

[1] Although the ALRA uses the term "labor organization," such organizations are often referred to as "unions."

secret ballot election. (Lab. Code, § 1156.3.) If a majority of employees vote in favor of representation, the designated labor organization will be certified by the Board as the exclusive bargaining representative. (*Ibid.*) The ALRA also permits employees to remove or replace a certified labor organization for any reason through the filing of a decertification petition. (Lab. Code, § 1156.7.)

The ALRA defines certain forms of conduct that are prohibited by the statute (known as "unfair labor practices"). (Lab. Code, § 1153.) Among these, it is an unfair labor practice for an employer to refuse to bargain collectively in good faith with a certified labor organization. (Lab. Code, § 1153, subd. (e).) Likewise, it is an unfair labor practice for a labor organization to refuse to bargain in good faith with the employer whose employees the labor organization represents. (Lab. Code, § 1154, subd. (c).) Any person my file a charge alleging that an unfair labor practice has been committed. (Cal. Code Regs., tit. 8, § 20201.)

Because the ALRA is heavily modeled on the NLRA, the Board is statutorily required to follow "applicable precedents" of the NLRA. (Lab. Code, § 1148.) However, where differences in statutory language or concerns particular to the "California agricultural scene" are present, NLRA precedent is inapplicable and need not be followed. (*ALRB v. Superior Court* (*Pandol & Sons*) (1976) 16 Cal.3d 392, 412-413; *F&P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667, 673 ("the Legislature

intended the board to select and follow only those federal precedents which are relevant to the particular problems of labor relations on the California labor scene.").)

II. FACTUAL BACKGROUND

In 1977, after a secret ballot election in which a majority of Tri-Fanucchi's employees voted in favor of representation, the UFW was certified as the exclusive bargaining representative of those employees. (*Joe G. Fanucchi & Sons / Tri-Fanucchi Farms* (1986) 12 ALRB No. 8, p. 2.) Over the following seven years, Tri-Fanucchi refused to bargain on three separate occasions. Shortly after the UFW was certified, Tri-Fanucchi announced that it would refuse to bargain while it challenged the certification election but relented after the UFW filed an unfair labor practice charge. (*Ibid.*) In 1981 and again in 1984 Tri-Fanucchi refused to bargain with the UFW claiming it had conducted a poll that showed that its employees no longer supported the UFW. (*Id.* at p. 3.) In the unfair labor practice litigation that resulted, Tri-Fanucchi claimed, among other things, that it had no bargaining obligation because the UFW had "abandoned" the bargaining unit through inactivity. The Board rejected this argument and found that Tri-Fanucchi's refusal to bargain was unlawful. (*Id.* at pp. 4-9.)

As Tri-Fanucchi notes in its opening brief on the merits,[2] the Board's decision was upheld by the Court of Appeal in a 1987 unpublished decision. (*Tri-Fanucchi Farms v. ALRB* (Nov. 21, 1987, F008776) ([nonpub. opn.])

Tri-Fanucchi claims that, in 1988, after the court of appeal decision, Tri-Fanucchi "indicated its willingness to bargain with the UFW." [CR 92.] Tri-Fanucchi claims that, although the UFW initially stated that it would respond and set a date for negotiations after the UFW's negotiator returned from vacation, the UFW never provided a response. (*Ibid.*) Tri-Fanucchi further contends that it heard nothing from the UFW for the next roughly 24-year period.[3] (*Ibid.*)

In September 2012, the UFW sent a letter to Tri-Fanucchi in which it invoked its certification and requested collective bargaining negotiations. [CR 439-440.] Tri-Fanucchi refused to bargain and to provide the requested information, stating in a letter to the UFW that "Tri-Fanucchi

---

[2] See page 6 of Errata to Petitioner Tri-Fanucchi Farms' Opening Brief on the Merits. All subsequent references to Petitioner's opening brief are to the errata brief and will be indicated by "Pet. Op. Br."

[3] The unfair labor practice case before the Board was decided via a dispositive motion that assumed the facts that Tri-Fanucchi sought to prove (i.e., that the UFW had no further contact with Tri-Fanucchi or its employees from 1988 until 2012). [CR 160; 168-180; 391-393.] Accordingly, this brief also assumes, for the sake of argument only, that those facts are true.

maintains that the UFW has . . . abandoned the bargaining unit and is no longer the valid collective bargaining representative." [CR 441.]

Over three years have now elapsed since the UFW reasserted its right to bargain on behalf of Tri-Fanucchi's employees and, in that time, Tri-Fanucchi's employees have not filed a petition seeking to decertify the UFW as their bargaining representative. Tri-Fanucchi has continued to refuse to meet and bargain with the UFW since the UFW's bargaining demand in September 2012.

III. PROCEDURAL HISTORY

A. The Charge and the Complaint

On March 7 and April 6, 2013, the UFW filed unfair labor practice charges with the ALRB alleging that Tri-Fanucchi was violating the Act by refusing to bargain and refusing to provide information. [CR 1-6.] On September 5, 2013, the ALRB's General Counsel (the "General Counsel") who is responsible for investigating charges and for issuing and prosecuting unfair labor practice complaints before the Board, issued a "Corrected Consolidated Complaint" (the "Complaint") against Tri-Fanucchi alleging that Tri-Fanucchi unlawfully refused to bargain and provide information. [CR 7-11.]

On or about October 8, 2013, Tri-Fanucchi filed an answer to the Complaint (the "Answer"). [CR 91-96.] In the Answer, Tri-Fanucchi substantially admitted the factual allegations against it, including that it refused to bargain with the UFW and refused to provide requested information. [CR 94.]

Tri-Fanucchi claimed that its conduct was justified because the UFW lost its certification by "abandoning" the bargaining unit and the UFW's claims were barred under the doctrines of laches and unclean hands. [CR 96.]

B. The Unfair Labor Practice Hearing and the ALJ's Decision

A hearing on the unfair labor practice allegations was scheduled for October 21, 2013, before Administrative Law Judge Thomas Sobel (the "ALJ"). Prior to the hearing, the General Counsel filed a motion in limine with the ALJ, arguing for the exclusion of all evidence relating to Tri-Fanucchi's "abandonment" defense as such a defense is not recognized under established Board precedent. [CR 123-128.] During the hearing, the ALJ queried Tri-Fanucchi's counsel as to the basis of its defense and Tri-Fanucchi confirmed that its defense was predicated solely upon the allegation that the UFW had no contact with Tri-Fanucchi or its employees between 1988 and 2012. [Tr. 8:6-21; 13:21-14:7.]

The ALJ issued a decision on November 5, 2013. The ALJ treated the motion in limine as akin to a demurrer to the answer or motion for judgment on the pleadings, and, accordingly, assumed the truth of the facts Tri-Fanucchi sought to prove, i.e., that the UFW had not contacted Tri-Fanucchi or its employees between 1988 and 2012. [CR 168-169.] The ALJ concluded that, even assuming the truth of those facts, Tri-Fanucchi could not establish a defense to the refusal to bargain allegations under established ALRB precedent holding

that labor organization inactivity or absence does not constitute a defense to a refusal to bargain charge. [CR 169-171.]

C. The Board's Decision

Tri-Fanucchi filed exceptions to the ALJ's decision, including, specifically, to the ruling on the "abandonment" issue. [CR 181-184.] The Board issued its decision in the case on April 23, 2014. [CR 388-410.]

The Board affirmed the ALJ's rejection of Tri-Fanucchi's defenses. [CR 394-400.] With respect to Tri-Fanucchi's "abandonment" defense, the Board held that its previous decisions "have been very clear 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." [CR 395.] This holding, the Board stated, stemmed from the legislative intent that "the power to select and remove unions as bargaining representatives should reside with agricultural employees and not with their employers." (*Ibid.*)

D. The Petition for Review of the Board's Decision

Tri-Fanucchi petitioned for review of the Board's decision in the Fifth District Court of Appeal pursuant to Labor Code section 1160.8. Tri-Fanucchi attacked various aspects of the Board's decision, including the rejection of the "abandonment" defense. (Petitioner's Opening Brief to the Court of Appeal at pp. 13-23.)

E. The Court of Appeal's Opinion

On March 14, 2015, the Court of Appeal issued its opinion on the petition for review. (*Tri-Fanucchi Farms v. ALRB* (2015) 236 Cal.App.4th 1079.) Concerning the issue of Tri-Fanucchi's claim that inactivity by the UFW relieved Tri-Fanucchi of its obligation to bargain, the Court of Appeal affirmed the Board's conclusion that "such facts did not create a defense to bargaining or excuse Fanucchi from its obligation as employer to bargain in good faith with UFW." (*Id.* at p. 1084.) The Court of Appeal quoted at length from the Board's decision and held that the Board's holding on the "abandonment" issue "is consistent with how California appellate courts have construed the ALRA." (*Id.* at pp. 1091-1092.) The Court of Appeal noted prior judicial decisions that held that an employer's duty to bargain with a certified labor organization under the ALRA is a continuing one, that the remedy for inaction on the labor organization's part is decertification by employees, and that, given the availability of that remedy, the employer has no basis to concern itself with the question of whether it is bargaining with the true representative of its employees. (*Id.* at p. 1092 (citing *Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1, 23-28 and *F&P Growers Assoc. v. ALRB, supra*, 168 Cal.App.3d 667, 672-678).)

The Court of Appeal also noted that a prior appellate decision had confirmed that employers under the ALRA were precluded from relying upon a loss of majority employee support for the certified labor organization to refuse to bargain. (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1092-

1093 (citing *F&P Growers Assoc. v. ALRB, supra,* 168 Cal.App.3d 667, 672-678).) Allowing employers to rely on such a defense would permit them "to do indirectly . . . what the Legislature had removed from the employer's purview" i.e., participate in deciding whether or not it would bargain with a particular union. (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1093.) The Court of Appeal found that the "abandonment" defense was "clearly analogous" to the rejected "loss of majority support" defense and that "[i]n light of the similar nature of the case at bench, we believe that the same reasoning applies and the same result should follow . . . whether [the defense is] labeled as abandonment or otherwise." (*Ibid.* (bracketed material added).)

The Court of Appeal also relied upon the "guiding principle" that deference is owed to the Board's interpretation and application of the ALRA. (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1093.) The Court of Appeal held that, in light of the existing judicial construction of the ALRA, the Board's position on "abandonment" was a reasonable interpretation and application of the Act. (*Id.* at p. 1094.)

Tri-Fanucchi petitioned for review of the Court of Appeal's decision on the "abandonment" issue. On August 19, 2015, this Court granted the petition for review.[4]

---

[4] Although the Court of Appeal correctly upheld the Board's decision concerning the unlawfulness of Tri-Fanucchi's refusal to bargain, it reversed the Board's award of "bargaining makewhole" pursuant to Labor

(Footnote continued....)

ARGUMENT

The Court of Appeal was correct to uphold the Board's order rejecting Tri-Fanucchi's defense to the refusal to bargain allegations because the Board's order represented a reasonable interpretation of the ALRA. The Board's holding that an employer may not withdraw recognition and refuse to bargain with a certified labor organization based upon a claim that the labor organization was inactive or absent for a period of time is supported by clear legislative intent, the statutory provisions of the ALRA, and firmly established board and appellate precedent. Tri-Fanucchi's arguments to the contrary are without merit, and its petition for review should be denied.

I. STANDARD OF REVIEW

In reviewing the decisions of administrative agencies, the courts are charged with the final responsibility to construe the law properly. (*ALRB v. Superior Court (Pandol & Sons), supra*, 16 Cal.3d 392, 426.) Nevertheless, because the legislature established the board as an expert agency with primary and exclusive jurisdiction over claims arising under the ALRA, the Board's decisions are entitled to deference. (*Tex-Cal Land Management v. ALRB* (1979) 24 Cal.3d 335, 346; *Montebello Rose Co. v. ALRB, supra*, 119 Cal.App.3d 1, 8,

---

(Footnote continued)
Code 1160.3. The Board contends that this aspect of the Court of Appeal's decision was in error and this Court has granted the Board's petition for review on that issue.

fn. 4.) Even with respect to issues of law, the courts give great weight to the construction of the statute given it by the administrative agency charged with its enforcement. (*Highland Ranch v. ALRB* (1981) 29 Cal.3d 848, 859 ("although the ultimate interpretation of legislation rests, of course, with the courts . . . The construction of a statute by the officials charged with its administration must be given great weight . . . ." (internal punctuation and brackets omitted); *D.R. Horton, Inc. v. NLRB* (5th Cir. 2013) 737 F.3d 344, 349-350 (the NLRB's "interpretation of the NLRA will be upheld so long as it is rational and consistent with the act.") (internal punctuation omitted).)

Accordingly, the Board's interpretation of the ALRA must be upheld provided the interpretation is a reasonable one. (*Holly Farms Corp. v. NLRB* (1996) 517 U.S. 392, 409 ("Regardless of how we might have resolved the question as an initial matter . . . the Board's decision here reflects a reasonable interpretation of the law and, therefore, merits our approbation"); *Montebello Rose Co. v. ALRB, supra,* 119 Cal.App.3d 1, 24 (Board's interpretation of the ALRA entitled to "great respect" and not to be overruled unless "clearly erroneous").)

Furthermore, this Court has recognized that, when a Board decision involves the application of the Board's subject matter expertise, the decision is entitled to a presumption of validity. (*George Arakelian Farms v. ALRB* (1982) 49 Cal.3d 1279, 1292.) This is in accordance with established federal law, which holds that, with respect to the NLRA, "Congress did not merely lay down a

substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . ." (*San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 242-243.) (See also *NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221, 236; *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, 798.) The Board's expertise and its reasonable interpretation of the Act here are entitled to such deference.

II. THE BOARD'S DECISION THAT AN EMPLOYER MAY NOT WITHDRAW RECOGNITION FROM A CERTIFIED LABOR ORGANIZATION BASED UPON A CLAIM THAT THE LABOR ORGANIZATION WAS INACTIVE IS A REASONABLE INTERPRETATION OF THE ALRA, WHICH THE COURT OF APPEAL CORRECTLY UPHELD

A. The Stated Purpose of the ALRA Is to Protect the Right of Employees to Make Representation Decisions and to Eliminate Employer Interference in Such Decisions

In enacting the ALRA, the Legislature stated the purpose of the law in the statute itself. Labor Code section 1140.2 states as follows:

> It is hereby stated to be the policy of the State of California 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, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Thus, the ALRA is intended to further two complementary goals: first, to ensure that agricultural employees have the right to decide for themselves

whether to be represented by a labor organization and, second, to be free from employer interference in making representation decisions. As will be seen below, the Legislature put these objectives into practice by crafting the portions of the ALRA dealing with certification of labor organizations in such a way as to eliminate employer involvement in the Act's representation procedures.

B. The Legislature Deliberately Drafted the ALRA to Limit Employer Involvement in the Representation Process

Because the ALRA was modeled on its federal antecedent, the NLRA, most of the ALRA's provisions track the equivalent provisions of the federal statute.[5] (*United Farm Workers of America (Corralitos Farms, LLC)* (2014) 40 ALRB No. 6, p. 7.) However, in order to foster the goals of securing employee free choice and eliminating employer interference discussed above, the Legislature deliberately diverged from the NLRA model in significant respects relating to employer involvement in the certification process.

The ALRA, like the NLRA, features a system for certifying labor organizations wherein a process culminating in a secret ballot representation election is set in motion by the filing of a representation petition. (Lab. Code, § 1156.3 & 29 U.S.C. § 159.) However, under the federal act, if a labor organization demonstrates to an employer that the organization has the support of a majority of employees, the employer may voluntarily recognize the labor

[5] The NLRA is codified at title 29 United States Code section 151 et seq.

organization as the representative the employees and bargain with it without the labor organization having been certified through an NLRB-conducted election. (*General Box Co.* (1949) 82 NLRB 678, 679; *Cobb Theatres, Inc.* (1982) 260 NLRB 856, 859.)

In contrast to the NLRA, the ALRA forbids voluntary recognition. (Lab. Code, § 1153, subd. (f) & 1154, subds. (g)-(h).) To the contrary, the ALRA makes it an unfair labor practice for an employer to "recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified pursuant to the provisions of this part." (Lab. Code, § 1153, subd. (f).) Thus, representative status may not come about through the employer's voluntary agreement; it must be achieved through selection by the employees using the Board's certification processes. (*Nish Noroian Farms* (1982) 8 ALRB No. 25, p. 13 ("Even if there were proof of 100 percent support in the appropriate unit, it is unlawful, under our Act, for an employer to recognize the bargaining representative . . . through any means other than the election process.")

The Legislature also diverged from the NLRA to exclude employers from any role in initiating the certification procedure. Under the NLRA, where a labor organization claims to represent an employer's employees, the employer may file a petition seeking an election. (29 U.S.C. § 159(c)(1)(B).) No such procedure is available under the ALRA. Only employees and labor organizations acting on employees' behalf may initiate the ALRA's certification process by filing a

representation petition.[6] (Lab. Code, § 1156.3, subd. (a); *F&P Growers Assoc. v. ALRB, supra,* 168 Cal.App.3d 667, 674-675.)

Further evidence that the Legislature crafted the ALRA to eliminate employer interference in representation procedures is found in Labor Code section 1156. That section defines an exclusive bargaining representative as one that is "designated or selected ***by a secret ballot*** . . . by the majority of the agricultural employees in the bargaining unit . . . ." (Lab. Code, § 1156 (emphasis added).) The section of the NLRA on which Labor Code section 1156 was based contains similar language, but no reference to secret ballot elections. (29 U.S.C. § 159(a).) Thus, in this area as well, the Legislature made manifest its intent that issues of representation were to be resolved by employees via the ballot box.

The steps taken by the Legislature to eliminate employer interference in the representation procedure were not limited to the provisions of the ALRA dealing with initial certification. In crafting the provisions of the Act dealing with the decertification of labor organizations, the Legislature, again diverging

---

[6] Labor Code section 1156.3, subdivision (a) authorizes the filing of petitions by "an agricultural employee or group of employees, or any individual or labor organization acting on behalf of those agricultural employees." It is established that, by authorizing "individual[s]" acting on behalf of employees to file petitions, the Legislature was not authorizing employers to file petitions "on behalf" of employees. (*F&P Growers Assoc. v. ALRB, supra,* 168 Cal.App.3d 667, 674-675 ("The ALRA only permits employees or labor unions to petition the Board to conduct an election or certification procedure.").)

from the precedent set by the NLRA, denied employers the ability to initiate the decertification procedure. Under the NLRA, where an employer has good faith uncertainty that a certified labor organization continues to enjoy the support of a majority of bargaining unit employees, the employer may file a petition seeking an election to test employee support for the union (known as an "RM petition"). (*Levitz Furniture Co.* (2001) 333 NLRB 717, 721; 723-724.) Such a petition essentially functions as an employer-initiated decertification petition.

Despite the well-established ability of employers under the NLRA to initiate decertification proceedings, the Legislature denied employers this ability under the ALRA. Labor Code section 1156.7 governs the filing of decertification petitions under the ALRA. In crafting this section, the Legislature gave the right to file a decertification petition exclusively to employees and labor organizations acting on behalf of employees. (Lab. Code, §1156.7, subd. (c) & (d).)

The intent behind these multiple complementary statutory provisions restricting employer involvement in the ALRA's certification and decertification procedures, particularly combined with the Legislature's explicit declaration of purpose, could hardly be more clear: The right to select and remove labor organizations belongs to agricultural employees and employers have no role to play in initiating, directing, or otherwise interfering with the procedures through

which that right is exercised.[7] This fact was acknowledged in *F&P Growers Assoc. v. ALRB, supra,* 168 Cal.App.3d 667, 676 where the court stated that "these differences in the NLRA and the ALRA, with respect to employer participation in the certification and decertification petitions, show 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." The court further stated that it was the intent of the Legislature "to remove the employer from *any peripheral participation* in deciding whether to bargain with a particular union," whether such participation was direct or indirect. (*Id.* at p. 677 (emphasis added).)

[7] Pursuant to constitutional free speech principles, employers are permitted to express their opinions on labor organizations, including in the context of a labor organization's petition to represent employees, provided that such expression is not coercive. (See Lab. Code, § 1155; *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 617; *Dal-Tex Optical Co.* (1962) 137 NLRB 1782, 1787 fn. 11.) In crafting the ALRA, the Legislature, while recognizing employers' legitimate interest in free speech, denied employers the ability to interfere with employee free choice by initiating, directing, or controlling the procedures through which employees certify and decertify labor organizations. For example, it is well established that it is unlawful for an employer to encourage employees to file a decertification petition or assist them in doing so. (*D'Arrigo Bros. Co. of California* (2013) 39 ALRB No. 4 p. 6.)

C. Consistent With the Legislative Intent, the ALRB, With Subsequent Judicial Approval, Holds That Labor Organizations, Once Certified by Employees, Remain Certified Until Decertified by Employees and that Employers May Not Withdraw Recognition Based Upon Claims That the Certified Labor Organization has Lost the Support of Employees

In furtherance of the clear legislative goals of protecting employee choice and eliminating employer participation in the procedures for selecting and removing labor organizations, the Board holds that a labor organization's certification as the bargaining representative of a group of employees is continuing in nature and endures unless and until the employees exercise their right to terminate the certification (frequently termed the "certified until decertified" principle). As a corollary to this principle, the Board also holds that an employer may not supplant its employees' right to choose whether or not to be represented by unilaterally withdrawing recognition from a labor organization based upon a belief that the labor organization has lost the support of a majority of employees. Not only are these principles consistent with the legislative intent and structure of the ALRA, they have been approved by reviewing courts.

1. The "Certified Until Decertified" Rule

In an early case, *Kaplan's Fruit & Produce Co., Inc.* (1977) 3 ALRB No. 28 ("*Kaplan's Fruit*"), the Board was called upon to consider whether a certification, and the corresponding duty to bargain, was continuing in nature or whether it lapsed after one year. The issue in the case was whether a certification automatically expires after one year. Labor Code section 1155.2, subdivision (b)

authorizes the Board, at the expiration of the initial year of certification, to "extend the certification for one additional year" if the employer failed to bargain in good faith. It was posited that this provision meant that certifications expire for all purposes after one year (or two years in the case of extension). (*Kaplan's Fruit, supra*, 3 ALRB No. 28, p. 1.)

The Board rejected this interpretation of the Act, stating that references to "certification" in Labor Code section 1155.2, subdivision (b) referred only to the aspect of a certification that creates a one year period during which the labor organization's status as bargaining representative cannot be challenged (sometimes known as the "certification bar").[8] (*Id.* at pp. 2-4.) In contrast, the

---

[8] During the period of the certification bar, the labor organization enjoys an irrebuttable presumption that a majority of bargaining unit employees continue to support the organization. After the expiration of the certification bar, the presumption becomes a rebuttable one. (*Kaplan's Fruit, supra*, 3 ALRB No. 28, pp. 2-4.) The Board's recognition of the rebuttable nature of the presumption of majority support does not mean, as Tri-Fanucchi has suggested, that the Board intended to incorporate the NLRA defense permitting employer withdrawal of recognition based upon loss of employee support for the labor organization (including where based upon labor organization inactivity). The rebuttable nature of the presumption of majority support was not seen as inconsistent with the rejection of the loss of majority support defense in the *F&P Growers* case. (*F&P Growers Assoc. v. ALRB, supra*, 168 Cal.App.3d 667, 672 & 676-677.) Nor is it inconsistent with the rejection of an inactivity-based defense. Under the ALRA, the means of rebutting the presumption of majority support is a decertification election. (Cf. *Williams Enterprises, Inc.* (1993) 312 NLRB 937, 942 (noting that the "ordinary presumption of continuing majority support" can be rebutted via the union's loss in a representation election.); *CPS Chemical Co., Inc. v. NLRB* (3rd Cir. 1998) 160 F.3d 150, 155 (stating that petitioning for an election is one of the ways to test the presumption of continued majority support).)

Board stated, the aspect of certification that creates a duty to bargain does *not* lapse with the certification bar. (*Kaplan's Fruit, supra*, 3 ALRB No. 28, p. 4.) Rather, it is continuing in nature and "contains no time limit." (*Id.* at pp. 2-3.) Furthermore, to the extent that there is tension between the right to choose to reject an incumbent union and the need for stability in bargaining relationships, the right under consideration is that of the employees: "*The employer's "right" not to bargain is no part of the equation.*" (*Id.* at p. 4 (emphasis added).)

In *Montebello Rose Co., Inc. v. ALRB, supra,* 119 Cal.App.3d 1, the Fifth District Court of Appeal upheld the Board's analysis concerning the continuing nature of the duty to bargain under the ALRA. Considering an argument similar to the one presented in *Kaplan's Fruit* that the Act required that certifications terminate after one year, the Court of Appeal discussed the Board's *Kaplan's Fruit* analysis at length and "approve[d]" the Board's holding "on the employer's duty to bargain beyond the initial certification year." (*Montebello Rose Co., Inc. v. ALRB, supra,* 119 Cal.App.3d 1, 29-30.)[9]

The following year, the Board issued its decision in *Nish Noroian Farms, supra,* 9 ALRB No. 25. As discussed above, the Board had already held, with subsequent judicial approval, that the duty to bargain under the ALRA is a

---

[9] See also *Adamek & Dessert, Inc. v. ALRB* (1986) 178 Cal.App.3d 970, 983 ("Under the ALRA, once a union is certified as the bargaining representative for a company's employees, the company has a duty to bargain with the union until the union is decertified *through a second election.*" (emphasis added.)

continuing duty that does not terminate with the passage of time and that the right to remove a certified union belongs to employees alone. In *Nish Noroian Farms*, the Board recapitulated these principles, making clear that, under the ALRA, "[o]nce 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." (*Id.* at p. 14.) This has come to be known as the "certified until decertified" rule.[10] In support of its holding, the Board cited, among other things, the differences between the ALRA and the NLRA concerning representation procedures and employer participation therein (see discussion above) as well as the public policy favoring stability in bargaining relationships. (*Id.* at pp. 13-16.)

The Board has recognized two exceptions to the "certified until decertified" principle. The first applies when the certified labor organization deliberately and unequivocally relinquishes its certification (known as a "disclaimer of interest"). The second occurs when the labor organization ceases to exist altogether (known as "defunctness"). (*Lu-Ette Farms, Inc.* (1982) 8

[10] Although the *Nish Noroian* decision is frequently cited as the first enunciation by the Board of the "certified until decertified" rule, the principle that the ALRA duty to bargain is a continuing one unaffected by the passage of time and subject to revocation only by employees was, as noted above, stated in *Kaplan's Fruit*, which was upheld in *Montebello Rose*.

ALRB No. 91, pp. 4-5.) However, outside of these narrow exceptions, the "certified until decertified" rule prevails.

2. The Inapplicability of the "Loss of Majority Support" Defense Under the ALRA

One issue not squarely addressed by the decisions discussed above was the applicability under the ALRA of the NLRA rule that permits an employer to withdraw recognition from a certified labor organization under certain circumstances without the organization having been decertified through a secret ballot election. As will be discussed below, the Board has held, and a court of appeal has agreed, that, due to the legislative intent to eliminate employer interference in matters of representation, the NLRA defense is not applicable under the ALRA.

Under the NLRA, which, as discussed, permits employers a role in representation procedures denied to them under the ALRA, an employer may unilaterally withdraw recognition from a certified labor organization where the organization has lost the support of a majority of the members of the bargaining unit. The withdrawal of recognition effectively terminates the labor organization's certification and the employer is no longer obligated to bargain with the organization. In such a situation, the certification is terminated without

the employees having had an opportunity to express their desires in a secret ballot election.[11]

In *F&P Growers Assoc.* (1983) 9 ALRB No. 22, decided the year after *Nish Noroian*, the Board found the NLRA defense inapplicable under the ALRA and held that an employer under the ALRA may not withdraw recognition based upon a contention that the certified labor organization has lost the support of a majority of bargaining unit employees. Again, the Board cited the statutory differences between the ALRA and the NLRA regarding representation procedures and the policy favoring labor relations stability. (*F&P Growers Assoc.*, *supra*, 9 ALRB No. 22, p. 5.) In applying the ALRA on this point, the Board also found that the particular characteristics of California's agricultural industry, particularly the high rate of employee turnover and fluctuation in workforce size caused by seasonal operations made application of the NLRA defense inappropriate. (*Id.* at p. 6.)

---

[11] Prior to 2001, the NLRB allowed an employer to withdraw recognition provided that it had a "good faith doubt" that the labor organization continued to enjoy majority support. In 2001, the NLRB adopted the current, more stringent, standard that requires that the labor organization actually have lost the support of a majority of bargaining unit employees before the employer may withdraw recognition. (*Levitz Furniture Co.*, *supra*, 333 NLRB 717, 717.) This brief will generally refer to the defense as the "loss of majority support" defense, although some of the earlier decisions of the Board and California courts refer to the same defense as the "good faith belief" or "good faith doubt" defense.

The Board's holding on the applicability of the loss of majority support defense was emphatically upheld on review by the Second District Court of Appeal. The court reviewed the statutory divergence of the ALRA from NLRA precedent in the area of representation procedures. The Court of Appeal agreed that "these differences in the NLRA and the ALRA, with respect to employer participation in the certification and decertification petitions, show 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 Assoc. v. ALRB, supra*, 168 Cal.App.3d 667, 675-676.) The court elaborated that:

> [T]he 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. Therefore, to permit an agricultural employer to be able to rely on its good faith belief in order to avoid bargaining with an employee chosen agricultural union, indirectly would give the employer influence over those matters in which the Legislature clearly appears to have removed employer influence. This court will 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.

The court also agreed with the Board that the nature of California's agricultural industry, including seasonal workforce fluctuation, rapid employee turnover, and a largely non-English speaking workforce provided "all the more reason for the Legislature to decide to remove the employer from any peripheral participation in deciding whether to bargain with a particular union." (*F&P*

Growers Assoc. v. ALRB, supra, 168 Cal.App.3d 667, 677.) The court emphasized that it would not permit the employer to treat the labor organization as if it had been decertified by withdrawing recognition given that "under the ALRA it is clear that the employer may not initiate certification or decertification proceedings." (*Ibid.*)

D. Applying the Principles Stated in Prior Board Decisions and Upheld by the Courts of Appeal, the Board has Correctly Held That an Employer May Not Unilaterally Withdraw Recognition Based Upon an Allegation of Labor Organization Inactivity

The Board and appellate decisions discussed above establish that a certification under the ALRA is continuing in nature, that represented employees, and not their employers, have the right to choose to decertify an incumbent labor organization, and that employers may not directly or indirectly usurp that right by relying on the perceived desires of employees to unilaterally withdraw recognition, treating the labor organization as decertified when the employees have not elected to decertify the organization. The principles upheld in these cases have their ultimate basis in the legislative objectives of preserving employee choice in representation matters and eliminating employer interference therewith, as expressed in the statutory language of the ALRA. These same principles have guided both the Board and the Court of Appeal to conclude that allowing an employer to unilaterally withdraw recognition because a certified labor organization has been inactive for an undefined period of time is

incompatible with the ALRA. This conclusion is not only a reasonable interpretation of the ALRA, it flows inexorably from the legislative intent, the statutory structure of the Act, and firmly established case law interpreting the Act.

1. The Board's Precendent on Inactivity-Based Withdrawal of Recognition

The Board's first decision involving an attempted withdrawal of recognition based upon alleged labor organization inactivity was *Ventura County Fruit Growers, Inc.* (1984) 10 ALRB No. 45. Responding to the employer's withdrawal of recognition from the certified labor organization based upon a two-year period of inactivity by the organization, the Board rejected the defense citing the principle that labor organizations "retain their representative status until such time as the unit employees either decertify the incumbent union or elect a new bargaining representative."[12] (*Id.* at pp. 3-4 (citing *Nish Noroian Farms, supra,* 9 ALRB No. 25.)

Subsequent Board decisions have confirmed this principle and have repeatedly held that the ALRA does not permit employers to interfere in the representation process by withdrawing recognition based upon claims of

---

[12] The Board also held that, even if it were to apply NLRB precedent, the employer's "abandonment" claim would be a "factual impossibility" because it was asserted only after the labor organization reasserted its representational rights by requesting bargaining. (*Ventura County Fruit Growers, Inc., supra,* 10 ALRB No. 45, p. 6-7.) That same "factual impossibility" is present in this case, as discussed below.

inactivity. In *Dole Fresh Fruit Co.* (1996) 22 ALRB No. 4, the Board rejected the employer's claim that it was not obligated to bargain with the certified labor organization due to the organization's "dormancy" or "abandonment." The Board held that, except in cases of disclaimer of interest or defunctness of the labor organization (the two established exceptions to the "certified until decertified" rule), "certified bargaining representatives remain certified until decertified by the employees themselves in either a decertification or rival union election." (*Id.* at p. 15.) To allow an employer to withdraw recognition based upon labor organization inactivity would "distort[] the express directives of the ALRA and invad[e] the province of the Legislature." (*Id.* at p. 16 (bracketed material added).)

The Board's decisions following *Dole Fresh Fruit* have continued to hold that, in cases of labor organization inactivity, it is the represented employees who have the right under the Act to remove the labor organization through decertification and employers are not to usurp that right. Thus, in *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, p. 10, the Board held that "a period of dormancy in bargaining, even a prolonged period, [does] not establish union 'abandonment' of a certification." In *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5, decided the year before Tri-Fanucchi's latest refusal to bargain, the Board rejected an inactivity-based defense to a refusal to bargain charge where the labor organization was allegedly inactive for roughly 13 years. The Board held that "under the ALRA the concept of abandonment has no

significance beyond a union disclaimer of interest or union defunctness. . . . Rather, the continued representation status of the union may be tested only via a decertification election." (*Id.* at p. 3.)

2. The Board's Precedent on Inactivity-Based Withdrawal of Recognition is a Reasonable Interpreation of the ALRA,l Consistent with the Statute, the Legislative Intent, and Established Board and Judicial Precedent

As discussed above, the Board's interpretation of the ALRA, which it is legislatively empowered to administer, is entitled to great deference and the Board's decision is not to be reversed if it is a reasonable interpretation of the ALRA. (*Montebello Rose Co. v. ALRB, supra,* 119 Cal.App.3d 1, 24.) The Board's precedent on inactivity-based withdrawals of recognition, and, specifically, its rejection of Tri-Fanucchi's defense in this case, clearly meets this standard, as the Court of Appeal correctly recognized. In fact, not only is the Board's decision a reasonable interpretation of the ALRA, it is compelled by the language of the Act, the legislative intent underlying it, and the established Board and judicial precedent interpreting the Act.

The Board's ruling directly promotes the core legislative purposes underlying the ALRA: to protect employee choice over representation decisions and to eliminate employer interference therein. As shown above, these purposes, and the manner in which the Legislature crafted the ALRA's representation provisions, show a clear intent on the part of the Legislature "to remove the employer from any peripheral participation in deciding whether to bargain with a

particular union." (*F&P Gowers Assoc. v. ALRB, supra*, 168 Cal.App.3d 667, 677.) The Board's ruling ensures that these purposes will be carried out by eliminating the ability of an employer such as Tri-Fanucchi to substitute its choice as to the representation of its employees for the employees' own choice. If Tri-Fanucchi's employees believed or believe that the UFW has failed to represent them and that their interests would be best served by removing the UFW or replacing it with another labor organization, the decertification process is available to them to accomplish that end. However, the Legislature did not intend that an employer would have the ability to interfere with its employees' choice by essentially making it for them; removing their designated bargaining representative without the employees having an opportunity to express their wishes in an election. The Board's decision, therefore, is consistent with the ALRA and the legislative intent.

The Board's decision is also consistent with established administrative and judicial precedent. As discussed above, the Board has held, with judicial approval, that the duty to bargain created by a certification is continuing in nature, coming to an end only when employees exercise their right to terminate it through the decertification process, and that the NLRA "loss of majority support"

defense is inapplicable to the ALRA. The principles that underlie those cases apply with equal force to inactivity-based defenses to the duty to bargain.[13]

Thus, the Court of Appeal was entirely correct to conclude that, not only was the Board's decision rejecting Tri-Fanucchi's inactivity-based defense consistent with prior appellate precedent interpreting the ALRA, but that Tri-Fanucchi's defense was analogous to the "loss of majority support" defense whose inapplicability to the ALRA is established law. The Board's decision was, therefore, a reasonable interpretation of the ALRA and, particularly given the deference owed to the Board's interpretation of the Act, the Court of Appeal was correct to uphold the Board's decision.

E. The Legislature Has Effectively Ratified the Board's Precedent on Inactivity-Based Withdrawal of Recognition

"The Legislature is presumed to be aware of a long-standing administrative practice" and where the Legislature "makes no substantial modifications to the act, there is a strong indication that the administrative practice is consistent with the legislative intent." (*Thornton v. Carlson* (1992) 4 Cal.App.4th 1249, 1257 (internal punctuation omitted); *El Dorado Oil Works v.*

---

[13] In fact, the Board's decisions recognize that a defense predicated upon labor organization inactivity is merely a subspecies of the "loss of majority support" defense. (*Dole Fresh Fruit, supra*, 22 ALRB No. 4, p. 10.) Indeed, Tri-Fanucchi conceded this in its opening brief to the Court of Appeal. (Petitioner's Opening Brief to the Court of Appeal at p. 15 ("abandonment is a narrow theory within the broader area of good faith doubt . . .").) This issue is discussed in greater detail below.

McColgan (1950) 34 Cal.2d 731, 739 (Where Legislature did not amend a statute in response to an administrative interpretation of it, this was "a strong factor indicating that the administrative practice was consistent with the Legislature's intent.").) The Board has applied the "certified until decertified" rule since the early 1980s and its first rulings rejecting labor organization inactivity as a basis for an employer to unilaterally withdraw recognition date from that time period as well. (See *Nish Noroian Farms, supra,* 8 ALRB No. 25 and *Ventura County Fruit Growers, Inc., supra,* 10 ALRB No. 45.) In *Dole Fresh Fruit,* a case now nearly 20 years old, the Board emphasized that, if withdrawal of recognition based upon labor organization inactivity were to be permitted, the Legislature would need to amend the Act to allow it. (*Dole Fresh Fruit Co., supra,* 22 ALRB No. 4, p. 16.) Yet in the more than three decades during which the Board has applied its precedent on inactivity-based withdrawal of recognition, the Legislature has taken no action to amend the Act to allow such a procedure. This is so, despite the fact that the Legislature has repeatedly amended the Act in other respects.

Among the most significant amendments to the ALRA as it relates to the type of inactivity alleged by Tri-Fanucchi were those that added the Mandatory Mediation and Conciliation ("MMC") process. (Lab. Code, § 1164 et seq.) Under the MMC statutes, a labor organization that has been certified but has not reached a first contract (or the employer in such a scenario) may request referral to mediation. If proceedings before the mediator do not produce

agreement on a contract, the mediator is empowered to resolve any outstanding issues between the parties in a report, which ultimately becomes the parties' first collective bargaining agreement.[14]

For purposes of demonstrating legislative intent concerning ongoing representation, the most salient features of the MMC process are that there is no limitation on the age of the certification in question and no requirement that there has been continuous bargaining. With respect to a union that was certified prior to January 1, 2003, the Legislature required only that the union show that the parties failed to reach agreement for one year after a renewed demand to bargain, the employer has committed a ULP, and the parties have never had a contract. (Lab. Code, § 1164.11.) Thus, although the certification may be as old as the Act itself, the Legislature imposed no requirement that the union continuously bargained with the employer or otherwise actively represented employees since certification.[15] This is the case even though the Board's "certified until decertified" rule and precedent rejecting inactivity-based

---

[14] In a case decided the same day as the instant case, the Court of Appeal ruled that the MMC statutes were unconstitutional. (*Gerawan Farming, Inc. v. ALRB* (2015) 236 Cal.App.4th 1024.) The ALRB contends that the *Gerawan* decision was erroneous and this Court has granted review. (*Gerawan Farming, Inc. v. ALRB*, Case Nos. S227243 & S227250.)

[15] It is also notable that, in the case of pre-2003 certifications, the Legislature required the labor organization to make a "renewed demand to bargain," obviously contemplating, if not expecting, that the bargaining relationship would be dormant and would need to be "renewed" prior to a request for referral to MMC. (Lab. Code, §1164, subd. (a).)

withdrawal of recognition were already well-established at the time when MMC was enacted.

In fact, examination of MMC's legislative history indicates that the Legislature passed MMC in large part to address the problem of longstanding certifications where the parties had never reached an initial contract. Proponents of the MMC bill (SB 1156 and AB 2596) argued that the bill was necessary because employees "have waited for years" and "continue to languish without the negotiated contracts they have elected to secure." (Off. of Assem. Floor Analysis, 3rd Reading of SB 1156 (2001-2002 Reg. Sess.) Aug. 31, 2002, p. 7; Off. of Assem. Floor Analysis, conc. in Sen. Amend. of Assem. Bill No. 2596 (2001-2002 Reg. Sess.) Aug. 31, 2002, pp. 7-8.) Proponents also specifically cited the fact that there were cases where a union had been certified, but there had been no negotiations. (*Ibid.*)

If the Legislature intended for certifications to terminate, or for employers to be privileged to withdraw recognition, after a period of dormancy, it could, and presumably would, have placed some outer limit on the age of a certification eligible for MMC or required that a labor organization requesting MMC establish a history of continuous bargaining efforts or other representational activity. Of course, more directly, the Legislature could have amended (and, if it wishes, can amend) the Act at any time to provide that employers may withdraw recognition from labor organizations where the organization is inactive for a certain period of time. The Legislature has never taken this step, which, in the context of the

Board's well established precedent in this area, can only be taken as legislative approval and effective ratification of the Board's interpretation of the Act.

III. THE ARGUMENTS PRESENTED BY TRI-FANUCCHI AGAINST THE DECISIONS OF THE BOARD AND THE COURT OF APPEAL DO NOT WITHSTAND SCRUTINY

A. Contrary to Tri-Fanucchi's Claim, Permitting Employers to Unilaterally Terminate Certifications Does Not Promote Employee Free Choice, but Undermines it.

Tri-Fanucchi argues that allowing it to unilaterally terminate the representative status of the labor organization selected by Tri-Fanucchi's employees fosters employee free choice. (Pet. Op. Br. pp. 15-22.) This claim is incorrect as a matter of fact and as a matter of the established administrative and judicial construction of the Act. The argument ignores the fact that the Legislature's goal in enacting the ALRA was to protect the right of employee choice *and* to eliminate employer interference with that right. (Lab. Code, § 1140.2.) Allowing the representation decision to be made without any participation whatsoever by employees and, furthermore, allowing the process to be driven and controlled by the employer whose interference the Legislature specifically sought to eliminate is completely inimical to both of those legislative goals.

Furthermore, the argument that the remedy for a labor organization that has forfeited the support of the employees it represents is for the paternalistic employer to act where the employees have not has been firmly rejected. (See *F&P Growers Assoc. v. ALRB, supra,* 168 Cal.App.3d 667, 677 (stating that the

legislative goal of removing employer interference in representation decisions "certainly overrides any paternalistic interest of the employer that the employees be represented by a union of the present employees' own choice."). (See also *Auciello Iron Works v. NLRB* (1996) 517 U.S. 781, 790 (The NLRB 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.").) Under the ALRA, even where an employer learns that a majority of employees no longer wish to be represented by the certified labor organization, it must continue to bargain unless and until the employees decertify the organization. Given this, it would be anomalous, and quite contrary to the legislative intent, to permit withdrawal of recognition where there are not even any expressions of dissatisfaction by any employees but merely on the basis of labor organization inaction. The idea that the right of employee choice is fostered by depriving employees of the right to choose must be rejected.

Tri-Fanucchi argues that, at some point during the UFW's alleged period of absence, the employees in the bargaining unit may have become collectively unaware that they were represented by the UFW. [Pet. Op. Br. p. 19.] Tri-Fanucchi claims that, once the UFW demanded bargaining in 2012, it would be "absurd" to expect that the employees could decide for themselves whether to seek decertification while the UFW sought to bargain on their behalf. (Tri-Fanucchi's solution, of course, is to make the decision for them.) Tri-Fanucchi

claims that, when a labor organization demands to bargain after a period of inactivity, there is "very little time" for employees to decide whether to seek decertification. This contention is unsupported and, in fact, the opposite is true. Collective bargaining negotiations, particularly over first contracts, are frequently contentious and protracted.[16] Accordingly, there is no reason to believe that employees would not have a meaningful amount of time in which to seek decertification before a contract is signed.[17] Tri-Fanucchi claims that the labor organization may request referral to MMC but concedes that the organization must allow three months to elapse after its renewed demand to bargain before doing so.[18] (Lab. Code, § 1164, subd. (a).) Tri-Fanucchi's argument is also legally invalid. The ALRA presumes that employees can and will make decisions as to representation within expedited time-frames. For example, the ALRA requires that, when a valid petition for an election is filed, an election must be held within seven days and, if there is strike activity, the

---

[16] See *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?* (2009) 70 La. L.Rev. 1, 18-19 (citing studies showing that only 38 percent of NLRB certifications result in a first contract within one year).

[17] Furthermore, Tri-Fanucchi contradicts itself, stating that, if it were permitted to withdraw recognition, and its employees actually wished to remain represented by the UFW, those employees would "swiftly" file a representation petition and reelect the UFW (Pet. Op. Br. p. 21.). Tri-Fanucchi does not explain why, if the employees could "swiftly" reelect the UFW after a withdrawal of recognition, they could not decertify it if they no longer wish to be represented by it.

[18] In fact, the UFW did not seek referral to MMC in this case.

election is to occur *within 48 hours* of the filing of the petition. (Lab. Code, § 1156.3, subd. (b).).

Putting aside Tri-Fanucchi's speculative hypotheticals, the fact is that over *three years* have elapsed since the UFW reasserted its bargaining rights and in that time Tri-Fanucchi's employees have not sought to remove or replace the UFW, although they could have done so at any time. This is so, although Tri-Fanucchi has refused to bargain with the UFW for the entire period, which conduct is recognized as generally having a corrosive effect upon employee support for a labor organization. (*J.R. Norton Company, Inc.* (1984) 10 ALRB No. 42 at p. 14.) Tri-Fanucchi's argument that employee choice would have been fostered by allowing an employer-initiated termination of the certification in 2012 must be rejected.

B. The Board has Never Permitted an Employer to Withdraw Recognition or Refuse to Bargain Based Upon Inactivity by the Certified Labor Organization and Tri-Fanucchi Misrepresents the Case Law in Arguing Otherwise

Tri-Fanucchi argues that the Board decisions have recognized an "abandonment" defense that applies when the certified labor organization is "unwilling or unable" to continue representing the bargaining unit. In analyzing this argument, it is critical to understand the type of defense that Tri-Fanucchi asserts (as opposed to the nomenclature used to describe that defense) because it is clear that the Board has never recognized the type of defense Tri-Fanucchi asserts in this case.

As Tri-Fanucchi made clear at the hearing before the ALJ, the defense it is asserting is that Tri-Fanucchi may refuse to bargain with the UFW, thereby withdrawing recognition from it and effectively terminating the UFW's certification, due solely to the passage of time combined with inactivity on the part of the UFW.[19] The Board, the Court of Appeal, and Tri-Fanucchi itself have referred to this as an "abandonment" defense. However, some of the Board's earlier decisions have also used the term "abandonment" to refer to different, legally distinct concepts. Tri-Fanucchi attempts to confuse the issues by citing these earlier cases as if their references to "abandonment" were describing inactivity-based withdrawal of recognition, when they clearly were not.

In cases such as *O.E. Mayou & Sons* (1985) 11 ALRB No. 25, pp. 11-12, fn. 8 and *Bruce Church, Inc.* (1991) 17 ALRB No. 1, pp. 9-10, the Board found that "abandonment" is established when it is shown that the labor organization is "unwilling or unable" to represent the bargaining unit, which the Board in *Bruce Church* alternatively phrased as the labor organization having "left the scene altogether." That the concept of being "unwilling or unable" to represent a bargaining unit is distinct from the concept of loss of certification through inaction is made clear by the fact that these same cases categorically rejected arguments presented by the employers that they were entitled to refuse to bargain

[19] See Tr. 8:6-21; 13:21-14:7 where Tri-Fanucchi, in response to queries by the ALJ, repeatedly confirmed that its defense was predicated solely upon the UFW's alleged inactivity.

due to labor organization inaction. Thus, in *O.E. Mayou*, the Board found that a defense based upon a two-year period of inactivity combined with employee turnover was "not legally cognizable under the ALRA." (*O.E. Mayou & Sons, supra,* 11 ALRB No. 25, appen. p. 3). Likewise, in *Bruce Church* the Board held that, "a Union remains the certified representative until decertified or until the Union becomes defunct or disclaims interest . . ." (*Bruce Church, Inc., supra*, 17 ALRB No. 1, p. 9.)[20]

In subsequent decisions, the Board has made abundantly clear that, to the extent that its prior decisions referred to "abandonment" being established through a showing that the labor organization was "unwilling or unable" to represent the bargaining unit, the decisions were referring to the established exceptions to the "certified until decertified" rule: disclaimer of interest

---

[20] In discussing the *Bruce Church* decision, Tri-Fanucchi repeatedly quotes from portions of the decision of the ALJ in that case, although the Board, in its own decision, stated that it was affirming the ALJ's rulings, findings and conclusions only "insofar as they are consistent with the decision herein." (*Bruce Church, Inc., supra*, 17 ALRB No. 1, p. 2.) Not only does Tri-Fanucchi fail to signal to this Court when it is quoting from the ALJ's decision, rather than the Board's, it repeatedly mischaracterizes statements from the ALJ's decision as statements from "the Board," including statements of the ALJ that are inconsistent with the Board's own decision. Quotations from the *Bruce Church* ALJ decision (incorrectly presented as statements by the Board) appear in Tri-Fanucchi's opening brief at pages 11, 24-26, 28, 30-31, and 39. The Court should not be misled by Tri-Fanucchi's erroneous citation to statements of the ALJ that were not adopted by the Board.

(unwillingness to represent the unit) and defunctness (inability to represent the bargaining unit).

In *Dole Fresh Fruit*, the Board discussed whether the employer had established "abandonment" of a bargaining unit. The Board concluded that union inactivity is viewed by the NLRB as merely some evidence of a loss of majority support and that, because the loss of majority support defense is unavailable under the ALRA, "'abandonment' . . . could not itself be a valid defense under the ALRA." (*Dole Fresh Fruit, supra*, 22 ALRB No. 4, p. 10.) Instead, the proper question was whether the employer established the labor organization's "inability or unwillingness" to represent" the employees, which "represents the extent to which 'abandonment' may be recognized under the ALRA as a defense to the duty to bargain." (*Id.* at pp. 10-11.) Contradicting Tri-Fanucchi's claim that the Board's references to "inability or unwillingness" to represent a bargaining unit constitutes a recognition of an inactivity-based defense to the duty to bargain, the Board in *Dole* confirmed that the Board "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 interest in continuing to represent the bargaining unit***" and that "***[i]n all other circumstances***, certified bargaining representatives ***remain certified until decertified*** by the employees themselves." (*Id.* at p. 15 (emphasis added) (and see footnote 6 of the decision where the Board stated that it was "constrained by the Act from adopting a definition of

abandonment any broader than that encompassed by the concepts of defunctness and disclaimer.").)

Dole Fresh Fruit made clear that, to the extent that the Board had referred in its prior decisions to "abandonment" being established by a showing of "unwillingness or inability" to represent a bargaining unit or that the labor organization had "left the scene altogether," it was referring to disclaimer and defunctness, the two recognized exceptions to the "certified until decertified" rule. Subsequent Board decisions have confirmed this. (See *Pictsweet Mushroom Farms, supra,* 29 ALRB No. 3, pp. 5-6 (stating that disclaimer and defunctness are the "[o]nly two events aside from decertification in a Board election [that] have been recognized as effective to terminate a certification" (bracketed material added); *San Joaquin Tomato Growers, Inc., supra,* 37 ALRB No. 5, p. 3 ("under the ALRA, the concept of abandonment has no significance beyond a union disclaimer of interest or union defunctness."); *Arnaudo Brothers, LP* (2014) 40 ALRB No. 3 p. 10 ("'unwilling or unable' means disclaimer or defunctness. There is no broader application of the phrase 'unwilling or unable.'")

Tri-Fanucchi has failed to show any inconsistency on the part of the Board concerning its treatment of asserted defenses to the duty to bargain based on labor organization inactivity. Tri-Fanucchi does not cite a single case where the Board has accepted such a defense, and there are numerous cases where the defense has been categorically rejected, as Tri-Fanucchi concedes. Despite

variances in the nomenclature used to describe the relevant legal concepts, the Board has been consistent that, with the limited exceptions of disclaimer and defunctness, labor organizations remain certified until removed or replaced by employees through an election.[21]

C. Contrary to Tri-Fanucchi's Arguments, the Court of Appeal was Correct in Determining that the *F&P Growers* Decision Supports the Board's Decision

In its decision, the Court of Appeal found that the Board's precedent on inactivity-based withdrawal of recognition was consistent with existing appellate precedent. (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1092.) Among this precedent was the decision in *F&P Growers v. ALRB*, the holding of which has been discussed previously. The Court of Appeal found that Tri-Fanucchi's defense was "clearly analogous" to the loss of majority support defense rejected in *F&P Growers v. ALRB* and that, in light of the similar nature of the defenses, a similar result pertained; i.e., rejection of the defense. (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1092.)

---

[21] Furthermore, even if Tri-Fanucchi were correct that one of the Board's decades-old decisions contains dicta suggesting that the Board might allow an employer to withdraw recognition based on labor organization inactivity, the Board's more recent case law is abundantly clear that the Board's interpretation of the ALRA is that such employer interference in the representation process is not permitted by the Act. For the reasons described previously, this is a reasonable interpretation of the Act. Even if a competing interpretation of the Act were possible, this would not be grounds to reverse the Board's interpretation, particularly given the deference that is to be shown to the Board's interpretation of the Act.

Tri-Fanucchi's argument that the Court of Appeal misapplied *F&P Growers* and that its inactivity-based defense is not analogous to the "loss of majority support" defense should be rejected. First, as discussed previously, rejection of the loss of majority support defense and rejection of Tri-Fanucchi's inactivity-based defense rest on the same foundation; the Legislature's decision to deprive employers of the ability to interfere with employee choice over representation matters by denying employers "any peripheral participation in deciding whether to bargain with a particular union." (*F&P Growers Assoc. v. ALRB, supra*, 168 Cal.App.3d 667, 677.) *F&P Growers* held that, pursuant to this Legislative intent, an employer may not refuse to bargain with a certified labor organization even if it receives evidence that a majority of its employees no longer desire representation by the organization. (*Id.* at pp. 676-679.) It follows, *a fortiori*, that an employer may not interfere in the representation process merely because it believes that a labor organization has "abandoned" the bargaining unit. In both types of cases, the fundamental principle is that, if employees wish to remove an unwanted or ineffective labor organization, their remedy is to utilize the decertification process. As the Court of Appeal correctly stated, "So long as the employees can petition for a new election if they wish to remove the union, the employer has no real cause for concern about whether it is bargaining with the true representative of its employees." (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1092 (quoting *Montebello Rose Co. v. ALRB, supra,* 119 Cal.App.3d 1, 28).)

In fact, the Court of Appeal actually understated the impact of the rejection of the loss of majority support defense. Several Board decisions have recognized that, under NLRB precedent (which Tri-Fanucchi claims should apply), evidence of labor organization "abandonment" is merely a component of the broader loss of majority support inquiry. (See e.g. *Dole Fresh Fruit, Inc., supra*, 22 ALRB No. 4, p. 10 ("a claim of abandonment is but one possible factor to be considered in determining whether there has been a loss of majority support.") Indeed, in its opening brief before the Court of Appeal, Tri-Fanucchi conceded this point, stating that "abandonment is a narrow theory within the broader area of good faith doubt . . . ." (Petitioner's Opening Brief to the Court of Appeal at p. 15.) Having made this concession, Tri-Fanucchi can hardly contend that the Court of Appeal erred in finding that the rationale of *F&P Growers v. ALRB* supports the rejection of Tri-Fanucchi's "abandonment" defense. As the ALJ in this case cogently stated, "[Tri-Fanucchi's] argument essentially reduces to the proposition that, even though a court has rejected the whole of the [loss of majority support] defense, it did not reject a part of it." [CR 173 (bracketed material added).]

D. This Court's Decision in *Englund v. Chavez* Does Not Support Tri-Fanucchi's Position

Tri-Fanucchi erroneously argues that this Court's decision in *Englund v. Chavez* (1972) 8 Cal.3d 572 supports its position when, in fact, the opposite is true. *Englund v. Chavez* predated the ALRA and dealt with the issue of whether

an employer could recognize a labor organization it knew did not enjoy the support of a majority of employees and then seek injunctive relief against the organizational activities of a rival labor organization under California's Jurisdictional Strike Act (Lab. Code, § 1115 et seq.). The Jurisdictional Strike Act allows employers to enjoin strike activity arising out of claims by competing labor organizations as to which of them is entitled to recognition as bargaining agent. (*Englund v. Chavez, supra*, 8 Cal.3d. 572, 585.) This Court held that the Jurisdictional Strike Act was designed to be a defensive measure that could be taken by an employer caught between the conflicting demands of competing labor organizations. (*Id.* at pp. 585-586.) It was not intended to be used as a means for an employer to recognize a favored union and enjoin competing activity by a disfavored union. (*Ibid.*) For this reason, injunctive relief was not available where the employer engaged in "interference" with a labor organization by recognizing it when it did not enjoy majority support. (*Id.* at p. 597.)

Tri-Fanucchi claims that the holding of *Englund v. Chavez* supports its position. In fact, it supports the Board's order. This Court's discussion of the intent behind the Jurisdictional Strike Act reveals another example of the Legislature's concern that employers would use their economic power over employees to impose their choice as to representation without any input from employees. As discussed, when the Legislature enacted the ALRA, this concern led the Legislature to forbid voluntary recognition and other forms of employer involvement in the certification and decertification processes. (See *Harry*

Carian Sales v. ALRB (1985) 39 Cal.3d 209, 225-226.) In order to prevent the kind of interference discussed in *Englund v. Chavez*, under the ALRA, matters of representation are to be decided by employees through the ballot box.

E. Tri-Fanucchi's Attempt to Import Principles Developed Outside the Context of Labor Organization Certification and Decertification Should Be Rejected

Perhaps owing to the fact that the precedent interpreting the ALRA does not support its position, Tri-Fanucchi cites cases and statutes in unrelated fields of law in an attempt to bolster its arguments. These attempts fail. Tri-Fanucchi argues that it must be allowed to withdraw recognition from the UFW because in certain other areas of the law, parties may forfeit rights under certain circumstances. Tri-Fanucchi cites the examples of statutes allowing for "adverse possession" of property and dismissal of civil actions for failure to prosecute. (See Pet. Op. Br. p. 44 (citing Cal. Code Civ. Proc. §§ 321 & 583.420).)

The ALRA is a comprehensive statutory scheme governing agricultural labor law in California, subject to considerations unique to the legal and factual setting in which it is placed. (*J.R. Norton Co., Inc. v. ALRB* (1979) 26 Cal.3d 1, 8; *United States v. Palumbo Bros.* (7th Cir. 1998) 145 F.3d 850, 861 ("The NLRA is a comprehensive code that regulates the unique labor-management relationship . . .").) It would be inappropriate to blithely incorporate legal

precedent arising out of wholly distinct areas of law, as Tri-Fanucchi suggests.[22] None of the areas of law cited by Tri-Fanucchi feature a system such as exists under the ALRA where a class of individuals is given the exclusive collective right to designate bargaining representatives and to terminate such representation. Furthermore, those areas do not feature concerns that underlie the provisions of the ALRA, such as the vulnerability of agricultural employees to coercive interference by their employers, a problem the Legislature sought to address by eliminating the kinds of interference Tri-Fanucchi seeks to impose.

Tri-Fanucchi further argues that California law recognizes that private contracts may be "abandoned" by the mutual assent of the contracting parties. Of course, the bargaining relationship between an employer and a certified union is fundamentally different than the relationship between two contracting parties. Furthermore, the circumstances under which a labor organization may voluntarily relinquish its certification under the ALRA have been defined. Absent decertification, such a relinquishment occurs only when the labor organization disclaims interest and such a disclaimer can only be accomplished through an unequivocal statement by the labor organization. (*Arnaudo Brothers,*

[22] In both the areas of law cited by Tri-Fanucchi, the Legislature enacted statutes defining the circumstances under which forfeitures would occur, but the Legislature has declined to enact a statute permitting inactivity-based withdrawal of recognition under the ALRA.

LP, supra, 40 ALRB No. 3, p. 13-14.) Mere inaction by the labor organization does not constitute a disclaimer of interest.[23] (*Ibid.*)

Tri-Fanucchi also cites cases involving franchises granted by the state to public utilities. (*County of Los Angeles v. Southern California Telephone Co.* (1948) 32 Cal.2d 378; *County of Kern v. Pacific Gas & Electric Co.* (1980) 108 Cal.App.3d 418.) Those cases featured franchises that were granted by the state to utility companies, which allowed the companies to use public land in exchange for the companies' provision of utility services. The cases held that the franchises were of indefinite duration, but that it was reasonable to imply that they continued only for so long as the companies continued to provide the agreed-upon utility services. It was held that such franchises were in the nature of a contract between the state and the companies, in which the state received services in exchange for the franchise. (*County of Los Angeles v. Southern California Telephone Co., supra*, 32 Cal.2d 378, 384.) This scenario bears little, if any, resemblance to a state law or administrative precedent governing the circumstances under which employees may designate and remove agents to collectively bargain on their behalf. Furthermore, in the ALRA, the Legislature defined the manner in which a labor organization's right to represent employees

---

[23] The Board found that Tri-Fanucchi did not assert in its administrative answer that the UFW disclaimed interest and that, even if it had preserved the issue, no disclaimer had been shown. [CR 401-402.] Tri-Fanucchi does not challenge these aspects of the Board's decision before this Court.

may arise and be terminated: certification and decertification under the processes of the Act. The cases cited by Tri-Fanucchi offer no guidance on this issue.

Finally, Tri-Fanucchi cites cases such as *Steele v. Louisville & Nashville Railroad Co.* (1944) 323 U.S. 192 and *James v. Marinship Corp.* (1944) 25 Cal.2d 721. Those cases (which long predate the ALRA) discuss the duty of a certified labor organization to refrain from engaging in hostile discrimination against a minority of represented employees (such as a minority racial/ethnic group). No such claim has been made with respect to the UFW's conduct in this case.[24] Furthermore, there is nothing in the ALRA's requirement that representation decisions be made by employees free from interference by their employers that is inconsistent with the principle that certified labor organizations have a duty to refrain from engaging in invidious discrimination against a minority group.

F. The Board Did Not Exceed its Legislatively Granted Authority

Tri-Fanucchi argues that the Board's decision exceeded the scope of the authority granted to the Board by the Legislature. In fact, the Board's decision is completely consistent with the Act and the underlying legislative intent. The

---

[24] To the extent that Tri-Fanucchi might claim that the UFW's conduct violated the duty of fair representation, and to the extent that Tri-Fanucchi would even have standing to assert such a claim, it was not raised before the Board or the Court of Appeal and, therefore, could not be raised before this Court. (*Lindeleaf v. ALRB* (1986) 41 Cal.3d 861, 869-870.)

abundant support for the Board's decision in the legislature's express statements of intent, the provisions of the ALRA, and the case law interpreting the Act have has been discussed above. Those same factors require the rejection of Tri-Fanucchi's claim that the Board exceeded its authority in rejecting Tri-Fanucchi's defense.

G. Even if the Board had Applied the NLRB Law that Tri-Fanucchi Claims Should Have Applied, its Defense Would Have Been Rejected

Tri-Fanucchi claims that the Board should have applied NLRB precedent in deciding its case. It does not, however, cite the NLRB authority it claims the Board should have followed.[25] In fact, as discussed previously, the NLRB regards labor organization inactivity as a factor to be considered in the broader loss of majority support analysis, an analysis which, as shown, is inapplicable to the ALRA. (*Dole Fresh Fruit, supra*, 22 ALRB No. 4, p. 10.)

Moreover, even if NLRB precedent were to be applied, Tri-Fanucchi's claim would necessarily fail because the NLRB has held that, to the extent that evidence of a period of union activity may be relied upon in a defense to the duty

---

[25] If Tri-Fanucchi would have this Court hold that the Board failed to follow NLRA precedent, it should, at the very least, be required to identify the precedent it claims the Board should have followed. The fact that it has not done so should be viewed as fatal to its claim. Indeed, because Tri-Fanucchi also failed to cite any such precedent before the Board, this argument was waived. (*Lindeleaf v. ALRB, supra,* 41 Cal.3d 861, 869-870 ("a petitioner is deemed to waive any objections that could have been raised before the ALRB").)

to bargain, the labor organization may 'cure' a period of inactivity by reasserting its bargaining rights, after which any evidence of inactivity becomes irrelevant as a matter of law. Thus, in *Spillman Co.* (1995) 311 NLRB 95, the labor organization reasserted its bargaining rights after a period of inactivity. After this reassertion, the employer withdrew recognition, citing the labor organization's prior inactivity. (*Id.* at p. 97.) The NLRB rejected the employer's claim finding that "the Union's reassertion of its bargaining rights . . . negated any inference to be drawn from the preceding period of inactivity." (*Id.* at pp. 95-96.) Likewise, in *Pioneer Inn Associates* (1977) 228 NLRB 1263, 1264, the NLRB held that, to defeat a claim that a labor organization has become defunct through a period of inactivity, the organization "need only show that it is willing and able to represent the covered employees at the time its status is called into question." The Ninth Circuit Court of Appeal upheld the NLRB's decision. (*Pioneer Inn Associates v. NLRB* (9th Cir. 1978) 578 F.2d 835, 839-840.) (See also *Whisper Soft Mills, Inc. v. NLRB* (9th Cir. 1985) 754 F.2d 1381, 1387 ("An employer may rebut that presumption [of majority support], so as to withdraw recognition, by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.) (bracketed material added).) The ALRB itself has held that, even if it were to apply NLRB law on abandonment, once a previously inactive labor organization reasserts its bargaining rights, an abandonment defense becomes an impossibility. (*Ventura County Fruit Growers, Inc., supra*, 10 ALRB No. 45 at

pp. 7-8; *Dole Fresh Fruit Co., Inc., supra*, 22 ALRB No. 4 at p. 8; *Arnaudo Bros., LP, supra*, 40 ALRB No. 3 at p. 12, fn. 3).).

CONCLUSION

In reviewing the Board's decision in this case, the Court of Appeal was required to uphold the decision provided that the Board's holding on Tri-Fanucchi's inactivity-based defense to the refusal to bargain allegations represented a reasonable interpretation of the ALRA. As found by the Court of Appeal and as shown herein, the Board's decision easily meets this standard, particularly in light of the deference owed to the Board concerning interpretation of the ALRA. The Board's decision furthers the legislative goals of protecting the right of employees to make representation decisions free of employer interference, as reflected in the provisions of the ALRA relating to the representation process. It is consistent with the continuing nature of certification and the duty to bargain under the ALRA and the Board's judicially approved "certified until decertified" rule. It is also consistent with the Board's judicially approved rejection of the "loss of majority support" defense as inconsistent with the purposes of the ALRA.

Tri-Fanucchi has failed to establish that the Board's decision was not a reasonable interpretation of the Act or was otherwise improper. Accordingly, for the reasons stated herein, Respondent Agricultural Labor

Relations Board respectfully submits that Petitioner Tri-Fanucchi Farms' petition for review should be denied.

DATED: January 29, 2016

Respectfully submitted,

J. ANTONIO BARBOSA
Executive Secretary

PAUL M. STARKEY
Special Board Counsel

SCOTT P. INCIARDI
Senior Board Counsel

Attorneys for Respondent
AGRICULTURAL LABOR
RELATIONS BOARD

CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court 8.504(d)(1), the undersigned hereby certifies that the Agricultural Labor Relations Board's Answer Brief on the Merits contains 13,709 words according to the word count function included in Microsoft Word software with which the brief was written.

DATED: January 29, 2016

SCOTT P. INCIARDI
Senior Board Counsel
AGRICULTURAL LABOR
RELATIONS BOARD

Tri-Fanucchi Farms v. ALRB
S227270

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1325 J Street, Suite 1900-B, Sacramento, California 95814.

On **January 29, 2016**, I served the within AGRICULTURAL LABOR RELATION BOARD'S ANSWER BRIEF ON THE MERITS on parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

Via U.S. Mail

Howard A. Sagaser
Sagaser, Watkins & Weiland PC
7550 N. Palm Avenue, Suite 100
Fresno, CA 93711-5500

Mario G. Martinez
MARTINEZ AGUILASOCHO & LYNCH
P.O. Box 11208
Bakersfield, CA 93389-1208

Clerk of Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, California 93721

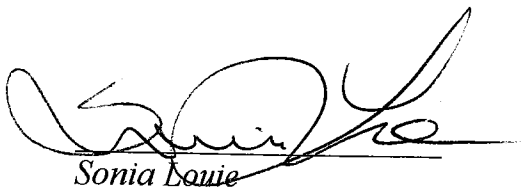
Via Hand Delivery

Mark Woo-Sam,
Acting General Counsel
1325 J Street, Suite 1900-A
Sacramento, California 95814

Via U.S. Mail

Kamala G. Harris, Attorney General
Office of the Attorney General
1300 I Street
Sacramento, California 95814-2919

Executed on **January 29, 2016**, at Sacramento, California. I certify (or declare), under penalty of perjury that the foregoing is true and correct.



Sonia Louie