Case No. S227270

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
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TRI-FANUCCHI FARMS,
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD, et al.
Respondent.

and

UNITED FARM WORKERS OF AMERICA, a labor union,
Real Party-In-Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT
Case No. F066648

PETITIONER TRI-FANUCCHI FARMS' COMBINED REPLY BRIEF ON THE MERITS TO THE AGRICULTURAL LABOR RELATIONS BOARD AND THE UNITED FARM WORKERS OF AMERICA'S ANSWER BRIEFS

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I.

INTRODUCTION

The Agricultural Labor Relations Board ("ALRB" or "Board") and the United Farm Workers of America's ("UFW") attempt to misconstrue this case as being a matter regarding an "employer attempting to insert itself into the representation process by unilaterally withdrawing recognition from a certified labor organization based on the employer's beliefs." (ALRB Answer[1] p. 1.) However, to be clear, this is not a case regarding Tri-Fanucchi Farms' ("Fanucchi") conduct or the conduct of Fanucchi's employees. Nor does this situation involve an employer doubting union support, guessing what employees will do, and claiming a loss of majority support for the union. To the contrary, this set of circumstances concerns union misconduct and the complete disappearance of the UFW from representing a group of employees the union was expected to represent for twenty-four years. Since Fanucchi was not allowed to cross-examine UFW witnesses[2] at the ALRB proceedings, it is

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[1] All citations to the ALRB's Answering Brief on the Merits appear as "ALRB Answer" and all citations to the UFW Answering Brief on the Merits appear as "UFW Answer."

[2] As set forth in Fanucchi proffered exhibit 18, at the time the ALJ closed the hearing, Fanucchi had three subpoena duces tecums outstanding to the UFW. (CR 332-359.) The first subpoena required the attendance of the UFW person most knowledgeable as to why the UFW did not negotiate with Fanucchi from 1988 through 2012. That subpoena also required that the person most knowledgeable produce all correspondence exchanged

unclear whether the UFW was unwilling or unable to represent Fanucchi's employees for twenty-four years. Nevertheless, the answer to that question is irrelevant as it is clear from the record that the lower tribunals were required to view the evidence in the light most favorable for Fanucchi and regarded the UFW's abandonment of Fanucchi's employees for a twenty-four year period as fact for purposes of reviewing Fanucchi's defenses.

The UFW and ALRB's Answering Briefs[3] attempt to misconstrue ALRB precedent set forth in *Bruce Church, Inc.*, 17 ALRB No. 1 and *Dole*

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between the UFW and representatives of Tri-Fanucchi Farms between 1988 and 2012 and all documents showing contact between the UFW and employees of Tri-Fanucchi Farms during the time period between 1988 and 2012. The absence of any contact between the UFW and employees of Fanucchi was important as it would show that the union had unclean hands and abandoned the unit. It also shows that the UFW either disclaimed Fanucchi's employees or was unwilling to represent the employees by not communicating with the employees, by not representing the workers in grievance matters, and by doing absolutely nothing on behalf of the employees, much less communicating with the employees or representing the workers, for 24 years. The second subpoena duces tecum was to the UFW person most knowledgeable regarding the history of negotiations between Tri-Fanucchi Farms and the UFW. That subpoena also requested the same documents as the first subpoena and was important for the same reasons. The third subpoena requested the person most knowledgeable regarding the UFW contacts with the bargaining unit from 1988 through 2012. Like the other two subpoenas, it was accompanied by a declaration setting forth the relevancy. All three subpoenas were not objected to and should have been complied with by the UFW at the hearing. (RT, 30/11 – 34/22.)

[3] Most of Fanucchi's Reply will reference the ALRB's Answer Brief as the UFW's Answer Brief fails to raise any new issues not already addressed in the ALRB's Answer Brief. The UFW merely repeats the same arguments, often verbatim, as the ALRB's Answer Brief.

Fresh Fruit, Co., 22 ALRB No. 4 as these decisions clearly articulate that union abandonment is potentially a legally valid defense under the ALRA.

By all standards, the UFW's neglect of Fanucchi's employees in this case is deplorable, and should not be tolerated. The UFW's abandonment for over twenty-four years of its statutory duties must be seen for what it is – a disclaimer of interest by the UFW's unwillingness or inability to represent Fanucchi's employees and a signal that it intentionally repudiated its role as the employee's true bargaining representative.

Fanucchi has always taken the position that due to the UFW's long-term absence and egregious inactivity, the UFW's certification status was repudiated, disclaimed, and therefore, abandoned by the union. Under Fanucchi's analysis, the ALRA statutory provisions prohibited it from bargaining with the UFW because the UFW was no longer the true, certified bargaining representative. California Labor Code section 1148 requires the ALRB to follow applicable precedent of the National Labor Relations Act ("NLRA"). Under the NLRA a union that shirked its statutory duty to represent employees would clearly be found to have abandoned the bargaining unit and forfeited its status as the employees' statutory collective bargaining representative.

Despite the UFW's irreparable conduct for over twenty-four years, the Board and the UFW boldly assert that Fanucchi's abandonment claim is an attempt by Fanucchi to unilaterally withdraw recognition from a

certified union in violation of the clear mandate of the Agricultural Labor Relations Act ("ALRA") prohibiting interference by the employer in the designation of representation. This argument overlooks Labor Code section 1148. The Board and UFW, and the Court of Appeal for that matter, completely misapprehend Fanucchi's position in seeking this judicial review on the issue of union abandonment. Fanucchi is not seeking to interfere or make decisions about the employees' desire for union representative, but instead is seeking this Court's clear guidance as to whether a union can be held to forfeit its certification status if it abandons its duties for twenty-four years.

The Court of Appeal and the Board maintain that rejection of the abandonment defense as presented in this case is consistent with the ALRA principle that an employer's duty to bargain with the originally certified union continues until that union is replaced or decertified by a subsequent election. However, the case law relied upon to support this argument does not hold that certification is an all-purpose grant of perpetual power to the union, save its limited check via the decertification process. In *F & P Growers* (1985) 168 Cal.App.3d 667, 676-677, the court examined the difference between the NLRA and ALRA, and rejected the employer's lack of majority defenses on the basis that in enacting the ALRA, the Legislature sought "to prohibit the employer from being an active participant in determining which unit it shall bargain with." In the present

case, Fanucchi has not asserted a loss of majority defense rejected by the courts and the ALRB, but rather, Fanucchi is asserting an abandonment defense. Abandonment is a different defense that has been recognized under the ALRA statutory scheme.[4] (*Bruce Church, supra,* 17 ALRB No.1 at 10; *Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 13.) It is also based on applicable NLRA precedent which should have been applied pursuant to California Labor Code section 1148. Moreover, abandonment is caused solely due to the union's conduct.

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

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[4] Both the ALRB and UFW Answering Briefs misstate that Fanucchi conceded the loss of majority defense is analogous to the abandonment defense. This is entirely incorrect as Fanucchi has consistently argued that the abandonment defense is a separate defense. In fact, abandonment is more akind to defunctness which is recognized by the ALRB as both defenses involve union conduct or as noted in this case, lack of union conduct. Not employer or employee conduct that is at issue in other defenses recognized by the NLRA, including loss of majority support.

(1948) 32 Cal.2d 378, 284 [holding that the privilege of a state-granted franchise lasts only so long as the holder meet the obligations in consideration of which the right was granted].)

Despite the UFW and ALRB's attempt to improperly shift the burden on Fanucchi and Fanucchi's employees[5], it is plainly evident that the Court's analysis should focus on the union's misconduct as Fanucchi had nothing to do with the UFW's twenty-four-year absence. It was the union's own choice and conduct that led the union's complete disappearance from the scene for twenty-four years. Based on the fundamental purposes of the ALRA, common sense, and long standing legal principles concerning statutes of limitations and forfeiture of rights, Fanucchi respectfully requests that this Court hold that a union cannot engage in a long-term dereliction of its duties and abandon a bargaining unit of employees for decades without consequences.

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[5] The ALRB and UFW's attempt to somehow shift the burden onto Fanucchi's employees to decertify an absentee union that the employees' did not even know was supposed to be representing the employees as the UFW completely abandoned the workforce for twenty-four years. This is entirely absurd and should be summarily rejected by this Court. In the ALRB's Answer, the Board improperly continues to argue that the employees that have no knowledge of the absentee union should somehow be required to decertify the derelict union they do not know. (ALRB Answer p.40.) The issue is union misconduct and union dereliction of statutory duties for twenty-four years. Agricultural employees with limited resources and knowledge of the ALRA should not be shouldered with the burden of having to decertify an absentee union that the workforce did not even know was supposed to be representing the employees.

As is painfully evident in the record, the Board did not reasonably interpret the ALRA and committed error by refusing to provide Fanucchi a hearing and summarily denying Fanucchi the opportunity to raise prior and total abandonment by the UFW as a defense to its obligation to bargain. The order of the ALRB should therefore be reversed, and the case remanded for the Board to allow Fanucchi the opportunity to demonstrate whether the UFW abandoned its employees during the twenty-four year absence to support a defense to the obligation to bargain.

II.

ARGUMENT

A. The ALRB is Incorrect that the Board's Precedent is Consistent with the Policies and Purposes of the ALRA.

The ALRB's Answer only highlights the deficiencies in the Court of Appeal's holding rejecting the abandonment defense. The ALRB contends that the Court's holding is based on longstanding ALRB precedent and does not represent a departure from the underlying legislative intent of the ALRA. In support of this claim, the Board asserts that pursuant to the "certified until decertified" rule, there are no circumstances under which an employer can challenge a union's status as the bargaining representative of its employees, even where the union has completely abandoned the bargaining unit and failed to carry out its statutory duties for a period of more than twenty-four years. (ALRB Answer, pp. 13 – 20.)

Although it is consistent with the ALRA that the right to select or remove unions is placed in the hands of the employees, the policies of the Act do not support the application of a strict rule prohibiting an employer from raising a meritorious objection to bargaining with a union that has forfeited its role as the exclusive bargaining representative due solely to a union's misconduct. Such a rule undermines the broad purpose of the ALRA to ensure stability in labor relations and encourage collective bargaining. (Stats. 1975, Third Ex. Sess., ch. 1, § 1, p. 4013; Lab. Code, § 1140.2.) In fact, it does the opposite. If the abandonment defense, which is recognized under the NLRA is applied, then unions would be required to actively negotiate, rather than ignore their statutory duty to represent the bargaining unit.

Fanucchi does not dispute that under the ALRA the right to select or remove unions is in the hands of the employees and free from employer influence. The issue presented by Fanucchi is whether ***a union should be held to have forfeited its status as the certified bargaining agent of the employees*** that it has failed to represent, let alone keep in contact with, for an unreasonably long period of time, i.e. twenty-four years. If a union is determined to have forfeited its status as the exclusive bargaining representative of the bargaining unit, pursuant to the ALRA, the employer is a prohibited from bargaining with that union. (Lab. Code, § 1153, subd. (f).)

Thus, contrary to the Board's assertions, Fanucchi is not playing an active role in the removal of the UFW as the employees' bargaining representative, but is seeking judicial resolution of an important question of law and statutory construction. If this Court determines that a union forfeits its status as the exclusive bargaining representative of the bargaining unit by long-term absence and egregious inactivity, therefore establishing that the employer has no duty to bargain with the union, the employer cannot be held to have interfered with the selection of the bargaining representative. This would also be consistent with Labor Code section 1148. The result would be that the union, by its own conduct, has demonstrated its intent to renounce the bargaining unit, and at that point, is no longer the employee's true bargaining representative[6].

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[6] As the Board has conceded in its Answer pp. 41-44, the ALRB has recognized similar exceptions to the "certified until decertified rule." For example, the Board recognizes that certifications terminate through union disclaimer of interest (the affirmative act by the union of unequivocally relinquishing its certification) and union defunctness (the institutional death of the certified union). (*Dole Fresh Fruit Co., supra,* 22 ALRB No. 4, pp. 12-14; *Bruce Church, Inc., supra,* 17 ALRB No. 1, p. 13.) The Board distinguishes these exceptions on the grounds that they do not "call upon *the employer* to assess the quality of representation provided by the certified union." Fanucchi's position is that under the ALRA, certification terminates through the union's long-term absence and egregious inactivity. In other words, union conduct demonstrating full abandonment of the bargaining unit terminates the union's status as certified bargaining representative. Thus, the employer is not assessing the quality of representation or making the decision to terminate the bargaining obligation.

The Board's imposition of the "certified until decertified" rule in the context of complete abandonment by the union, as presented in this case, cannot be squared with the statutory purpose of the ALRA to have actual employee representation by the union and promoting the collective bargaining relationship. In enacting the ALRA, unless NLRA precedent is followed pursuant to Labor Code section 1148, the Legislature clearly did not foresee that a certified bargaining representative would abandon its statutory obligations to the bargaining unit for several decades and that the employees would be denied the negotiated contract they elected the union to secure. Instead, the Legislature anticipated that the certified bargaining unit would actively negotiate the terms and conditions of employment on behalf of the agricultural employees it represents (Lab. Code, §§ 1140.2, 1152) and would bargain in good faith (Lab. Code, § 1155.2, subd. (a). If it did not, then under NLRA precedent the union would forfeit its status due to abandonment. As noted by the ALRB, the Legislature's intent to promote collective bargaining was further demonstrated in 2002 when the Legislature amended the ALRA to add the Mandatory Mediation and Conciliation ("MMC") procedures. (Lab. Code, § 1164, et seq.) The ALRB and the UFW conveniently pointed out in their Answers that in adding MMC to the Act, the Legislature was particularly concerned with addressing circumstances in which employees "have waited for years" and "continue to languish without the negotiated contracts they have elected to

secure." (ALRB Answer, pp. 34-36, citing Office of Assembly Floor Analysis, concurring in Senate Amendments of Assembly Bill No. 2596 (2001 – 2002 Reg. Sess.) August 31, 2002; UFW Answer p. 52-54.)

This legislative history shows legislative intent to encourage bargaining and the creation of contracts which employee elections sought to secure. It does not suggest legislative support for union misconduct and support for a union to completely abandon and disregard a bargaining unit for decades, failing entirely to negotiate a contract the employees elected the union to secure. This legislative history, taken together with the wider stated legislative purpose of the Act to promote collective bargaining, is thwarted by both the Board and Court of Appeal's rejection of the abandonment theory. Moreover, it indicates that the NLRA precedent of the abandonment theory should be recognized by the ALRB pursuant to Labor Code section 1148 to prevent unions from abandoning their statutory duties.

In ascertaining legislative intent, courts are called upon to consider the consequences that flow from a particular interpretation of a statute. (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303, 315.) The result of the imposition of the certified until decertified rule in the present case demands that an employer bargain with a union that has been entirely absent from the scene and had no contact whatsoever with the employees or the employer for over twenty-

four years. Under the ALRB's rationale, a union elected decades prior that has failed to carry out any of its statutory duties since that election, is still presumed to be the true representative of the bargaining unit's own choosing. The application of the certified until decertified rule under these circumstances gives no consequence to the fact that for the past twenty-four years the employer and employees have had a stable working relationship without the union. It also fails to recognize the fact that the employees have no knowledge that they were supposed to be represented by any union, much less the absentee union, and Fanucchi's workforce had no interaction or relationship with the union for twenty-four years due to the UFW's complete and total abandonment of the employees during the same time period.

During these twenty-four years, the employees have never sought intervention from the UFW for the purpose of collective bargaining or other aid or protection.[7] Under the Court of Appeal's decision, the burden is unfairly on the agricultural employees, who the Act seeks to protect, to prove that the derelict union is no longer their true bargaining

[7] During prior briefing of this matter, the UFW made a desperate attempt to mislead this Court by asserting that the UFW maintained contact with Fanucchi's employees throughout the 24-year period and that the UFW represented Fanucchi's employees on many non-bargaining matters. (UFW Answer to Petition for Review, p. 4.) These assertions are unsupported by the record. The Court of Appeal chastised the UFW for making similar claims during oral argument. This Court should similarly give no consequence to the UFW's inexcusable effort to assert facts unsupported by the record.

representative. The consequence of the Board's precedent is unreasonable and plainly inconsistent with the purpose of the ALRA to enable agricultural employees to designate "*representatives of their own choosing ... for the purpose of collective bargaining.*" (Lab. Code, § 1140.2, italics added; also see *J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 30.)

Further, the Board's decision signals to unions throughout the state that as long as they have been certified as bargaining agent, they are secure to disregard their statutory responsibilities to the bargaining unit for decades without the risk of forfeiting their status as bargaining representative. This result is antithetical to the ALRA policies of having actual employee representation by the elected union and of promoting the collective bargaining relationship. (Lab. Code, §§ 1140.2, 1152, and 1155.2, subd. (a).)

Contrary to the Board's assertions, the fact that a union has completely disregarded the bargaining unit it was elected to represent for over twenty-four years presents a novel legal principle for this Court to consider as to whether applicable NLRA precedent should be followed pursuant to the legislative mandate contained in Labor Code section 1148.[8]

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[8] As argued at further length below, Fanucchi also argues that fundamental principles of fairness and equity that are foundational concepts to our legal system, as well as common sense necessitates that at a complete

Although the appellate courts have recognized the general rule that an employer's duty to bargain with a certified union continues until that union is decertified, those cases did not present an issue of long-term complete and total abandonment by the union. (*Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1[9]; *F & P Growers Assn. v. Agricultural Labor Relations Bd.* (1985) 168 Cal.App.3d 667.)

In contrast to those cases, Fanucchi is asserting its duty to bargain with the UFW ended when the UFW forfeited its status as bargaining representative by such long-term abandonment (i.e., twenty-four years) by disclaiming interest in the employees and egregious inactivity. At some point, a union's abandonment has to be recognized for what it is –a signal that the union has repudiated its role as the employee's true bargaining representative. Clearly, in the present situation, the UFW disclaimed interest in the bargaining unit in abandoning the employees due to the union's unwillingness and/or inability to represent Fanucchi's employees for twenty-four years.

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and total abandonment of a right and statutory obligation to represent employees for twenty four years should result in forfeiture.

[9] In reaching this conclusion, the *Montebello* court followed applicable NLRA precedent as required by Lab. Code, § 1148.

B. The Board is Incorrect that the Court Correctly Deferred to the Board's Interpretation of the ALRA in Rejecting Fanucchi's Abandonment Claims.

The Board also argues that this Court should uphold the Court of Appeal's ruling because the appropriateness of the Court of Appeal's judicial deference to the Board's interpretation of the ALRA is a firmly established principle. (ALRB Answer, p. 13-20.) The Board argues the Court must uphold the Board's interpretation of the ALRA as long as it is "reasonable." (*Ibid.*)

As Fanucchi has demonstrated at length, the Board's interpretation of the ALRA to reject the abandonment defense is entirely unreasonable and clearly erroneous because it undermines important policies of the ALRA, such as encouraging stability in labor relations, promoting collective bargaining, and ensuring that employees are represented by a union of their own choosing. (*Ruline Nursery Co. v. Agricultural Labor Relations Bd.* (1985) 169 Cal.App.3d 247, 259 [holding that the Board's interpretation of the ALRA will be followed unless it is "clearly erroneous"].) It also flies in the face of applicable NLRA precedents, which the ALRB should have applied pursuant to Labor Code section 1148.

Additionally, the Court of Appeal should not have afforded the Board's interpretation deference, and in fact was obligated to strike down the Board's rule denying Fanucchi's abandonment defense because it varies the terms and purposes of the ALRA, therefore exceeding the authority

conferred to it by the Legislature. (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 436; *J.R. Norton Co., supra,* 26 Cal.3d at p. 29.)

The Board fails to acknowledge that its decision rejecting the abandonment theory based on the Board's blanket rule that a "union is certified until decertified" varies the terms of the ALRA because it fails to recognize that there may be circumstances outside the election procedures that support termination of a union's certification status. Specifically, the ALRA was enacted "to provide for collective-bargaining rights for agricultural employees" by putting into place a system of laws. (Lab. Code, § 1140.2.) When a certified union fully abandons the bargaining unit it was elected to represent and engages in no collective-bargaining efforts on the bargaining unit's behalf whatsoever, the broad purpose of the ALRA is undermined. The expansive protections for agricultural employees are also threatened when unions disregard their statutory obligations to the bargaining unit. (Lab. Code, § 1140.2) Thus, by failing to recognize circumstances in which the union has forfeited its representative status, and the resulting termination of union certification status, the Board has varied the terms of the ALRA by obstructing agricultural employees' rights to collective bargaining and to designate representatives of their own choosing.

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C. The Court of Appeal's Ruling in This Case Cannot Be Reconciled with Other Appellate Court Precedent Recognizing that Circumstances May Exist To Support Termination of the Union's Certification Status.

The Board and the UFW feebly contend that Fanucchi misstates the holdings of *Montebello Rose, supra,* 119 Cal.App.3d 1 and *F & P Growers, supra,* 168 Cal.App.3d at 667. (ALRB Answer, p. 45-47; UFW Answer, p. 46-50.) In doing so, the Board and the UFW impermissibly narrow the context of *Montebello Rose* by asserting that it was limited to the issue of whether the duty to bargain with a certified union automatically terminated at the conclusion of the 1 year certification bar. (*See* ALRB Answer, pp. 23 – 24.) That is simply not true. The *Montebello Rose* court clearly reached its decision based on the broader principle enunciated in the NLRA that the presumption of continued majority support is rebuttable. (*Montebello Rose, supra,* 119 Cal.App.3d at 24 [holding that "[u]ntil the presumption is rebutted, a prima facie case is established that an employer is obligated to continue bargaining with the union (citations omitted)"].)

The UFW cites dicta in *Montebello Rose* in which the court asserted that "[s]o 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." (UFW Answer, p. 38, citing *Montebello Rose, supra,* 119 Cal.App.3d at 28.) However, the facts in this case are virtually the opposite of those

presented in *Montebello Rose.* The lawsuit in *Montebello Rose* developed as a result of several unsuccessful negotiation sessions between the union and the employer within the year following certification of the union. (*Id.* at p. 10-13.) The statement cited by the UFW in *Montebello Rose* is misplaced in the context of the present case where the UFW abandoned negotiations for twenty-four years.

Both the UFW and Board suggest, without justification, that the presumption recognized by the *Montebello* Court, even when severe union dereliction of its statutory duties and abandonment of employees for twenty-four years is at issue, can only be rebutted in one way – decertification through a secret ballot election. (ALRB Answer, p. 21, 23-24; UFW Answer, p. 34-35.) The UFW goes as far as to state that under the certified until decertified rule, "a union continues to *enjoy* its representative status until it loses this status through a secret ballot election." (ALRB Answer, p. 35 [emphasis added].) Clearly, UFW has *enjoyed* its representative status of Fanucchi's employees seeing as it ignored its obligations to the bargaining unit for over 24-years. The ALRA was not enacted so that the UFW can *enjoy* its representative status. The ALRA was enacted "to provide for collective-bargaining rights for agricultural employees." (Lab. Code, § 1140.2.) As was noted by the Court of Appeal, the UFW disregarded its statutory responsibilities to a bargaining unit for over two decades, which is "*extreme dereliction*". (*Tri-*

Fanucchi Farms v. Agricultural Labor Relations Bd. (2015) 236 Cal.App.4th 1079, 1098, fn.2. [emphasis added].) Such union misconduct was clearly not anticipated nor addressed in *Montebello Rose.*

As demonstrated herein, there are circumstances, such as extreme dereliction by the union in the form of long-term and complete abandonment, which can rebut the presumption of continued majority support. Therefore, the Board's narrow interpretation of legislative intent cannot be reconciled with the appellate court's holding in *Montebello Rose, supra,* 119 Cal.App.3d 1.

Fanucchi maintains that the lower court erred in relying on the flawed analysis of the California Fourth District Court of Appeal in *F & P Growers, supra,* 168 Cal.App.3d at 667 which addressed the issue of whether the rebuttable presumption rule may be used by an employer as a basis for refusing to bargain with a union it believed in good faith had lost its majority support. The lower court mistakenly found Fanucchi's abandonment defense to be "clearly analogous" to the loss of majority defense asserted by the employer in *F & P Growers,* and summarily disposed of the issue. (*Tri-Fanucchi Farms v. Agricultural Labor Relations Bd., supra,* 236 Cal.App.4th at 1093-1094.) In doing so, the Court of Appeal overlooked the significant difference between the loss of majority defense and the abandonment defense – under the abandonment defense the employer is not interfering in the selection and removal of bargaining

representative, but is asserting that the union, by its own conduct, has forfeited its role as bargaining representative of the employees by its long-term disappearance from the scene. The Board and the Court of Appeal ignored this important distinction.

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

The ALRB and UFW Answering Briefs fail to dispute the fact that the ALRA was enacted to protect employee rights by prohibiting employers and unions from imposing a contract upon the employees without their consent. (*See Englund v. Chavez (1972)* 8 Cal.3d 572, 597.) Failing to recognize abandonment as a defense to an employer's obligation to bargain with a certified union may result in the very consequence the Legislature sought to prevent when enacting the ALRA. The UFW and the ALRB Answering Briefs only narrowly and misleadingly assert that *Englund v. Chavez* sought to prohibited employer interference with employee representative choice. However, the decision also sought to prohibit union sweetheart contracts with employers and unions from representing employees without their consent. As noted by the ALRB, *Englund v. Chavez* predated the enactment of the ALRA and had an influential impact on the ALRA's inclusion of safeguards to prevent employers and unions from imposing contracts on employees without their consent. In *Englund v. Chavez* this Court refused to uphold collective bargaining agreements that

were forced upon unwilling employees after being negotiated by a union that did not have the support of those employees. (*Id.* at 577-579.)

By not applying the abandonment defense in the present case, the concern expressed in *Englund v. Chavez* may actually occur as the union, through the MMC process, can bypass the employees and impose a contract upon the employees without their consent when the employees after twenty-four years of abandonment may not even know the union once represented them in theory when in fact the union abandoned the employees and had no contact with the workforce for decades. In fact, the Court of Appeal's decision contradicts the broader purposes of the ALRA that sought to avoid the issues that occurred in *Englund v. Chavez.* The appellate court's decision additionally condones union misconduct as the holding unfairly allows an absentee union that was not previously known by the employees to impose a contract on them, while also unjustly shifting the burden to agricultural workers, who have limited resources and are uneducated in the law, to decertify a union that has abandoned the employees and done absolutely nothing on their behalf for twenty-four years.

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E. The ALRB Concedes in its Answering Brief that the Board Has Recognized That Abandonment By A Certified Union and Other Exceptions to the Certified until Decertified Rule Exist as Defenses to An Employer's Obligation to Bargain

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

The ALRB concedes in its Answering Brief pp. 40-44 that Board precedent recognizes union abandonment as a potential defense as the ALRB has already recognized union abandonment by way of disclaimer of interest and defunctness[10]. Moreover, the ALRB has recognized other defenses do exist under the ALRA that arise due to union conduct. Specifically, the ALRB stated "*Dole Fresh Fruit* made clear, that to the extent that the Board had referred in its prior decisions to 'abandonment' being established by showing of 'unwillingness or inability' to represent a bargaining unit or that the labor organization had "left the scene altogether.'" (ALRB Answer Brief p. 44.) Similarly, in the present case, employer and employee conduct is not at issue. The issue is whether the union by its own conduct, in not representing the employees, having no contact with the employees, and doing absolutely nothing on their behalf for twenty-four years, has abandoned the bargaining unit.

As the ALRB has conceded, recognition of the abandonment theory in this case does not require this court to adopt an entirely new theory into

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[10] All of which arise due to union conduct.

the ALRA, but merely recognize the abandonment theory already found to exist by the ALRB and under NLRA precedent. The Board has held that an employer's bargaining obligation will cease due to union disclaimer of interest and defunctness and may cease when a union is found to have totally abandoned the bargaining unit for a period of time.

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

Board precedent clearly recognizes that an employer's obligation to bargain may cease when it can establish the certified union's total absence from the scene for a significant period of time. In its decision in *Bruce Church,* the Board recognized that although it does not utilize the doctrine of good faith doubt applicable under the NLRA, it "nevertheless retained the doctrine of abandonment as an exception to its usual 'certified until

decertified' rule." (*Bruce Church, supra,* 17 ALRB No.1 at 43, 44.) In "clearly recognizing" the existence of the abandonment theory in the context of the ALRA, the Board in *Bruce Church* relied on its earlier holding in *Lu-Ette Farms* (1982) 8 ALRB No. 91, in which it stated: "Once a union has been certified, it remains the exclusive collective bargaining representative of the employees in the unit until it is decertified or a rival union is certified, *or until the union becomes defunct or disclaims interest in continuing to represent the unit employees...*" (*Bruce Church, supra,* at 44, citing *Lu-Ette Farms, supra,* 8 ALRB No. 91 at 8 [emphasis added].) Stated another way, the Board explained that under the ALRA, the bargaining obligation may cease with "formal decertification, or, in essence, a showing that the Union had effectively left the scene altogether." (*Id.* at 10.)

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

Ultimately, the Board in *Bruce Church* reviewed the record and determined that in that case there was no evidence indicating the union had disclaimed interest in, or was unwilling or unable to represent the bargaining unit. (*Bruce Church, supra,* at 10.) In reaching this conclusion, the Board stated "no evidence was presented to show the amount of contact, or lack thereof, with unit employees, or to show that the Union has stopped representing employees in grievances or other nonbargaining matters." (*Ibid.*) The record in *Bruce Church* showed that despite the slow pace in which the union communicated with the employer and periods of union inactivity lasting between six months to one year, the union continued to represent the employees by presenting a complete proposal and wage package on their behalf, engaging in negotiation meetings with the employer, requesting a wage proposal from the employer, protesting wage changes, and filing unfair labor practices on the employees' behalf. (*Id.* at 45-50.) Additionally, in *Bruce Church,* the Board found that the employer had engaged in unfair labor practices during the time of alleged abandonment that undermined the union's representative status, and thus was disqualified from raising abandonment as a defense. (*Id.* at 50.)

The Board's analysis in *Bruce Church* demonstrates that an employer's bargaining obligation may cease under the ALRA upon "a showing that the Union had *effectively left the scene altogether*." (*Id.* at 10 [emphasis added].) Although the Board concluded that the factual

circumstances in *Bruce Church* did not justify a finding that the union was either unwilling or unable to represent the employees in question, it did leave open the question of whether another set of facts, such as the facts in this case, might justify such a finding.

In the ALRB's Answering Brief, the ALRB attempts to muddle the record and argues the Board meant differently when it described the potential abandonment defense in past decisions. (ALRB Answer Brief pp. 29-34, 40-45.) However, the record is clear that the ALRB recognized the abandonment defense and made the same inquiry of whether the union was "totally absent from the scene" in *Dole Fresh Fruit, supra,* 22 ALRB No. 4. In *Dole,* the employer asserted that it was justified in withdrawing recognition and refusing to bargain with the UFW, the certified union, with regard to a sector of its employees involved in the production of table grapes, on the basis that the UFW had previously disclaimed or abandoned its interest in representing the employees. (*Id.* at 1 - 2.)

On the issue of abandonment, the Board noted that pursuant to the "distinct law that has developed under the ALRA, the proper question before the Board is whether Respondent has carried its burden of establishing that its duty to bargain has been extinguished by the Union's inability or unwillingness to represent the grape employees, on either...the date of the UFW's formal request to resume negotiations, *or at times prior thereto.*" (*Id.* at 10 [emphasis added].) Despite the Board's criticism of the

Dole's decision to raise abandonment at the time the union came forward with its request to bargain after the alleged absence, the Board's analysis did not end there.[11] (*Id.* at 10.)

Instead, the Board went on to examine the record and found that the facts "only serve to demonstrate the Union's continued interest in representing" the grape employees. (*Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 13.) Specifically, the Board focused on the interaction between the UFW and the grape employees during the time between Dole's acquisition of the grape operations in 1988 and the date Dole refused to bargain on the basis of abandonment in May 1994. The Board noted the following facts: (1) the UFW made separate formal requests to bargain on behalf of the grape employees in 1990, 1992, and 1994; (2) the UFW filed Notices of Intent to Take Access to engage employer's grape employees; and (3) the UFW sought a general wage increase for all grape workers in the region. (*Id.* at 13.) The Board concluded that the UFW "actually remained active on behalf of the grape employees, albeit by various means other than direct

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

negotiations, and therefore was not 'totally absent from the scene.' (*Bruce Church, supra,* 19 ALRB No. 1.)" (*Ibid.*)

In a separate and distinct section of the Board's analysis in *Dole Fresh Fruit, supra,* 22 ALRB No. 4, the Board addressed concerns regarding "dormant" certifications[12] in which "the certified representative does not appear to be actively representing employees for an extended period of time." (*Id.* at 7 – 18.) The Board's decision to separately address abandonment based on a union's "total absence from the scene," as opposed to a "hiatus in negotiations," demonstrates that the Board itself recognizes there is a line when a union's inactivity progresses from dormant to full-on abandonment. It is hard to imagine a factual scenario more fitting for recognizing abandonment than the UFW's total absence from the scene at Fanucchi's operations for more than twenty-four years.

That distinction carries with it a world of difference – marking the line between union inactivity in bargaining context and union inactivity altogether. As demonstrated by *Bruce Church* and *Dole Fresh Fruit*, past union inactivity is a defense to the employer's obligation to bargain where a

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[12] In its analysis, the Board undertook arguments raised by Dole that "the Board should recognize the concept of abandonment beyond that already present in Board case law, i.e., where certified labor organizations become inactive by becoming defunct or by disclaiming interest in continuing to represent the bargaining unit." (*Id.* at 15.) The Board ultimately rejected Dole's claim, falling back on its rule that "representatives once certified remain certified until decertified by the Board." (*Ibid.*, fn. 7.)

union totally disappears from the scene without remaining active on the employees' behalf or having contact with them whatsoever. Thus, where the Board has refused to recognize the abandonment theory in circumstances where although there is a *limited period of dormancy in bargaining*, evidence existed that the union *remained active on the employee's behalf by means other than negotiations*.

In the present case, Fanucchi has consistently alleged that for twenty-four years the UFW was *totally absent* from the scene at its operations and had *no contact whatsoever* with its agricultural employees. Fanucchi sought to introduce evidence and to prove that the UFW had not remained active on its employees' behalf during this period of time as the Board had permitted the employers in *Bruce Church* and *Dole Fresh Fruit* to do. (CR 72-78.) Instead, the Board flatly rejected Fanucchi's defense of abandonment without an evidentiary hearing, and held, that even if Fanucchi could prove that the UFW had no contact with its employees for twenty-four years, total abandonment by a union for twenty-four was not a defense to Fanucchi's duty to bargain. (CR 394-396.)

The Board clearly applied the wrong legal standard when it held that abandonment could not be based upon the facts presented in Fanucchi's case. In summarily rejecting Fanucchi's claim, it never allowed Fanucchi to make an evidentiary showing as to whether the UFW was totally absent from the scene during the twenty-four years. The Board necessarily abused

its discretion when it rejected Fanucchi's defenses without properly considering whether the UFW did in fact abandon the unit.

Critically, despite the fact that both the ALRB and Fanucchi had pointed out the Board's prior recognition of the abandonment theory, the Court of Appeal failed to address this precedent altogether. Instead, the lower court erroneously deferred to the Board's rejection of Fanucchi's defense and concluded, that "Fanucchi was not entitled to refuse to bargain with UFW based on UFW's past failings or inactivity, and such conduct did not create a defense to bargaining, whether labeled as abandonment or otherwise[13]." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1093.)

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

The Board's analysis in *Bruce Church* and *Dole Fresh Fruit* both recognized that the certified until decertified rule does not prevent raising the abandonment theory where the certified union is totally absent from the employer's scene for a period of time and has no contact with the employees during that period. (*Bruce Church, supra,* 17 ALRB No. 1 at 43

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[13] As the Court of Appeal recognized, the ALRB has described the potential abandonment defense in different ways by using various phrases and diction over the years. Regardless of what the defense should be called and even though Fanucchi was not even afforded an administrative hearing to present evidence, Fanucchi has clearly properly raised the defense before the ALRB and the California Courts. The ALRB should not benefit due to its failure to provide Fanucchi with an evidentiary hearing and its attempt to confuse its past choice of words in prior Board decisions.

[Citing *Nish Noroian Farms* (1982) 8 ALRB No. 25: "While, because of the peculiarities in our statute, our Board does not utilize the doctrine of good faith doubt, it has nevertheless retained the doctrine of abandonment as an exception to its usual 'certified until decertified' rule."]; *Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 15 ["After reviewing the limitation of the statute, the Board concluded that it could not recognize the concept of 'abandonment' beyond that already present in Board case law, i.e., where certified labor organizations become inactive by becoming defunct or by disclaiming an interest in continuing to represent the bargaining unit."].)

Despite the Board's early precedent, in the cases following *Dole Fresh Fruit,* the Board arbitrarily began narrowing the circumstances under which an employer could demonstrate abandonment. For example, in *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3 at 6 and *San Joaquin Tomato Growers, supra,* 37 ALRB No. 5 at 6, the Board cites *Bruce Church* as holding that "[o]nly two event aside from decertification in a Board election have been recognized as effective to terminate a certification: (1) a disclaimer by the certified union of its status as collective bargaining representative or (2) the certified union's 'defunctness,' i.e., its institutional death and inability to represent the employees." As demonstrated *supra*, the Board in *Bruce Church* never adopted such a restricted and narrow interpretation of "disclaimer" or "defunctness." In fact, the Board discussed the fact that the terms

"disclaimer," "defunctness," and "abandonment" have been used interchangeably in NLRB and ALRB precedent, and in fact adopted the concept broadly enough to include evidence of "passivity or unwillingness to perform." (*Bruce Church, Inc., supra,* 17 ALRB No.1 at 45, fn. 37.)

The Board also distorted its prior holdings in *Bruce Church* and *Dole Fresh Fruit* as holding that a "Union's absence alone does not constitute a waiver of rights." (*Arnaudo Brothers, LP* (2014) 40 ALRB No. 3 at 9.) In the present case, citing *Dole Fresh Fruit,* the Board asserted that under the ALRA "the fact that a labor organization has been inactive or absent, even for an extended period of time, does not represent a defense to the employer's duty to bargain." (*Tri-Fanucchi, supra,* ALRB No. 4.) Conversely, as demonstrated herein, the Board's holding in *Dole Fresh Fruit* clearly explained that there was a material difference between "absence in negotiations" (22 ALRB No. 4 at 12), as opposed to circumstances were the union was "totally absent from the scene." (22 ALRB No. 4 at 13.) Thus, the Board's repeated failure to allow employers to present evidence of the lack of contact and activity of the union on behalf of the employees by means other than direct negotiations is an abuse of discretion.

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

One of the few judicial decisions construing the employer's duty to bargain with a certified union under the ALRA is *Montebello Rose, supra*, 119 Cal.App.3d 1. In *Montebello Rose*, the question at issue was "whether an employer's duty to bargain with a certified employee representative continued beyond the initial certification year absent an extension of the certification period as provided in section 1155.2, subdivision (b) ..." (*Montebello Rose, supra*, 119 Cal.App.3d at 6.) The employer in *Montebello Rose* argued that it no longer had a duty to bargain with the union because the one-year certification period under Labor Code section 1155.2 had expired and no extension had been issued. (*Id.* at 23-24.) After an "intricate process of statutory construction and reconciliation" of the ALRA, the Fifth District Court of Appeal applying NLRA precedent held that an employer's duty to bargain extended beyond the initial certification year. (*Id.* at 23-30.)

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

27.) The Board's conclusion in *Kaplan's* rested on two main factors: NLRA precedent and agricultural policy. (*Ibid.*)

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

The *Montebello Rose* court emphasized the limited nature of its holding: "We therefore approve *Kaplan's* on the employer's duty to bargain beyond the initial certification year." (119 Cal.App.3d at 29-30.)[14] The Board's analysis in *Kaplan's* was limited to whether or not the employer's duty to bargain lapses following the end of the certification year. (*Id.* at 2-

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

7.) The Board in *Kaplan's* never discussed when the employer's obligation to bargain would cease other than in the context of the rebuttable presumption. The policy considerations discussed in *Montebello Rose* and *Kaplan's* further evidence that the analysis was limited to the employer's continued duty to bargain at the end of the certification year. (*Montebello Rose, supra*, 119 Cal.App.3d at 25-26.)

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

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

The ALRB and the Court of Appeal improperly relied on *F & P Growers*, despite the fact that the case did not address the unique facts and legal concepts at issue when a union abandons the bargaining unit due to its own severe dereliction of duties and complete disappearance from the scene altogether for twenty-four years. Rather than recognizing the theory of

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

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

The *F & P Growers* court rejected the employer's contention, and found that the loss-of-majority support defense to bargaining with a particular union was clearly inapplicable to the ALRA based on specific differences between the ALRA and NLRA. (*F & P Growers, supra*, 168 Cal.App.3d at 674-676.) The Court noted that the ALRA only allows an employer to bargain with a union that has won an election, as opposed to the NLRA that permits the employer to bargain with any union that demonstrates by any means that it has majority status. Additionally, the ALRA does not allow employers to file election petitions regarding

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

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

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

recognized union abandonment through disclaimer of interest and union defunctness.

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

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

representative is, while the other depends exclusively on the union's conduct as evidence of its abandonment of the unit.

Additionally, Fanucchi's abandonment defense does not rely on the principles underlying the loss of majority support defense recognized under the NLRA. Fanucchi is not arguing that the union's total absence from the scene is evidence that the UFW has lost majority support of Fanucchi's agricultural employees. (*Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 9 – 10 [holding that the employer's "abandonment defense must fail to the extent that it relies on principles underlying loss of majority support claims under the NLRA"].) Fanucchi's abandonment claim is based on the "distinct law that has developed under the ALRA," which extinguishes an employer's duty to bargain where the employer establishes "the Union's inability or unwillingness to represent" the employer's agricultural employees on the date of the union's formal request to resume negotiations or at times prior thereto. (*Id.* at 10.) The ALRB and UFW Answering Briefs improperly attempts to characterize Fanucchi's arguments as another loss of majority support defense but this oversimplification fails to recognize that the ALRA diverges from the NLRA regarding the theory of abandonment and Fanucchi's claim is based on the distinct differences that have developed under the ALRA that supports Fanucchi's abandonment defense. (ALRB Answer pp. 45-47; UFW Answer pp. 48-50.)

Despite the Board's assertions, recognition of the abandonment defense in the context of this case does not amount to giving the employer influence in determining whether or not it will bargain with a particular union. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1093, citing *F & P Growers, supra,* 168 Cal.App.3d at 677-678.) In order to raise the claim of abandonment the employer must do so in the context of a defense to bargaining. The Board recognized early on that under the ALRA a claim of union abandonment can only be raised by an employer as a defense to the obligation to bargain. (*Bruce Church, supra,* 17 ALRB No. 1 at 44 [Recognizing the claim of abandonment under the ALRA "appears to be primarily a defense weapon in the refusal to bargain context"].) In no way is permitting an employer to raise the defense of total union abandonment of the bargaining unit the equivalent of permitting an employer to assert its influence over the selection or deselection of the union. Facts demonstrating the UFW's total and complete abandonment of Fanucchi's agricultural employees, in the bargaining context and by all other means, cannot be linked to any conduct or unfair labor practices on the part of Fanucchi. In fact, the analysis does not include the employer, only the union's misconduct.

The lower court's extension of the court's holding in *F & P Growers* to the context of union abandonment shows a misapplication of the ALRA and Labor Code section 1148. After an exhaustive analysis of the

differences between the NLRA and ALRA, the court in *F & P Growers* concluded "a purpose on the part of the Legislature to prohibit the employer from being an *active participant* in determining which union it shall bargain with in cases arising under the ALRA." (*F & P Growers, supra,* 168 Cal.App.3d at 676.) The court also noted that in light of peculiarities in the ALRA, "it does appear that the Legislature's purpose in enacting the ALRA was to *limit the employer's influence* in determining whether or not it shall bargain with a particular union." (*Ibid.*) The *F & P Grower's* holding therefore does not imply that under the ALRA no factual scenario exists in which an employer may be able to raise a valid defense to the duty to bargain. The court's holding instead clarifies that the Legislature intended to prohibit the employer from being an active participant in the union representation procedure and to limit employer influence in determining whether to bargain or not with a particular union. (*Id.* at 676.) In the present case, Fanucchi is not speculating whether the UFW has majority support. In contrast, Fanucchi is raising the issue of whether the union's misconduct and extreme dereliction in completely abandoning the bargaining unit, disappearing from the scene altogether, and being unknown to the employees for twenty-four years is a defense to bargain.

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

Legislative history reveals that raising the defense of union total abandonment is not the type of employer interference that the Legislature sought to prohibit in enacting the provisions of the ALRA that differ from the NLRA. The so called "certified until decertified" rule derives from the ALRA provisions prohibiting agricultural employers from exercising discretion regarding whether to recognize a union and leaving recognition exclusively to the election procedures of the Board. (See *Nish Noroian Farms* (1982) 8 ALRB No. 25 at 13-14.) The history leading to the enactment of the ALRA demonstrates that these provisions were included in the statute to prohibit the type of employer interference described in *Englund v. Chavez* (1972) 8 Cal.3d 572. In that case, there was significant interference by the agricultural employers whereby the employers had actually recognized and negotiated collective bargaining agreements with one of two competing unions prior to an election and without any attempt to ascertain whether their workers wanted to be represented by that union. (*Id.* at 578-579.) In contrast, Fanucchi's objection to bargaining with the UFW is based solely on its claim that the UFW through its own extreme dereliction, by total absence and inactivity on behalf of its agricultural employees for twenty-four years, has forfeited its status as bargaining representative. In light of the history of employer interference leading to

the enactment of the ALRA, the suggestion that the Legislature intended to prohibit employers from raising the abandonment defense is nonsensical as it is the union's conduct that is at issue.

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

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

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

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

The grant of a public right such as a public monopoly or franchise is not absolute, and may be rescinded or limited due to a failure to meet the obligations in consideration of which the right was granted. As such, this Court has recognized that abandonment or forfeiture of these obligations will result in termination or revocation of the grant of these rights. (*County*

of L.A. v. Southern Cal. Tel. Co. (1948) 32 Cal.2d 378, 284 [holding that the privilege of a state-granted franchise lasts only so long as the holder met the obligations in consideration of which the right was granted]; *also see, County of Kern v. Pacific Gas & Electric Co.* (1980) 108 Cal.App.3d 418, 423 [recognizing that a public franchise may terminate on failure to provide services in consideration of the right for which it was granted].)

In addition, it has long been recognized under common law that rights may be forfeited by abandonment. This Court has recognized that an owner of an easement may lose it by abandonment if he failed to object for years to another's occupation of the property. (*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890-891; *also see* Code of Civ. Proc. § 321, *et seq.* [provides that an owner of land can lose property rights by adverse possession by failing to object to use by another after five (5) years].) The doctrine of abandonment and waiver has also been applied in the context of contractual rights. (*See John v. Fletcher Oil Co., Inc.* (1940) 38 Cal.App.2d 26, 30 [concluding that intent of the parties to mutually abandon contractual rights can be evidenced by the acts of the parties].) Further, the doctrine of abandonment applies to statutory and constitutionally recognized rights. (*See, e.g.* Code of Civ. Proc. § 583.420 [provides that a litigant who is exercising a constitutionally recognized right to seek redress through the courts loses the right to prosecute a civil action if the plaintiff delays for three (3) years].)

Despite the unique aspects of the ALRA, a union's status as exclusive bargaining representative is the grant of a public right, and as such, may be revoked. The foremost purpose of the ALRA is to "encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment." In furtherance of this purpose, the ALRA "creates a public rights statute which guarantees agricultural employees certain rights." (*Dole Fresh Fruit Co., supra,* 22 ALRB No. 4 at 17.) The Board has recognized that "situations in which the certified labor organization rests on its bargaining rights...erode and undermine the right to be represented that is granted to employees." (*Ibid.*) As such, the Board has held that where a union failed to "exercise a degree of diligence in seeking to enforce its representation rights" to the employees it was elected to represent, the union may be "deemed to have waived them." (*Ventura County Fruit Growers, Inc.* (1983) 10 ALRB No. 45 at 24.)

Nothing in the UFW and ALRB Answering Briefs rebuts the UFW's forfeiture of its rights and statutory obligations under common law principles of fundamental fairness and equity. Where, as here, the state bestowed upon the UFW a public grant of power and certain corresponding obligations twenty-four years ago, and the UFW failed to vindicate those obligations, thus impairing the rights of the public the grant sought to

protect, the UFW should be held to have abandoned its position as certified bargaining representative. In any other legal context, a right can be forfeited after one to five years. Therefore, the rights at issue here are clearly forfeited after twenty-four years of abandonment.

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

Although this Court has recognized the principle that an administrative agency is entitled to deference when interpreting policy in its field of expertise, that deference is limited. (*J.R. Norton, supra*, 26 Cal.3d at 29.) "A ministerial officer may not . . . under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute." (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 436 ("*Bearden*".) "[W]hen administrative rules or regulations 'alter or amend the statute or enlarge or impair its scope,' they 'are void and courts not only may, but it is their obligation to strike down such regulations.' [Citations.]" (*J.R. Norton, supra*, 26 Cal.3d at 29.) Thus, a Board rule that "eviscerates important ALRA policy and fundamentally misconstrues the nature of and legislative purpose behind" ALRA policy should not be upheld. (*Ibid.*)

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

The Board's blanket rule that past union absence or inactivity does not create an abandonment defense to the duty to bargain far exceeds the scope of the authority conferred to it by the Legislature. (*Bearden, supra,* 138 Cal.App.4th at 436 ["A ministerial officer may not . . . under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment..."].) Although the ALRA holds that an employer can only bargain with a union that has won an election and cannot file an election petition, the Board's general rules and strict interpretation far exceed the terms of the statute and the restrictions on employers in the context of bargaining. As such, this Court is obligated to strike down the ALRB's

rule denying Fanucchi's abandonment defense to its obligation to bargain with UFW. (*J.R. Norton Co., supra*, 26 Cal.3d at 29 [courts have an obligation to strike down administrative rules that enlarge the scope of the legislative enactment].)

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

If this Court determines that the Board abdicated its statutory obligations and exceeded its authority by refusing to recognize the abandonment defense as asserted by Fanucchi, it should reverse judgment and remand the case to the Board. The Board should permit Fanucchi the opportunity to demonstrate whether the UFW abandoned its employees during the twenty-four year absence to support a defense to the obligation to bargain.

J. The Board is Incorrect that Fanucchi's Abandonment Argument Fails Under NLRB Precedent.

Union abandonment has clearly been repeatedly recognized by the NLRB for decades.[15] The Board's Answer cites three NLRB cases that, it says, have held that a union may "cure" a period of inactivity by reasserting its bargaining rights, after which any evidence of inactivity becomes irrelevant as a matter of law. (ALRB Answer, p. 29-30.) Notably, the facts of this case are fundamentally different from the cases cited by the Board.

Only two of the cases cited by the Board involve abandonment and the periods of time were significantly less than the twenty-four year absence at issue in this case. (*Spillman Co.* (1993) 311 NLRB No. 18 [6-months of union inactivity]; *Pioneer Inn* (1977) 228 NLRB No. 160 [4-years of union inactivity].) Secondly, in all three of the cases union had engaged in negotiations of a collective bargaining agreement. (*Spillman, supra,* at p. 3 [parties met of 18 occasions in efforts to agree on a contract]; *Pioneer Inn, supra,* at p. 10 [parties actually entered into a collective-bargaining agreement that renewed yearly]; *Whisper Soft Mills v. NLRB* (9th Cir. 1984) 754 F.2d 1381, 1383 [the parties engaged in 19 bargaining sessions before the employer withdrew recognition of the union asserting

[15] Abandonment is an NLRB doctrine that has been recognized for at least 50 years. (See *Benson v. Brower's Moving & Storage Inc.*, 907 F.2d310, 314-315 (1990) citing *Austin Powder Co.,* 201 NLRB No. 90, 82 LRRM1272, 1273 (1973); *Raymond's, Inc.*, 161 NLRB No. 80, 63 LRRM 1363, 1364 (1966).)

good faith doubt as to majority support].) Finally, in all three of these cases, the employer argued that union inactivity, or abandonment, evidenced lack of majority support. (*Spillman, supra,* at p. 4; *Pioneer Inn, supra,* at p. 17; *Whisper Soft Mills, supra,* 754 F.2d at p. 1387.) Therefore, the Board's reliance on these cases does not support the Board's assertion that Fanucchi's abandonment claim fails.

The Board also contends that Fanucchi's abandonment claim fails under NLRB precedent because the UFW was actively representing Fanucchi's employees when the union's status was challenged after the twenty-four-year hiatus. The Board's argument collapses on itself. Notably, the Board at length and in much detail throughout its Answer describes why the NLRB cases regarding abandonment and loss of majority status are not applicable to the ALRA. Then to support the Board's argument that the UFW resumed its bargaining status, the Board conveniently cites solely to NLRB decisions involving attempts by employers to raise the loss of majority defense that the Board has clearly stated is not applicable to the ALRA. As such, the Board's claim that Fanucchi's abandonment argument fails under the NLRB precedent necessarily fails.

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III.

CONCLUSION

The UFW's abandonment of Fanucchi's employees due to the UFW's unwillingness or inability to represent Fanucchi's employees for over twenty-four years must be seen for what it is –conduct by which it intentionally repudiated its role as the employee's true bargaining representative and a total abandonment of the employees through this disclaimer of interest.

The Board did not reasonably interpret the ALRA in refusing to provide Fanucchi a hearing and summarily denying Fanucchi the opportunity to raise prior and total abandonment by the UFW as a defense to its obligation to bargain.

Therefore, the order of the ALRB should be reversed.

Dated: March 14, 2016 **SAGASER, WATKINS & WIELAND PC**

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CERTIFICATE OF WORD COUNT

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

Pursuant to California Rule of Court 8.520(c)(1), counsel for Petitioners hereby certifies that the number of words contained in this **PETITIONER TRI-FANUCCHI FARMS' COMBINED REPLY BRIEF ON THE MERITS TO THE AGRICULTURAL LABOR RELATIONS BOARD AND THE UNITED FARM WORKERS OF AMERICA'S ANSWER BRIEFS**, including footnotes, but excluding the Table of Contents, Table of Authorities, and this Certificate, is 12,581 words as calculated using the word count feature of the computer program used to generate the brief.

Dated: March 14, 2016 SAGASER, WATKINS & WIELAND, PC

By: _____

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PROOF OF SERVICE
(Code of Civil Procedure § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF FRESNO

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

On March 14, 2015, I served the following document described as **PETITIONER TRI-FANUCCHI FARMS' COMBINED REPLY BRIEF ON THE MERITS TO THE AGRICULTURAL LABOR RELATIONS BOARD AND THE UNITED FARM WORKERS OF AMERICA'S ANSWER BRIEFS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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

Executed on March 14, 2015, at Fresno, California.

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