

SUPREME COURT COPY

No. S227243

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

SUPREME COURT
FILED

MAY 03 2017

Jorge Navarrete Clerk

GERAWAN FARMING, INC.
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest.

Deputy

GERAWAN FARMING, INC.,
Plaintiff and Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest and Respondent.

Fifth Appellate District, Case No. F068526
ALRB Case No. 2013-MMC-003 [39 ALRB No. 17]

Fifth Appellate District, Case No. F068676
Fresno County Superior Court, Case No. 13CECG01408
Hon. Donald S. Black, Judge

**REAL PARTY IN INTEREST UNITED FARM WORKERS OF
AMERICA'S MOTION FOR JUDICIAL NOTICE**

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MOTION FOR JUDICIAL NOTICE

Pursuant to Rules 8.520(g) and 8.252(a) of the California Rules of Court and Evidence Code §459, Real Party in Interest United Farm Workers of America (“UFW”), moves for judicial notice of Exhibit A to the accompanying Declaration of Mario Martinez.

Exhibit A is an April 14, 2017 decision by an ALRB Administrative Law Judge (“ALJ”) resolving unfair labor practice charges against Gerawan Farming, Inc., and finding, *inter alia*, that Gerawan violated the Agricultural Labor Relations Act through the following misconduct:

- After the UFW was certified as bargaining representative of Gerawan’s workers following its victory in a 1990 state-conducted secret-ballot election, the ALJ examined the parties’ bargaining history and concluded: “I find it’s fair to infer that at some point in the mid-1990s [Gerawan] deliberately chose to ignore its duty to bargain under the ALRA altogether.” ALJ Decision at 46.
- Gerawan had no “factual record” to support its claim of “abandonment” by UFW, simply making “self-serving cries of anguish over UFW’s reemergence.” ALJ Decision at 46.
- “[T]here is scant evidence from which I have been able to discern from the history between these two parties that [Gerawan] harbored any intention of reaching any kind of agreement with the UFW. The more recent bargaining history [starting in 2013] strongly supports that conclusion.” ALJ Decision at 46.
- “[Gerawan] delayed furnishing critical economic information until late June or early July 2013, following 12 bargaining sessions, plus two sessions with a [state] mediator. By doing so, the UFW asserts with some justification that it could not formulate a complete economic proposal through most of the voluntary bargaining period.” ALJ Decision at 47.
- Gerawan “engaged in a series of serious unfair labor practices away from the bargaining table in an effort to undermine and dislodge the UFW as the bargaining representative of its employees.” ALJ Decision at 52.

- “[T]he record supports the conclusion that [Gerawan] engaged in the bargaining examined here with no intention of ever reaching an agreement with the union and by persistently refusing to bargain concerning the employment terms of the FLC workers.” ALJ Decision at 52.
- “Commencing on January 18, 2013, and continuing through August 2013, [Gerawan] violated [the ALRA] by engaging in collective bargaining with the UFW concerning the wages, hours, and other terms and conditions of employment of the agricultural employees in the above unit with no intention of reaching an agreement with the UFW.” ALJ Decision at 53.

Evidence Code §459(a) provides that a “reviewing court may take judicial notice of any matter specified in Section 452.” As discussed below, the ALJ Decision is subject to judicial notice pursuant to Evidence Code §452(c), which provides for judicial notice of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” The ALRB is a governmental agency (*see* Labor Code §1141), and the official acts of the ALRB, including the decision submitted here, is therefore the proper subject of judicial notice. *See* Evid. Code §452(c); *see also*, *e.g.*, *United Teachers of Los Angeles v. Los Angeles Unified Sch. Dist.* (2012) 54 Cal.4th 504, 528; *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 7; *Pac. Lumber Co. v. State Water Res. Control Bd.* (2006) 37 Cal.4th 921, 928.

Pursuant to California Rule of Court 8.252(a)(2)(A) and (C), UFW provides the ALJ decision to update the Court on the status of the administrative proceedings between the parties. UFW submits that the ALJ decision sheds light on the background to the MMC process here, but does not affect the legal issues before this Court. UFW requests judicial notice be taken of the ALJ Decision to provide complete and accurate information regarding the decertification matters and bargaining conduct leading up to the MMC process discussed in the Court of Appeal decision. Although the ALJ Decision concerns Gerawan’s conduct leading up to the MMC proceedings, the decision was recently issued on April 14, 2017, so was not presented to the lower court(s) below

because it was not available until now. Cal. Rule of Court 8.252(a)(2)(B) and 8.252(a)(2)(D).

For these reasons, Real Party in Interest respectfully requests that the Court take judicial notice of the ALJ Decision.

Dated: May 2, 2017

Respectfully submitted,

SCOTT KRONLAND
ALTSHULER BERZON LLP

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By: 
Mario Martínez

Attorneys for Real Party in Interest UFW

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Hon. Donald S. Black, Judge

**DECLARATION OF MARIO MARTINEZ IN SUPPORT OF REAL
PARTY IN INTEREST UNITED FARM WORKERS OF
AMERICA'S MOTION FOR JUDICIAL NOTICE**

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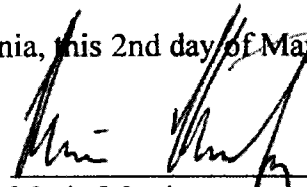
DECLARATION OF MARIO MARTINEZ

I, Mario Martinez, hereby declare as follows:

1. I am a partner at Martinez Aguilasocho Lynch, APLC, and one of the attorneys for Real Party in Interest United Farm Workers of America (“UFW”).
2. Attached as **Exhibit A** is a true and correct copy of an April 14, 2017 decision by ALRB Administrative Law Judge William L. Schmidt in *Gerawan Farming, Inc.*, ALRB Case No. 2012-CE-41-VIS, 2013-CE-7-VIS, 2013-CE-10-VIS, a case involving numerous unfair labor practice charges against Gerawan Farming.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct to the best of my knowledge.

Executed at Kern County, California, this 2nd day of May, 2017.



Mario Martinez

Exhibit A

engaged in bad faith “surface bargaining” in violation of Labor Code section 1153(e) while negotiating for a collective-bargaining agreement with the United Farm Workers of America (UFW, Union or Charging Party), the certified representative of its agricultural employees, in the eight-month period from January 2013 through August 2013.¹ The second is whether GFI independently violated Section 1153(e) during those same negotiations by “continuously proposing and insisting” that the terms of any agreement it reached with the UFW would not apply to the employees of Gerawan’s farm labor contractors (FLCs) who, for reasons found below, are also members of the certified bargaining unit. As to the first question, one labor law scholar has written that “[t]he nature of the bargaining process is such that it is almost impossible for the Board and courts to distinguish between tough bargaining and bargaining in bad faith,” the exact problem posed here.² The second question strikes me as one of unusual significance to the administration of unique provisions in California’s Agricultural Labor Relations Act (ALRA) concerning the definition of an employer that is determinative to the scope of bargaining units and the bargaining duty.

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

those matters had been previously litigated and resolved in 42 ALRB No. 1.

Accordingly, I severed and dismissed Case 2013-CE-041-VIS for that reason. See Omnibus Order, et al., dated October 21, 2016.

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

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

representative of workers employed by Gerawan's FLCs. For the reasons explained below, I find the assertions in Respondent's Answer regarding the scope of the unit and the current effect of the certification without merit.

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

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

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

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

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

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

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

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

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

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

The statute aside, a substantial basis exists to infer that all parties understood and agreed that this specific bargaining unit included the agricultural employees employed by Gerawan's FLCs. To begin with, the evidence shows that the FLC workers voted in the 1900 elections. Most notably, in *Gerawan Ranches* (1990) 16 ALRB No. 8 at slip op. 3, the Board affirmed, in the absence of exceptions by Gerawan, the Regional Director's finding in a Report on Challenged Ballots issued after the 1990 runoff election that a group of 66 workers who cast challenged ballots were eligible to vote. The Regional Director based his finding on the fact that the names of these voters appeared on either "*the Employer's master list or on lists of crews provided by the Employer or labor contractors.*" [Emphasis mine.] Further, as discussed in more detail below, Respondent's own proposals tacitly acknowledge the inclusion of the FLC's employees the certified bargaining unit. Otherwise, it would make no sense to quibble over making any part of an agreement reached with the UFW inapplicable to them. In addition, to obtain ammunition justifying its proposals during the 2013 voluntary bargaining that sought to exclude the FLC workers from some or all provisions of any bargaining agreement reached, Respondent subpoenaed from the UFW all current collective bargaining agreements it entered into with other agricultural employers providing for the exclusion of FLC workers some or all of the terms of the agreement reached.¹²

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

II. The Alleged Unfair Labor Practices

A. Respondent's Operations and Work Force

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

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

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

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

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

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

On March 29, 2013, about two and a half months following the first face-to-face voluntary bargaining session between the Gerawan and the UFW under review here, the Union invoked the mandatory mediation and conciliation (MMC) procedures available under the Agricultural Labor Relations Act by filing the required declaration in Case No. 2013-MMC-003-VIS. (See Lab. Code § 1164, et seq.) Gerawan sought dismissal of this action claiming: 1) the UFW's initiating declaration failed to meet the requirements of Labor Code § 1164.11;¹⁵ 2) the UFW had forfeited its rights by abandoning the employees had been certified to represent; and 3) the statutory MMC process violated its due process rights under the federal and state constitutions.

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

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

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

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

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

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

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

C. The Relevant Facts in the Current Proceeding

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

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

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

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

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

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

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

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

Moreover, GFI current "heard nothing" claim fails to indicate what it did to obtain answers from the UFW about can only matters of mutual interest. Thus, no evidence in this proceeding shows that GFI made any effort to notify or otherwise initiate contact with the UFW throughout this lengthy period in order to comply with its legal duty under Section 1153(e) of providing the employees' certified representative with an opportunity to bargain over proposed changes to their wages, hours, and other terms and condition of employment that obviously occurred over those many years. The prior decision

specifically addressed this particular legal obligation imposed on employers where, as here, a majority of their employees select an exclusive representative. (See 42 ALRB No. 1: 63, fn. 27.)

2. The Prelude to the 2013 Bargaining

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

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

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

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

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

As we proceed, it's very important that neither of us forget that few, if any, employees still exist from the election 22 years ago. Some were not even born yet. How, then, do we or you explain to them that they will now have a contract and dues thrust upon them by a union they never voted for and who abandoned them 20 years ago?

Gerawan Farming is a family company with close ties to our employees. They enjoy what are probably the industry's highest wages and best working conditions, and they achieved them without your involvement. No one has asked the current workforce whether they wish to be represented by the UFW, or any other union for that matter. The UFW has always promoted the right of farmworkers to have freedom of choice, and yet no choice is being given to our current employees.

When the UFW asked for and received the mandatory mediation procedures in the early part of this century, it claimed that it was needed because growers delayed bargaining and undercut the UFW's ability to represent farmworkers. By then, we had not heard from you for at least 10 years, and now 10 more years have passed before you make a demand to bargain, just as our harvest season is winding down. Given the recent changes to the law under SB 126, we have little opportunity to negotiate a contract with you before you have the ability to ask a mediator to impose a contract on the employees.

We understood that the UFW sought the adoption of the mandatory mediation procedures a decade ago to address the problems created when employers delayed reaching an agreement and bargained in bad faith. In our case, the 20-year delay in negotiating was not caused by us, but by the UFW abandoning the bargaining process, which is a situation that was not discussed when the legislature considered the bill to require mandatory mediation. We do not believe that the legislators and the Governor intended mandatory mediation and the changes made by SB 126 to be used as a means of forcing contracts upon employers and employees when no effort was made by the union to negotiate for two decades.

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

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

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

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

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

3. The Joint Stipulation About the 2013 Voluntary Bargaining.

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

1. GFI employed about 5,000 different workers annually in both seasonal and "cultural" (year-round) jobs in 2013.
2. GFI hired about 800 to 1,500 different agricultural employees through farm labor contractors in 2013.
3. GFI and the UFW had 14 bargaining sessions outside of the presence of the mediator from January 2013 to July 2013:
 - January 17
 - January 18
 - February 12
 - February 13
 - February 27
 - February 28
 - March 19
 - March 21
 - March 28
 - April 2
 - June 3
 - July 1
 - July 24
 - July 29
4. The parties' bargaining sessions in 2013 took place at La Quinta Inn, in Fresno, California.
5. 2013 bargaining sessions were usually 2-3 hours long from 3:00 p.m. to 6:00 p.m.

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6. In 2013, the following individuals attended bargaining sessions on behalf of GFI: Michael Mallery, Jose Erevia, Jaime Mendoza and Ronald Barsamian, with Mr. Barsamian serving as lead negotiator.
7. In 2013, Armando Elenes served as the UFW's lead negotiator. Jeanette Mosqueda and Tanis Ybarra each attended two negotiation sessions.
8. The UFW employee negotiation committee also attended the bargaining sessions. Employees that were not part of the UFW negotiation committee also attended at least one session.
9. The 2013 bargaining sessions were conducted in English, but Armando Elenes and Jose Erevia translated for the employees.
10. In 2013, the parties exchanged contract proposals via e-mail in Word format.
11. GFI made six non-matrix contract proposals from January 2013 to June 2013:
 - January 18
 - February 12
 - March 19
 - March 21
 - March 27
 - June 3
12. UFW made five non-matrix contract proposals from January 2013 to March 2013:
 - January 17
 - February 12
 - February 17
 - March 21
 - March 28
13. Once the MMC procedure started the parties started utilizing matrixes to exchange proposals and provide the mediator with updated positions.

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14. GFI and the UFW participated in the MMC process by participating in 4 MMC sessions (2 of which were on the record) on June 6, 2013, June 11, 2013, August 8, 2013 and August 19, 2013.
15. GFI's proposal incorrectly dated "January 12, 2013" is actually its proposal of February 12, 2013.
16. The Third Amended Complaint is limited to bargaining conduct up to August 31, 2013.

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

4. GFI'S Problematic Proposals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GFI's Article II provided for an open shop operation. As noted before, it bore the heading "Right to Work," a term that labor organizations universally regard as anathema. The proposal stated simply, "Neither membership in good standing in the Union, nor the payment of Union dues or non-member fees shall be a condition of employment with the Company." GFI never budged on its position rejecting union security or dues check off system. It even continued insist on the inflammatory "Right to Work" heading. (See Jt. Exh. 59:RespD01290.) Additionally, GFI continued its outright rejection of all aspects of the UFW's proposed Article 2, including the checkoff proposal.

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

Q What, if anything, caught your attention about this article when you reviewed it?

A Well, right off the bat the title, "Right to Work."

Q Why did that --

A That says it all, you know. And I remember I did tell Ron, I said, hey, California is not a right to work state. I said, I don't know where you're coming from on this.

Q Did Ron say anything in response to you?

A Well, it was some form of they believed in freedom of choice, employee free choice, employee free choice, you know.

Q Did Mr. Barsamian explain what he meant by employee free choice?

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

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

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

Not to belabor the point or make any political statement, but the fact remains that the several thousand employees who work for the Company were (and still are) already being paid the highest wages in the industry before the Union made any effort to represent them, and thus the

questionable concept of "fair share" or "free rider" simply does not apply here. The employees should not be forced to pay to keep their jobs, nor is there any justification to try to put those costs on the Company in the form of higher rates to cover the dues/fees. The Company already raised its rates for this season by 10% (\$1.00 per hour), and is maintaining its position as the highest paying employer in ~ its segments of the agricultural industry by a wide margin. The employees deserve to become acquainted with the Union and be provided with some semblance of service in the form of representation before being asked to pay money to it. As the provisions of the Union's proposal provide, and as has been confirmed by the Union at the bargaining table, the Union ultimately will force the Company to discharge any employee who fails or refuses to pay dues or fees.

* * *

Further, to require the Company to make any deductions, and in fact to do the Union's bidding by furnishing dues check-off authorization forms goes far beyond any concept of fairness nor does it foster any labor peace given the situation. If labor peace is desired, it is just as logical, if not preferable, to have the Union not collect any dues or fees for the one-year period given its failure to fairly represent the employees for so long. It is not illegal to have an open shop under the law, nor is it legally required that an agency shop be included in a collective bargaining agreement.

(Jt. Exh. 59: RespD01290.)

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

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

Tr I: 64.

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

Q Do you recall if you discussed this article in later negotiations?

A Yeah, this was an article that, I remember one time there was a group of employees that came in and they started making this big old show. I remember Jaime Mendoza, one of the company reps that was there, started making this big old thing about the dues and that's all we were interested in, etcetera, etcetera.

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

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

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

A Oh, it was a repeated point of contention.

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

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

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

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

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

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

Q And when you say along the same lines.

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

(Tr I:84-86.)

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

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

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

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

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

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

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

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

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

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

an employee and the Company during this concern-resolution process except “when requested by the employee, *as provided by law.*” [Emphasis mine.]

(Jt. Exh 9:GCD00630.)

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

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

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

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

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

Q But throughout the 7 months of negotiations, you rejected disciplining and discharging employees for just cause; correct?

A We were rejecting -- we didn't reject just cause. We kept asking for a definition of just cause so that that could be put into the contract. We had a problem with using a term. The company, Gerawan, had been at an at-will company, which is part of the law in California, for decades. And this was a new concept to them. They wanted a definition of what just cause meant. So, to say we rejected it, we were trying to understand it as it would be used in this contract.

Q The term "just cause" was not a new term to you; correct?

A No. I'd struggled with it for decades in arbitrations, in administrative proceedings, employment litigation in court. It's one of those terms that comes up and everybody thinks they know what it is and everything else -- it's like three blind men describing an elephant.

(Tr. I: 231-232.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. The March "Interim" Wage Increases

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

Elenes provided the following credible testimony about the UFW's reaction:

A We counter proposed, actually, on that one. We caucused with the negotiating committee and we counter proposed it. We were open to an interim wage increase while we were continuing to negotiate the contract, but that we counter proposed that it be a dollar wage increase but also that it would apply to not just crew labor, as indicated here, and not just to direct hires, but that it should be a dollar increase to all employees, to include cultural labor, crew labor, whether directly or through FLCs.

Q Did the company say anything in response to your counter proposal?

A No, they rejected it. They said that that's what they were proposing at the time and that was what their proposal was.

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

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

Important News About Your Pay

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

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

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

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

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

Elenes said "the employees "told us about (the leaflet) right away." (Tr. I:110.)

Regardless, Elenes emailed Barsamian at 5:52 p.m. on March 20 that UFW accepted the interim wage increase proposed by GFI the previous day. (Jt. Exh. 33:GCD00708.)

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

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

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

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

6. GFI'S Concurrent Unfair Labor Practices

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

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

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

. . . In October 2012, the UFW sent a letter to Gerawan seeking negotiations on behalf of the company's agricultural workers. (62 RT 56:18-22, 62 RT 83:25-84:2 and 67 RT 62:21-24) Starting the next month, November 2012, Gerawan began distributing a series of hard-hitting mailers and flyers to workers that described the UFW unfavorably. The materials were typically provided in both Spanish and English.

The first of these mailers was distributed on November 13, 2012 to approximately five thousand employees. (Exhibits J-1, page 1, and GCX-2) This mailer was signed by Ray, Mike and Dan Gerawan, on company letterhead, and stated "As your employer, we did not want [to give your personal information to the UFW,] but we have no control over this."

The next mailer was distributed on November 22, 2012 to approximately five thousand employees. (Exhibits J-1, page 1, and GCX-3) This mailer was on company letterhead and was in a question and answer format. The mailer states that the workers will probably have to give some of their earnings to the UFW as this is generally required by UFW contracts. The mailer states that the UFW may try to mislead workers into thinking that the company will pay the dues, but it is actually the workers who must pay the union. The mailer states that the company does not want this to happen, but that it is not the company's decision to make. The mailer gives multiple telephone numbers if a worker wants to contact the Agricultural Labor Relations Board ("ALRB"), as well as telephone numbers for the local State Assemblyman and State Senator.

The third mailer in November 2012 was distributed on November 30, 2012 to approximately five thousand employees. (Exhibits J-1, page 1, and GCX-4) This mailer was on company letterhead and was in a question and answer format. The mailer states in bold font: "There is no vote planned." Clearly, the company is trying to put the concept of an election in the minds of the recipients. The mailer gives the telephone number for the ALRB, saying "If you want to know why there is no vote planned, you can call the ALRB . . . and have them explain how elections are scheduled and conducted." The mailer states that UFW contracts generally require workers to give some of their money to the UFW in the form of dues or fees. The mailer adds, "The union may tell you that the company will pay the money, but in fact the money is paid by you." The mailer states that Ray, Mike and Dan Gerawan do not want this to happen.

On December 10, 2012, Gerawan distributed a two-page flyer to approximately five thousand employees. (Exhibits J-1, page 2, and GCX-6) This flyer asserts that except for one meeting 20 years ago, the UFW had not contacted the company. The flyer again emphasizes the UFW contracts generally require the workers to give some of their money to the UFW in the form of dues or fees. The flyer notes that "The answer is no, Ray, Mike and Dan do not want this to happen." The flyer talks about the fact that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Argument, Analysis and Conclusions

1. The Surface Bargaining Allegation

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

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

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

344 F.2d 210 (8th Cir. 1965)). A violation may be found where the employer will only reach an agreement on its own terms and none other. *Id.*; *Pease Co.*, 237 NLRB 1069, 1070 (1978).

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma(PSO)*, 334 NLRB 487 (2001), *enfd.* 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), *enfd.* 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, *supra*, at 1603. From the context of the party's total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *PSO*, 334 NLRB at 487.

The Board considers several factors when evaluating a party's conduct for evidence of surface bargaining. These include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed-upon provisions, and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, *supra*, at 1603. It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000). Indeed, avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale and wide-ranging activities in every one of these areas; rather, a respondent will be found to have violated the Act when its conduct in its entirety reflects an intention on its part to avoid reaching an agreement.

(See *id.* at 130 fn. 2.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the prior case, Judge Soble found that Dan Gerawan admitted outright that GFI gave no advance notice to the UFW about the June 2013 dollar an hour increase the hourly rate paid to GFI's FLC workers (42 ALRB No. 1: ALJD 37.) who, as found above, are a part of the wall-to-wall bargaining unit and who had been the subject of a bargaining table dispute since January 18.²⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

REMEDY

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

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

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

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

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

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

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

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

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

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

(*Dal Porto* at 1208-09.)

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

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

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

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

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

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

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

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

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

ORDER

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

1. Cease and desist from:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DATED: April 14, 2017



William L. Schmidt
Administrative Law Judge
Agricultural Labor Relations Board

No. S227243

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

GERAWAN FARMING, INC.
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest.

GERAWAN FARMING, INC.,
Plaintiff and Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest and Respondent.

Fifth Appellate District, Case No. F068526
ALRB Case No. 2013-MMC-003 [39 ALRB No. 17]

Fifth Appellate District, Case No. F068676
Fresno County Superior Court, Case No. 13CECG01408
Hon. Donald S. Black, Judge

**[PROPOSED] ORDER GRANTING REAL PARTY IN INTEREST
UNITED FARM WORKERS OF AMERICA'S MOTION FOR
JUDICIAL NOTICE**

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Counsel for Real Party in Interest United Farm Workers of America

Pursuant to Evidence Code §452, Real Party in Interest's motion for judicial notice is granted. The Court takes judicial notice of the ALRB ALJ Decision designated in Real Party in Interest's motion.

Dated: _____

Presiding Justice

No. S227243

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

GERAWAN FARMING, INC.
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest.

GERAWAN FARMING, INC.,
Plaintiff and Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest and Respondent.

Fifth Appellate District, Case No. F068526
ALRB Case No. 2013-MMC-003 [39 ALRB No. 17]

Fifth Appellate District, Case No. F068676
Fresno County Superior Court, Case No. 13CECG01408
Hon. Donald S. Black, Judge

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Case: *Gerawan Farming, Inc. v. ALRB*,
Supreme Court Case No. S227243
Fifth App. Dist. Nos. F068526 and F068676

I, Molly Hart, am employed by Martinez Aguilaoscho & Lynch, APLC. I am over the age of eighteen years and not a party to the within action; my business address is P.O. Box 11208, Bakersfield, CA 93309. On May 2, 2017, I served the following document(s):

Real Party In Interest United Farm Workers Of America’s Motion For Judicial Notice

Declaration Of Mario Martinez In Support Of Real Party In Interest United Farm Workers Of America’s Motion For Judicial Notice

[Proposed] Order Granting Real Party In Interest United Farm Workers Of America’s Motion For Judicial Notice


on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) By First Class Mail: I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. I am readily familiar with the practice of Martinez Aguilaoscho & Lynch, APLC for the collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in the County of Kern, California, for collection and mailing to the office of the addressee on the date shown herein.

Method of Service	Addressee	Party
A	David Abba Schwarz Michael A. Behrens Irell & Manella LLP 1800 Avenue of the Stars, #900 Los Angeles, CA 90067-4276	Gerawan Farming, Inc.
A	C. Russell Georgeson Georgeson, Belardineli & Noyes 7060 N. Fresno Street, Suite 250 Fresno, CA 93720	Gerawan Farming, Inc.
A	Ron Barsamian Barsamian & Moody 1141 W. Shaw Avenue, Suite 104 Fresno, CA 93711-3704	Gerawan Farming, Inc.

Method of Service	Addressee	Party
A	Michael P. Mallery, General Counsel Gerawan Farming, Inc. 7108 N. Fresno St., Ste 450 Fresno, CA 93720	Gerawan Farming, Inc.
A	Jose Antonio Barbosa Agricultural Labor Relations Board 1325 "J" Street, Suite 1900 Sacramento, CA 95814-2944	Agricultural Labor Relations Board
A	Benjamin Matthew Glickman Office of the Attorney General 1300 I Street, Suite 125 P. O. Box 944255 Sacramento, CA 94244	Agricultural Labor Relations Board
A	Honorable Donald S. Black c/o Clerk's Office Fresno County Superior Court B.F. Sisk Courthouse 1130 O Street Fresno, CA 93721	Fresno County Superior Court
A	Clerk of the Court Court of Appeal Fifth Appellate District 2424 Ventura Street Fresno, CA 93721	Fifth Appellate District Court of Appeal

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this May 2, 2017, in the County of Kern, California.


Molly Hart