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OPINION OF THE SUPREME COURT OF CALIFORNIA (NOVEMBER 27, 2017)

IN THE SUPREME COURT OF CALIFORNIA

TRI-FANUCCHI FARMS,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent,

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest.

S227270

California Court of Appeals, Ct. App. 5 F069419

LIU, J., CANTIL-SAKAUYE, C. J., CHIN, J., CORRIGAN, J., CUÉLLAR, J., KRUGER, J., KLINE, J

In 2012, Tri-Fanucchi Farms (Tri-Fanucchi) refused to bargain with the United Farm Workers of America (the UFW), the labor union that its employees had elected in 1977 as their bargaining representative under the Agricultural Labor Relations Act (the ALRA or the Act). Tri-Fanucchi argued that the union had abandoned its employees for more than two decades and thus forfeited its status as bargaining representative. Consistent with its longstanding practice, the

Agricultural Labor Relations Board (the Board or the ALRB) rejected the employer's abandonment defense and determined that Tri-Fanucchi's refusal constituted an unfair labor practice under the ALRA. The Board then ordered Tri-Fanucchi to pay make-whole relief under Labor Code section 1160.3, which is intended in part to compensate employees for employer-caused delays in the collective bargaining process. (All undesignated statutory references are to the Labor Code.) The Court of Appeal affirmed the Board's rejection of Tri-Fanucchi's abandonment defense. But the Court of Appeal reversed the Board's make-whole relief award, reasoning that Tri-Fanucchi's litigation "furthered the broader purposes of the ALRA" because no appellate court had expressly ruled on the abandonment issue presented here.

For the reasons set forth in *Gerawan Farming, Inc. v. Agricultural Labor Relations Board* (Nov. 27, 2017, S227243) __ Cal.5th __ (*Gerawan*), we hold that the Court of Appeal correctly rejected Tri-Fanucchi's assertion of an abandonment defense. As we explain in *Gerawan*, the ALRA does not permit an employer to "unilaterally declare that it will refuse to engage with the union because it believes the union has abandoned its employees." (*Gerawan*, at p. __ [p. 44].) As to the issue of make-whole relief, we hold that the Court of Appeal did not accord the Board sufficient deference and improperly exercised the Board's remedial authority. We thus reverse in part the Court of Appeal's judgment.

I.

Tri-Fanucchi is a farming business located in Kern County. It employs approximately 35 permanent employees and hires several hundred seasonal employees through various labor contractors.

On October 21, 1977, after a secret ballot election, the Board certified the UFW as the exclusive bargaining representative of Tri-Fanucchi's employees. Several days later, the UFW initiated collective bargaining negotiations. Tri-Fanucchi responded by refusing to bargain, purportedly to seek judicial review of the union's election. The following year, the UFW filed an unfair labor practice charge alleging that Tri-Fanucchi's refusal to bargain violated the ALRA. The charge was dismissed after Tri-Fanucchi reversed its position and agreed to begin negotiations. (*See Tri-Fanucchi Farms* (1986) 12 ALRB No. 8, p. 2 (hereafter ALRB 1986 Decision).)

Some initial bargaining sessions occurred after the UFW was certified. But between May 1979 and July 1981, "no communications between the parties took place and no negotiations were scheduled." (ALRB 1986 Decision, *supra*, 12 ALRB No. 8 at p. 2.) In July 1981, after the UFW requested to resume bargaining, Tri-Fanucchi conducted an employee "poll" to ascertain whether they desired to be represented by the UFW. As a result of this poll, Tri-Fanucchi concluded that the UFW had lost the support of a majority of its employees, and so the company again refused to bargain with the union. (*Id.* at p. 3.) The UFW filed several unfair labor practice charges against Tri-Fanucchi, which the Board ultimately sustained. Finding that Tri-Fanucchi's refusal to bargain "was without justification or arguable legal support," the Board awarded make-whole relief under section 1160.3. (ALRB 1986 Decision, at p. 9.) In an unpublished opinion, the Court of Appeal affirmed both the Board's findings that Tri-

Fanucchi committed unfair labor practices and its make-whole relief award.

According to Tri-Fanucchi, the company informed the UFW that it was willing to bargain in 1988. The UFW initially represented that it would schedule negotiations after the union's lead negotiator returned from vacation, but the UFW never responded and no dates were ever set. Tri-Fanucchi claims that the UFW then made no effort to communicate with the employer or to represent its employees for the next 24 years. The UFW disputes these claims, asserting that it maintained contact with the employees during this time period and even represented them on non-bargaining matters. Because the Board ruled that an employer cannot raise an abandonment defense as a matter of law, it took no evidence on Tri-Fanucchi's abandonment claim and simply assumed that the facts Tri-Fanucchi alleged were true.

On September 28, 2012, the UFW sent Tri-Fanucchi a formal request to restart bargaining. Tri-Fanucchi responded with a letter stating that "the UFW has . . . abandoned the bargaining unit and is no longer the valid collective bargaining representative of its employees." Further, Tri-Fanucchi said that because the question whether a union can lose its status as bargaining representative through abandonment had "never been conclusively addressed" by the courts, it would refuse to bargain "to obtain judicial review of the status of the UFW." The UFW urged Tri-Fanucchi to reconsider and said its refusal to bargain was "in clear bad faith" because relevant ALRB precedent rejecting abandonment was "so clear."

After Tri-Fanucchi did not retreat from its position, the UFW filed unfair labor practice charges with the

Board in early 2013, alleging that Tri-Fanucchi violated the ALRA by refusing to bargain and to provide requested information. The Board's general counsel thereafter filed an administrative complaint against Tri-Fanucchi alleging that the company's actions violated section 1153, subdivisions (a) and (e), and seeking make-whole relief for the benefit of Tri-Fanucchi's employees. (*Tri-Fanucchi Farms* (2014) 40 ALRB No. 4, p. 3 (hereafter ALRB 2014 Decision).) In its answer, Tri-Fanucchi admitted to the factual allegations but claimed as a defense, among other things, that the UFW had abandoned its status as bargaining representative. (*Id.* at p. 4.) Tri-Fanucchi also claimed that its refusal to bargain was in good faith for the purpose of obtaining judicial review of an important labor relations issue.

The case was set for an administrative law judge (ALJ) hearing on October 21, 2013. Before the hearing, the Board's general counsel filed a motion to exclude any evidence relating to Tri-Fanucchi's abandonment defense, contending that the ALRA did not permit such a defense. The ALJ granted the motion, holding that even if the facts Tri-Fanucchi sought to prove were true, they did not establish a defense to bargaining under the ALRA. In light of Tri-Fanucchi's admissions, the ALJ found that Tri-Fanucchi's refusal to bargain violated the ALRA. The ALJ further ordered that Tri-Fanucchi pay make-whole relief to its employees for the period from October 19, 2012, when Tri-Fanucchi made clear its refusal to bargain with the UFW, until the date that it commenced good faith bargaining with the union. (ALRB 2014 Decision, *supra*, 40 ALRB No. 4 at pp. 4–7.)

The Board issued its decision on April 23, 2014, largely affirming the ALJ's rulings. The Board explained that its "previous decisions have been very clear that, under the ALRA, the fact that a labor organization has been inactive or absent, even for an extended period of time, does not represent a defense to the employer's duty to bargain." (ALRB 2014 Decision, *supra*, 40 ALRB No. 4 at p. 8.) "[E]xcept in cases where the union disclaims interest in representing the bargaining unit or becomes defunct," the Board continued, "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." (*Ibid.*) The Board likewise affirmed the ALJ's order awarding make-whole relief. Because Tri-Fanucchi's position on the abandonment defense was "contrary to over 30 years of Board precedent holding that abandonment is not a defense to the duty to bargain," the Board concluded that Tri-Fanucchi's "position cannot be said to further the policies and purposes of the ALRA." (*Id.* at p. 18.)

The Court of Appeal upheld the Board's rejection of Tri-Fanucchi's abandonment defense as a "reasonable interpretation and application of the ALRA." Under the ALRA, the court concluded, Tri-Fanucchi "was not entitled to refuse to bargain with UFW based on UFW's past failings or inactivity, and such conduct did not create a defense to bargaining, whether labeled as abandonment or otherwise." But, holding that "the Board was clearly wrong in its legal conclusion that [Tri-]Fanucchi's litigation efforts in this matter did not further purposes and policies of the ALRA," the Court of Appeal reversed the Board's order imposing make-whole relief. Despite the Board's settled interpretation that the ALRA provided no abandonment defense to bargaining, the court believed that "the question has remained to a significant degree unsettled and controversial" because no "appellate court" had weighed in on the precise issue. In the court's view, Tri-Fanucchi's "litigation plainly furthered the broader purposes of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue."

Tri-Fanucchi petitioned for review of the Court of Appeal's rejection of its abandonment defense, and the Board sought review of the Court of Appeal's reversal of the make-whole relief. We granted both petitions for review.

II.

The Court of Appeal concluded that the UFW's allegedly "lengthy period of inactivity did not defeat [Tri-]Fanucchi's duty to engage in bargaining with that union upon request." We affirm this conclusion in light of our holding in *Gerawan* that "an employer may not defend against a union's [mandatory mediation and conciliation] request by challenging the union's certification as bargaining representative on the basis of abandonment." (*Gerawan*, *supra*, __ Cal.5th at p. __ [p. 44].) An employer "has multiple options to defend against 'what may appear to be a derelict or defunct incumbent union,' " including "fil[ing] an unfair labor practice charge against a certified union representative who 'refuse[s] to bargain collectively in good faith.' " (*Ibid.*) "What an employer cannot do under the ALRA is unilaterally declare that it will refuse to engage with the union because it believes the union has abandoned its employees. That is true whether in response to an initial demand to bargain, a renewed demand to bargain, or a request to refer the parties to mandatory mediation and conciliation. In all cases, the ALRA reserves the power to select the union representative to the employees and labor organizations alone." (*Ibid.*)

Tri-Fanucchi's arguments in favor of an abandonment defense restate those we rejected in *Gerawan*. The only new contention raised by Tri-Fanucchi is that the Board has "repeatedly recognized" the abandonment theory in earlier decisions. But Tri-Fanucchi misstates the Board's analysis in these decisions. As the Board explains, these decisions used the terms "abandonment" and "totally 'absent from the scene'" to describe situations in which the union was "unwilling or unable" to represent the employees — *i.e.*, union disclaimer or defunctness. (*See Bruce Church, Inc.* (1991) 17 ALRB No. 1, pp. 9–10; *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4, pp. 9–13.) Nothing in these decisions referred to the type of inactivity-based defense that Tri-Fanucchi attempts to raise here. Indeed, in *Dole Fresh Fruit Company*, the Board expressly refrained from recognizing the broader "concept of 'abandonment.'" (*Dole Fresh Fruit Company*, at p. 15.)

In sum, the Court of Appeal correctly upheld the Board's order rejecting Tri-Fanucchi's abandonment defense.

III.

We now consider whether the Court of Appeal improperly reversed the Board's determination that Tri-Fanucchi should pay its employees make-whole relief because of its refusal to bargain with the UFW.

The ALRA authorizes the Board to grant certain remedies, including make-whole relief, when it determines that a party has engaged in unfair labor practices. (§ 1160.3.) "Make-whole relief is a compensatory remedy that reimburses employees for the losses they incur as a result of delays in the collective bargaining process. [Citation.] The remedy is designed to give agricultural employees the type of economic benefits they would have received if the parties had reached a timely agreement." (*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1286, fn. 3 (*Arakelian*).) Section 1160.3 provides that the Board shall issue an order "requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, <u>and making employees whole, when the board deems such relief appropriate</u>, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part." (§ 1160.3, italics added.) "The words in [section] 1160.3 granting the Board the power to order make whole relief are words which indicate that the imposition of the remedy is discretionary . . . [¶] not per se." (*F & P Growers Assn. v. Agricultural Labor Relations Bd.* (1985) 168 Cal.App.3d 667, 679–680 (*F & P Growers*).)

The Legislature "inten[ded] that the ALRB serve as 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.'" (*Tex-Cal Land Management, Inc. v. Agricultural Labor Relations*

Bd. (1979) 24 Cal.3d 335, 346, *quoting Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 488.) Where the Board relies on its "specialized knowledge" and "expertise," its decision "is vested with a presumption of validity." (*Arakelian*, *supra*, 49 Cal.3d at p. 1292.) That presumption has even more force when courts review the Board's exercise of its remedial powers, which "are necessarily broad." (*Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654, 673 (*Carian*).) "'Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the dangers of sliding unconsciously from the narrow confines of law into the more spacious domains of policy.'" (*Id.* at p. 674.) One federal court discussing the National Labor Relations Board (NLRB), on which the ALRB is modeled, has observed that "'[t]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies, and sanctions.'" (*Fallbrook Hosp. Corp. v. National Labor Relations Bd.* (D.C. Cir. 2015) 785 F.3d 729, 735.) We have recognized that "the drafters of the ALRA intended to broaden, not diminish, the ALRB's remedial authority" as compared to that of the NLRB. (*Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 865 (*Highland Ranch*).)

In light of the Legislature's clear intent to confer broad remedial powers on the Board, the Board's orders imposing remedies are only " 'subject to limited judicial review.'" (*Carian, supra*, 36 Cal.3d at p. 674.)

Thus, "the [B]oard's remedial order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.' " (*Ibid.*, *quoting Virginia Electric Co. v. Board* (1943) 319 U.S. 533, 540; *see Nish Noroian Farms v. Agricultural Labor Relations Bd.* (1984) 35 Cal.3d 726, 745 ["The Board, an expert agency, has broad discretion to fashion remedies to effectuate the purposes of the act. Courts will interfere only where those remedies are patently unreasonable under the statute."].) Tri-Fanucchi acknowledges that courts owe the Board "considerable deference" when reviewing its determination of "which remedies would effectuate the policies of the ALRA."

We first considered the ALRA's make-whole remedy in *J. R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1 (*J. R. Norton*). Because the ALRA does not allow for immediate judicial review of a Board order certifying a union, employers may refuse to bargain, and thereby commit an unfair labor practice, simply in order to obtain such review. This kind of refusal has been called a "'technical' refusal to bargain." (*Id.* at p. 27.) Soon after the ALRA's enactment in 1975, the Board imposed a "blanket rule" applying the make-whole remedy in all such "technical refusal to bargain" cases. (*Id.* at pp. 27–28.) In *J. R. Norton*, we held that that the Board cannot award make-whole relief as a per se remedy for technical refusals to bargain. (*Id.* at p. 39.) Doing so "eviscerates important ALRA policy and fundamentally misconstrues the nature of and legislative purpose behind such relief." (*Id.* at p. 29.) Although "make-whole relief is appropriate when an employer refuses to bargain for the purpose of delaying the collective bargaining process," we said the Board's blanket rule "place[d] burdensome restraints on those who legitimately seek judicial resolution of close cases in which a potentially meritorious claim" regarding a union election could be made. (*Id.* at pp. 31–32.) We instead adopted the following standard: "the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted." (*Id.* at p. 39.)

Although *J. R. Norton*'s standard applies to cases involving technical refusals to bargain, its reasoning that the Board should not impose make-whole relief on a per se basis and should instead "examine the particular facts or circumstances of each case to determine [its] 'appropriateness'" is more broadly applicable. (*F & P Growers*, *supra*, 168 Cal.App.3d at p. 680; *see id.* at p. 681.) The Board has relied on this reasoning to develop a standard, known as the *F & P Growers* standard, for determining whether make-whole relief is appropriate in cases involving non-technical refusals to bargain. Under this standard, the Board "consider[s] on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the act, the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain." (*Id.* at p. 682.)

The parties agree that Tri-Fanucchi's refusal to bargain was not technical, and neither party disputes that the *F & P Growers* standard applies here. We have implicitly endorsed the *F & P Growers* standard before (*see Arakelian*, *supra*, 49 Cal.3d at pp. 1294–1295) and now hold that the *F & P Growers* standard applies to nontechnical refusals to bargain like Tri-Fanucchi's refusal in this case.

The Court of Appeal recognized that the Board "explicitly followed" the *F & P Growers* standard in its decision. Nevertheless, in setting aside the Board's remedial order, the Court of Appeal criticized the Board for basing its decision "solely on its legal evaluation or value judgment that [Tri-]Fanucchi's litigation of the abandonment issue . . . did not further the policies and purposes of the ALRA." This "legal conclusion" was "clearly wrong," the court said, because "the question of how an appellate court would actually rule when confronted with the novel situation of such <u>long-term</u> union absence or <u>egregious</u> inactivity (*i.e.*, 24 years) as alleged here was far from certain." The court continued: "[T]he question has remained to a significant degree unsettled and controversial. Against this larger backdrop, it is clear to us that judicial review of the issue was reasonably necessary and helpful to all parties concerned, including both unions and agricultural employers, for the beneficial purpose of clarifying and/or confirming the law. Therefore, [Tri-]Fanucchi's advancement of this litigation plainly furthered the broader purposes of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue."

We conclude that the Court of Appeal, in determining that Tri-Fanucchi's litigation "plainly further the broader purposes of the ALRA," improperly assumed the Board's remedial authority. Despite recognizing that the Board should be given "due deference," the Court of Appeal did not give the Board's make-whole relief order any deference. Rather, the court determined that the Board's "legal conclusion" was "clearly wrong" and then independently determined that make-whole relief was inappropriate in this case.

But the ALRA expressly authorizes the Board to impose make-whole relief "when the board deems such relief appropriate." (§ 1160.3, italics added.) In assessing whether make-whole relief is appropriate, the Board has adopted a standard that asks whether litigation of the employer's position furthers the ALRA's policies and purposes. The Board's decision to impose make-whole relief is thus best understood as an exercise of the Board's discretionary policy authority, not a legal conclusion subject to de novo review. (*See Bixby v. Pierno* (1971) 4 Cal.3d 130, 150–151 [An agency's "statutory discretion . . . would be entirely abrogated" if we were to hold that discretionary policy determinations "necessarily constitute questions of law for the courts to decide. . . . [T]he courts should not substitute their own judgment for that of the agency."].) Whether make-whole relief is appropriate in this case requires not only evaluation of the abandonment question but also consideration of countervailing concerns, such as previous interactions between the employer and the union as well as "the harm done to the employees by [the employer's] refusal to bargain." (*F & P Growers*, *supra*, 168 Cal.App.3d at p. 682.) Because the Legislature assigned the responsibility to evaluate and balance these concerns in the first instance to the Board, the Court of Appeal's independent review was improper.

Of course, the Board must determine on a case-by-case basis whether make-whole relief is appropriate; it may not award such relief without exercising its discretion. (*F & P Growers*, *supra*, 168 Cal.App.3d at pp. 681–682.) But there is no evidence to support Tri-Fanucchi's assertion that the Board imposed make-whole relief here "in a conclusory fashion simply because [Tri-Fanucchi] lost its appeal before the Board." Rather, the Board explained that make-whole relief was appropriate "[b]ased upon [its] review of <u>the facts and circumstances and the equities of this case</u>." (ALRB 2014 Decision, *supra*, 40 ALRB No. 4 at p. 20, italics added.) Indeed, although the Board rejected Tri-Fanucchi's arguments that delays caused by the UFW and the ALRB made it inappropriate to award make-whole relief, both the Board's order and the Board Chairman's special concurrence made clear that different facts could make out "a delay that would warrant denying the remedy." (*Id.* at p. 22 (conc. opn.).) The Board's order assessed the particular circumstances of this case and was not made in a conclusory fashion.

The Court of Appeal opined that only a published appellate decision in the context of a "long-term union absence" was sufficient to "settle" the question whether the ALRA permits employers to raise an abandonment defense. To be sure, "the courts are the ultimate arbiters of the construction of a statute." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11.) And there may be cases in which an employer's challenge to the Board's settled construction of the ALRA in order to obtain judicial review sufficiently advances the Act's policies and purposes. But we have repeatedly held that courts should "accord significant weight and respect to the long-standing construction of a law by the agency charged with its enforcement." (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1082; *see Highland Ranch*, *supra*, 29 Cal.3d at p. 859 [the Board's interpretation of the ALRA "'must be given great weight'"].) Yet the Court of Appeal gave no weight to the Board's interpretation that the ALRA does not allow for an abandonment defense, even though it acknowledged that the Board has consistently applied that interpretation for three decades.

Nor can the court's conclusion be squared with its own observation that the Board's rejection of Tri-Fanucchi's abandonment defense was "consistent with how California appellate courts have construed the ALRA." The Court of Appeal cited several published appellate decisions, including *Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1, and *F & P Growers*, *supra*, 168 Cal.App.3d 667, for the principle that an employer's duty to bargain under the ALRA continues until the union is replaced or decertified, and then explained how the Board's position on abandonment is simply a further application of those principles. But in reversing the Board's make-whole relief award, the Court of Appeal claimed that the abandonment question "has remained to a significant degree unsettled and controversial." The Court of Appeal's straightforward application of relevant precedent to reject Tri-Fanucchi's abandonment defense seems in tension with its conclusion that the issue was unsettled and in need of clarification.

Although *J. R. Norton* cautioned against placing "burdensome restraints on those who legitimately seek judicial resolution of close cases" (*J. R. Norton*, *supra*, 26 Cal.3d at p. 32), the longevity and uniformity of relevant authority suggests that the abandonment question was not especially close at the time Tri-Fanucchi refused to bargain. Moreover, *J. R. Norton*'s discussion of judicial review is limited to the context of that case. *J. R. Norton* did not involve an employer seeking judicial review in order to bring clarity to the law. Rather, it concerned employers' ability to litigate objections to particular union elections or certifications in a judicial forum. The "especially compelling" need for judicial review in *J. R. Norton* must be understood in light of the purpose of permitting employers to contest specific administrative actions that would otherwise be immunized from judicial review. (*Id.* at p. 34; *see id.* at pp. 30–32.)

The *F & P Growers* standard does not focus solely on whether an appellate decision would bring greater clarity to the law. Instead, it requires the Board to weigh the extent to which the employer's litigation advances the ALRA's purposes and policies against the risks and harms caused by such litigation and its attendant delays to the collective bargaining process. (*F & P Growers*, *supra*, 168 Cal.App.3d at p. 682.) Against the backdrop of Tri-Fanucchi's previous refusals to bargain, earlier findings that the employer had committed unfair labor practices, and an unbroken line of ALRB decisions rejecting the abandonment defense, the Board reasonably determined that make-whole relief was appropriate here to compensate Tri-Fanucchi's employees for the delays incurred by Tri-

Fanucchi's refusal to bargain and its subsequent litigation.

To hold that make-whole relief is inappropriate unless there is a published appellate decision on the exact issue raised by the employer would risk undermining the ALRA's purpose of bringing stability to agricultural labor relations by encouraging employers to refuse to bargain and instead to litigate disputed issues. If parties were allowed to regularly circumvent Board decisions by obtaining relief in court, "the Board would be replaced by ad hoc determinations by already overcrowded courts. The legislative effort to bring order and stability to the collective bargaining process would be thwarted. The work of the Board would be effectively impaired, its decisions similar in impression to that of a tinkling triangle practically unnoticed in the triumphant blare of trumpets." (*United Farm Workers v. Superior Court* (1977) 72 Cal.App.3d 268, 272.) Tri-Fanucchi's briefing in this court makes clear this danger: It contends that "until such time as [Tri-]Fanucchi raised the question of law before the Court of Appeal as to whether long term and total abandonment by the bargaining representative was a defense to an employer's duty to bargain, the Board's statutory construction and legal analysis of the abandonment defense under the ALRA was not binding or final."

Accepting the Court of Appeal's rationale would thwart the Legislature's design to give *the Board*, not the courts, "exclusive primary jurisdiction over all phases of the administration of the Act as regards unfair labor practices." (*United Farm Workers v. Superior Court*, *supra*, 72 Cal.App.3d at p. 271.) Because the Board's order was not "'a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act'" (*Carian*, *supra*, 36 Cal.3d at p. 674), the Court of Appeal should have upheld the Board's remedial order as an appropriate exercise of its discretion under the ALRA. In concluding otherwise, the court exceeded the "'limited judicial review'" applicable to the Board's order. (*Ibid.*)

CONCLUSION

For the reasons above, we reverse the Court of Appeal's judgment reversing the Board's award of make-whole relief. In all other respects, we affirm the Court of Appeal's judgment and remand for further proceedings consistent with our opinion.

LIU, J.

WE CONCUR:

CANTIL-SAKAUYE, C. J.
CHIN, J.
CORRIGAN, J.
CUÉLLAR, J.
KRUGER, J.
KLINE, J.[1]

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J. Antonio Barbosa, Santiago Avila-Gomez, Paul M. Starkey, Todd M. Ratshin and Scott P. Inciardi for Respondent.

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[1] Presiding Justice of the Court of Appeal, First Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section of the California Constitution.

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OPINION OF THE CALIFORNIA FIFTH DISTRICT COURT OF APPEALS (MAY 14, 2015)

187 CAL. RPTR. 3D 247

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

TRI-FANUCCHI FARMS,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent,

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest.

F069419 (40 ALRB No. 4)

Before: Kane, J., Hill, P.J., Levy, J.

ORIGINAL PROCEEDING; petition for writ of review.

Sagaser, Watkins & Wieland, Howard A. Sagaser, William M. Woolman and Ian B. Wieland for Petitioner.

J. Antonio Barbosa, Paul M. Starkey and Scott P. Inciardi for Respondent.

Mario Martinez, Thomas P. Lynch and Edgar I. Aguilasocho for Real Party in Interest.

Tri-Fanucchi Farms (Fanucchi) is an agricultural employer conducting farming operations in Kern County. In 1977, Fanucchi's agricultural employees elected the United Farm Workers union (UFW) to be their exclusive bargaining representative. However, for reasons UFW has not explained, no bargaining occurred between 1988 and 2012, a period of 24 years. In 2012, UFW contacted Fanucchi and requested the recommencement of bargaining. Fanucchi refused to bargain with UFW on the ground that, because of the 24-year hiatus, UFW had abandoned Fanucchi's agricultural employees. A complaint was then filed against Fanucchi for unfair labor practices, and the matter was referred to an administrative law judge (ALJ). Ultimately, the Agricultural Labor Relations Board (the Board) upheld the determinations of the ALJ that (i) abandonment and similar equitable theories were not available as defenses to the duty to bargain under the Agricultural Labor Relations Act (Lab. Code, § 1140 et seq.,[1] the ALRA) and (ii) make whole relief was appropriate under the circumstances. (*See Tri-Fanucchi Farms* (2014) 40 ALRB No. 4.) Fanucchi then petitioned this court for review of the Board's decision in *Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4 and we agreed to review the matter.

The primary issue raised in the petition is whether UFW's past conduct indicating abandonment—namely, its failure to bargain for 24 years—gave Fanucchi a legal basis to refuse to bargain with UFW once that union returned and sought to recommence bargaining. We affirm the Board's position that such facts did not create a defense to bargaining or excuse Fanucchi

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[1] Unless otherwise indicated, all further statutory references are to the Labor Code.

from its obligation as employer to bargain in good faith with UFW. Rather, in the instant context, the appropriate remedy for UFW's past dereliction was (and is) in the hands of the agricultural employees themselves. That is, if the employees do not wish to be represented by UFW, their recourse is to replace or decertify UFW by a new election pursuant to sections 1156.3 or 1156.7.

We preface our opinion with a brief comment on the broader issue of abandonment. In a companion case decided on the same day herewith, *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (May 14, 2015, F068526/F068676) ___ Cal.App.4th ___, we have concluded that where a union requests the Board to order mandatory mediation and conciliation (MMC) under section 1164 et seq., the employer may defend against the MMC request by raising the issue of the union's abandonment of its representative status, including abandonment thereof based on such union conduct as unreasonably lengthy absence and inactivity. One reason we concluded that such an abandonment theory could properly be raised by the employer in that limited context was the fact that the statutory MMC process is not a mere extension of voluntary bargaining, but is a distinct legal procedure that results in an imposed collective bargaining agreement (CBA) without the parties' consent, on terms dictated by a mediator and ordered by the Board. (§§ 1164, subd. (d), 1164.3.) Since to a substantial degree the MMC process leaves consensual bargaining behind, we held that the employer's continuing duty to bargain was not an obstacle to raising abandonment at that stage. Another reason we allowed the employer to raise abandonment in that context was a recognition that, where a long-absent union returned to the scene and requested the MMC process, in general there would not be an adequate opportunity for employees to exercise a decertification option if they did not want to be represented by that union. Moreover, as more fully explained in said companion case, we concluded that allowing such a theory to be raised in response to a union's MMC request was the only way to preserve the employees' fundamental statutory right to choose.

Here, in contrast to the above described companion case, the parties' dispute arose out of the ordinary bargaining context. The MMC process was not invoked. Fanucchi simply *refused to bargain* with UFW on the ground of the alleged abandonment. As noted above, we conclude that UFW's lengthy period of inactivity did not defeat Fanucchi's duty to engage in bargaining with that union upon request. Accordingly, we affirm the portion of the Board's decision in *Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4 that rejected Fanucchi's defenses to the duty to bargain and held that Fanucchi committed unfair labor practices under section 1153, subdivisions (a) and (e), for refusal to bargain with UFW and refusal to provide information. However, for reasons that will be more fully explained below, we reverse the portion of *Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4 wherein the Board imposed make whole relief against Fanucchi. Such relief was not appropriate in this case because Fanucchi's pursuit of judicial review of the abandonment issue provided needed clarification on that important legal question affecting labor relations under the ALRA.

FACTS AND PROCEDURAL HISTORY

Fanucchi is a family-owned farming enterprise in Kern County, California, that grows and harvests a variety of crops, including carrots, cotton, tomatoes, garlic, onions and wine grapes. Fanucchi maintains approximately 35 yearround employees and hires several hundred seasonal employees through various labor contractors. In 1977, an election by secret ballot was held by Fanucchi's agricultural employees and UFW was voted by them to be their collective bargaining representative. The election of UFW as the employees' representative was certified by the Board at that time.

Some initial bargaining sessions occurred after UFW was certified. However, based on a poll of its employees in the early-to mid-1980's, Fanucchi believed they no longer wanted UFW to represent them. In 1984, Fanucchi refused to bargain with UFW based on an alleged good faith belief that UFW no longer had majority support and also based on alleged union abandonment of the bargaining unit and related equitable defenses. UFW then brought an unfair labor practices complaint against Fanucchi and the Board held in UFW's favor. Fanucchi filed a petition for review of the Board's decision. In a nonpublished opinion issued by this court in 1987, we rejected each of Fanucchi's claimed defenses and affirmed the Board's findings that Fanucchi's refusal to bargain was an unfair labor practice. (*Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.* (Nov. 21, 1987, F008776) [nonpub. opn.].)[2]

In 1988, Fanucchi informed UFW that it was willing to bargain. According to Fanucchi, UFW res-

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2 We grant the Board's request for judicial notice of this prior nonpublished opinion. We do not rely on it as precedent, but merely refer to it as a part of the historical background to the present case.

ponded in 1988 that it would arrange bargaining dates as soon as its negotiator returned from vacation. However, UFW failed to follow through and no bargaining dates were ever scheduled. The next time UFW contacted Fanucchi was 24 years later by letter dated September 28, 2012, wherein UFW requested that bargaining be restarted and asked for certain information from Fanucchi relevant to bargaining. Fanucchi responded by letter of October 19, 2012, stating that it was refusing to bargain with UFW on the ground that UFW had abandoned the bargaining unit and was "no longer the valid collective bargaining representative of [Fanucchi's] employees." Fanucchi's letter also advised that it was seeking judicial review of the abandonment issue—an issue that had not yet been specifically addressed by the courts—and Fanucchi insisted that its refusal should be viewed by UFW as a "technical refusal to bargain" to facilitate such judicial review. Along these lines, Fanucchi asked UFW to agree to expedited proceedings based on stipulated facts, but UFW was not willing to proceed in that manner.

On March 7 and April 16, 2013, UFW filed charges with the Board's regional office in Visalia alleging that Fanucchi was engaging in unfair labor practices by refusing to bargain and by refusing to provide information relevant to bargaining. On September 5, 2013, the Board's general counsel (the General Counsel) filed a consolidated administrative complaint (the Complaint) against Fanucchi, claiming that Fanucchi's conduct constituted unfair labor practices in violation of section 1153, subdivisions (a) and (e) of the ALRA,[3]

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[3] Under section 1153, it is an unfair labor practice for an employer "[t]o interfere with, restrain, or coerce agricultural

and requesting that the Board award make whole relief for the benefit of the employees (§ 1160.3).

On October 8, 2013, Fanucchi filed an answer to the Complaint. Fanucchi's answer admitted to the material underlying facts, but claimed as a defense to the duty to bargain that UFW abandoned its representative status and/or had unclean hands and/or was barred by laches, all because of the 24-year period of UFW inactivity. Further, the answer reiterated that Fanucchi's refusal to bargain was in good faith for the purpose of obtaining judicial review of an important labor relations issue (*i.e.*, union abandonment).

A hearing of the case was scheduled for October 21, 2013, before ALJ Thomas Sobel. Prior to the hearing, the General Counsel filed a motion in limine with the ALJ requesting the exclusion of all evidence relating to Fanucchi's abandonment defense on the ground that such a defense to an employer's duty to bargain was not recognized under established Board precedent. The ALJ granted the motion in limine, which he regarded as in substance a motion to strike or a judgment on the pleadings relating to Fanucchi's abandonment defense and the related equitable defenses premised on the 24-year hiatus. The ALJ held that even if the facts Fanucchi sought to prove were true, they did not establish a defense to bargaining; therefore, the motion was granted.

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employees in the exercise of the rights guaranteed in Section 1152" (*id.*, subd. (a); or "[t]o refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5 (commencing with Section 1156) of this part" (*id.*, subd. (e)).

Having rejected Fanucchi's claimed defenses to the duty to bargain, the ALJ proceeded to consider the merits of the Complaint in light of Fanucchi's answer, which had admitted to the material factual allegations. The ALJ found that Fanucchi's refusal to bargain, etc., constituted unfair labor practices. On the issue of whether to award make whole relief, the ALJ found that Fanucchi's refusal to bargain as a means of seeking judicial review was not justifiable because the Board's precedents were very clear that purported abandonment based on past union inactivity was not a defense to a current request to bargain by the same union. Therefore, the ALJ found that Fanucchi's efforts to obtain judicial review of a "settled" labor issue did not further the purposes of the ALRA. Consequently, the ALJ held that make whole relief should be awarded against Fanucchi.

The ALJ's written decision was transferred to the Board. On November 20, 2013, Fanucchi filed with the Board 15 "exceptions" to the ALJ's decision. Among other things, the exceptions challenged the ALJ's decision to treat the motion in limine as a motion for judgment on the pleadings, the ALJ's rejection of Fanucchi's abandonment and related equitable defenses, the ALJ's refusal to take evidence concerning those defenses, and the ALJ's decision to award make whole relief.

On April 23, 2014, the Board issued its decision, which was reported at *Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4. The Board found, in agreement with the ALJ, that Fanucchi's refusal to bargain with UFW and to provide information constituted violations of section 1153, subdivisions (a) and (e). The Board rejected Fanucchi's contention that a defense existed to its duty to bargain based on the alleged abandonment on the part of UFW. The Board likewise rejected the similarly framed equitable defenses of laches, estoppel and unclean hands based on the same 24-year bargaining hiatus. The equitable claims were also rejected on the additional ground that there was no prejudice or harm caused to Fanucchi. On the question of whether make whole relief was proper, the Board expressed that because there was already established Board precedent rejecting the abandonment theory, "[Fanucchi's] position cannot be said to further the policies and purposes of the ALRA." (*Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4, p. 18.) Accordingly, the Board agreed with the ALJ that make whole relief was appropriate.

Fanucchi filed a petition to this court seeking our review of the Board's decision in *Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4. We issued a writ of review.

DISCUSSION

I. Standard of Review

The issues raised by Fanucchi are legal, primarily involving the interpretation of the ALRA and the question of the availability of certain defenses to an employer's statutory duty to bargain under the ALRA. Integral to these questions are the basic legislative purposes and policies of the ALRA. Since the Board is the administrative agency entrusted with enforcement of the ALRA, its interpretation of the ALRA is given deference by the courts and will be followed if not clearly erroneous. (*Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 24 (*Montebello Rose*).) Nevertheless, it is fundamental in statutory construction that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 29 (*J.R. Norton Co.*); *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326 [courts state the true meaning of a statute finally and conclusively].) Thus, while an administrative agency is entitled to deference when interpreting policy in its field of expertise, it cannot alter or amend the statute it is interpreting, or enlarge or impair its scope. (*J.R. Norton Co.*, *supra*, at p. 29; *Adamek & Dessert, Inc. v. Agricultural Labor Relations Bd.* (1986) 178 Cal.App.3d 970, 978 (*Adamek & Dessert*).)

II. ALRA Statutory Overview

The issue of whether abandonment or other equitable theories may be raised as a defense to bargaining requires an understanding of the statutory provisions and main purposes of the ALRA. We therefore begin with a brief overview of the ALRA.

In 1975, the California Legislature enacted the ALRA "to provide for collective-bargaining rights for agricultural employees" (§ 1140.2) by putting into place a system of laws generally patterned after the National Labor Relations Act (29 U.S.C. § 151; the NLRA). (*J.R. Norton Co.*, *supra*, 26 Cal.3d at p. 8.) The ALRA declares it is the policy of the State of California "to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing . . . for the purpose of collective bargaining or other mutual aid or protection."

(§ 1140.2.)[4] As noted by our Supreme Court, "[a] central feature in the promotion of this policy is the [ALRA's] procedure for agricultural employees to elect representatives 'for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.' (*Id.*, § 1156 et seq.)" (*J.R. Norton Co.*, *supra*, at p. 8.)

Under that election procedure, if a proper petition has been filed, the Board directs that an election be held by a secret ballot vote of employees to determine an issue of employee representation, such as whether a particular labor organization shall be the employees' bargaining representative.[5] (§§ 1156, 1156.3.) Except in certain runoff elections, every ballot "shall provide the employee with the opportunity to vote against representation by a labor organization by providing an appropriate space designated 'No Labor Organizations.'" (§ 1156.3, subd. (c).) After the election, the Board "shall certify" the result unless it determines based on a sustained election challenge "that there are sufficient grounds to refuse to do so." (§ 1156.3, subd. (e)(2) [stating grounds for such refusal].)

If a labor organization (*i.e.*, a union)[6] is certified as the winner of such an election and thus becomes the employees' bargaining representative, certain legal consequences follow. First, a statutory bar ex-

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4 The same employees also have the right "to refrain from any or all such activities . . . . " (§ 1152.)

5 A similar procedure exists by which the agricultural employees may vote to decertify a labor organization so that it is no longer their representative. (§ 1156.7.)

6 The terms "union" and "labor organization" are used synonymously herein.

ists to holding another representation election for at least the initial one-year certification period. (§§ 1155.2, subd. (b), 1156.5, 1156.6.) Second, a duty to bargain is created, which is owed by the employer to the union and vice versa. (§§ 1153, subd. (e), 1154, subd. (c), 1152.) However, unlike the election bar, the duty to bargain does not expire with the initial one-year period. That is because a union's status as the employees' certified bargaining representative continues beyond the one-year period for purposes of extending the parties' duty to bargain. (*Montebello Rose Co.*, *supra*, 119 Cal.App.3d at pp. 24–26, 29 [affirming ALRB's conclusion that a certified union continues to enjoy that status after the initial certification year expires].)[7] Consequently, it has been held that once a union is certified as the bargaining representative of an employer's agricultural employees, the employer's duty to bargain with that union continues until the union is replaced or decertified through a subsequent election pursuant to sections 1156.3 or 1156.7. (*Montebello Rose*, *supra*, at pp. 23–24, 29 [approving statutory interpretation adopted by the Board in *Kaplan's Fruit & Produce Co., Inc.* (1977) 3 ALRB No. 28]; *Adamek & Dessert*, *supra*, 178 Cal. App.3d at p. 983; *Bruce Church, Inc.* (1991) 17 ALRB No. 1, p. 13 [stating principle adhered to by the Board that "a [u]nion remains the certified representative

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[7] Although section 1155.2, subdivision (b), refers to an initial one-year period of certification (and allows for a one-year extension thereof), that time limitation has been held to relate only to the election bar, not to the duty to bargain aspect of certification. (*Montebello Rose*, *supra*, 119 Cal.App.3d at pp. 24–30.)

until decertified"]; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, p. 7 [same].)[8]

In summary, the ALRA recognizes, protects and promotes agricultural employees' right to collective bargaining (§ 1140.2) and, in the furtherance of that right, the ALRA requires the agricultural employer and the employees' certified representative to bargain collectively in good faith. (§§ 1153, subd. (e), 1154, subd. (c).) The ALRA defines the parties' mutual obligation to bargain collectively in good faith as follows: "[T]o bargain collectively in good faith is 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." (§ 1155.2, subd. (a).)

When an employer or labor organization fails to bargain in good faith as required, or when other unfair labor practices (as defined in the ALRA) have occurred, recourse to the Board is provided and the Board is empowered to issue orders or take remedial action to effectuate the purposes of the ALRA. (§§ 1160–1160.9; *see*, *e.g.*, *Harry Carian Sales v. Agricultural Labor*

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[8] A third consequence of certification is that no CBA may be negotiated or entered by the employer with any other (not currently certified) labor organization. (§ 1153, subd. (f).) The ALRA further declares that only a certified labor organization may be a party to a legally valid CBA. (§ 1159.)

Relations Bd. (1985) 39 Cal.3d 209, 229–230 [discussing Board's remedial authority relating to unfair labor practices].)

III. Abandonment

With the above statutory framework in mind, we now consider the issue of whether UFW's lengthy absence and inactivity in this case created an abandonment defense to Fanucchi's duty to bargain. We hold it did not.

We begin with the Board's perspective on the issue. In its decision in the instant case, reported at *Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4, the Board explained its rejection of Fanucchi's claim that UFW's conduct provided a defense to bargaining:

> The Board's previous decisions have been very clear that, under the ALRA, the fact that a labor organization has been inactive or absent, even for an extended period of time, does not represent a defense to the employer's duty to bargain. (*Dole Fresh Fruit Co., Inc.* (1996) 22 ALRB No. 4; *Pictsweet Mushroom Farms*[, *supra*,] 29 ALRB No. 3; *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5.) The Board recently reaffirmed its holdings on abandonment and confirmed that, except in cases where the union disclaims interest in representing the bargaining unit or becomes defunct, the union remains certified [for purposes of the employer's duty to bargain] until removed or replaced through the ALRA's election procedures, regardless of any bargaining hiatus or union inactivity

> that may have occurred. (*Arnaudo Brothers, LP* (2014) 40 ALRB No. 3[,] pp. 9–12.) These principles stem from the legislative intent inherent in the ALRA that the power to select and remove unions as bargaining representatives should reside with agricultural employees and not with their employers. [Citation.] The facts alleged by [Fanucchi] fall squarely within this well-established rule.

Tri-Fanucchi Farms, *supra*, 40 ALRB No. 4, p. 8, fn. omitted.)

Additionally, in the same decision of this matter in *Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4, the Board further explained that the principal remedy for such union failings—namely, a new election—is left in the hands of the agricultural employees:

> In cases where a union is failing to adequately carry out its duties as bargaining representative and employees' appeals to the union itself are insufficient to resolve the situation, the remedy for such dereliction is for the members of the bargaining unit to seek to decertify the union or replace it with another union through the ALRA's election procedures. Bargaining unit members may also, where appropriate, seek to enforce their union's duty of fair representation. [Citation.] While these procedures are unavailable to the employer, it need not stand idly by if a certified union refuses to come to the bargaining table but may use the ALRA's unfair labor practice procedures to assert a claim that a union is unlawfully

> refusing to bargain. [Citation.] Additionally, a union that fails to respond to changes to terms and conditions of employment proposed by the employer may be held to have waived its right to bargain over those changes, privileging the employer to implement them without bargaining. [Citation.] However, what the employer may not do is impose its own choice on employees by unilaterally determining that it will no longer bargain with the union. [¶] Accordingly, [Fanucchi's] claim that it was not obligated to bargain with the UFW due to an alleged period of inactivity by the UFW does not represent a legally cognizable defense to the duty to bargain under the ALRA. . . .

Tri-Fanucchi Farms, *supra*, 40 ALRB No. 4, pp. 8–9.)

The Board's position (recited above) on the abandonment issue as it relates to the employer's duty to bargain is consistent with how California appellate courts have construed the ALRA. An important principle recognized in the ALRA cases is that an employer's duty to bargain with the originally certified union *continues* until that union is replaced or decertified by a subsequent election. (*See Montebello Rose*, *supra*, 119 Cal.App.3d at pp. 23–24 ["employer's duty to bargain does not lapse after one year but continues until such time as the union is officially decertified as the employee bargaining representative"]; *F&P Growers Assn. v. Agricultural Labor Relations Bd.* (1985) 168 Cal.App.3d 667, 672 (*F&P Growers*) ["an employer's duty to bargain does not lapse after one year even in the absence of an extension"]; *Adamek & Dessert*, *supra*, 178 Cal.App.3d at p. 983 ["the company has a duty to bargain with the union until the union is decertified through a second election"].) In accordance with this principle, if a certified union's neglect or inaction causes the agricultural employees to be dissatisfied with that union, the appropriate remedy is for the employees to pursue a decertification election. (*See*, *e.g.*, §§ 1156.3 & 1156.7; *F&P Growers*, *supra*, at pp. 674–678.) As one court put it, "So long as the employees can petition for a new election if they wish to remove the union, the employer has no real cause for concern about whether it is bargaining with the true representative of its employees." (*Montebello Rose Co.*, *supra*, at p. 28.)[9]

The case of *F&P Growers* sheds additional light on the issue before us. In *F&P Growers*, the employer refused to continue bargaining with the originally certified union in that case, the UFW, because allegedly "objective criteria revealed that a majority of employees in the bargaining unit no longer supported the UFW . . . ." (*F&P Growers*, *supra*, 168 Cal.App.3d at p. 670.) The employer had argued that since the NLRA's rebuttable presumption rule had been found applicable to the ALRA, other related NLRA precedents likewise should be adopted, including the rule allowing an employer to refuse to bargain with a certified union if the employer had a good faith belief that the union had lost its majority support. (*F&P Growers*, *supra*,

9 We note the employer's continuing duty to bargain with a certified union does prejudice the employer because, in accordance with how bargaining is defined under the ALRA, both the employer and the union retain their respective rights of contractual consent as guaranteed in section 1155.2, subdivision (a), which states that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession."

at pp. 672–677.) In resolving that issue, the Court of Appeal concluded that the loss of majority support defense to bargaining with a particular union was clearly inapplicable to the ALRA because of important differences between the ALRA and the NLRA. (*F&P Growers*, *supra*, at pp. 674–676.) For example, the NLRA permitted an employer to bargain with a union that had demonstrated its majority status by means other than an election, but the ALRA only allowed an employer to bargain with a union that had won an election. Moreover, the NLRA permitted employers to petition for an election, but the ALRA did not allow employers to file election petitions regarding the certification or decertification of a union. (*F&P Growers*, *supra*, at pp. 674–678.) As noted in *F&P Growers*, these distinctive provisions of the ALRA indicated the Legislature did not intend for an agricultural employer to participate in deciding whether or not it shall bargain with a particular union. Such choice was left solely to the employees, and was removed from the employer. (*F&P Growers*, *supra*, at pp. 677–678.) For these reasons, the Court of Appeal held that employers could not refuse to bargain with a particular union based on a good faith belief in loss of majority status, since that would allow employers to do indirectly (*i.e.*, effectively decertify a union) what the Legislature had removed from the employer's purview. (*Id.* at p. 677.)

In the present case, Fanucchi's assertion of abandonment as an alleged defense to its duty to bargain is clearly analogous to the loss of majority support defense that was asserted by the employer in *F&P Growers*. In both cases, the employer refused to bargain with a previously certified union based on a factual development that allegedly resulted in a defense to bargaining. As *F&P Growers* correctly held, the Legislature did not intend for an agricultural employer to participate in deciding whether or not it shall bargain with a particular union and, therefore, the employer in that case could not refuse to bargain with the certified union based on a claimed defense of loss of majority support. (*See F&P Growers*, *supra*, 168 Cal.App.3d at pp. 677–678.) In light of the similar nature of the case at bench, we believe that the same reasoning applies and the same result should follow. Thus, here, Fanucchi was not entitled to refuse to bargain with UFW based on UFW's past failings or inactivity, and such conduct did not create a defense to bargaining, whether labeled as abandonment or otherwise.

Moreover, "[a] guiding principle for evaluating the Board's decision . . . is that an administrative agency is entitled to strong deference when interpreting policy in its field of expertise" (*Montebello Rose Co.*, *supra*, 119 Cal.App.3d at p. 24). Based on the foregoing analysis of the present issue, it is appropriate that we defer to the Board's resolution thereof. In implementing the ALRA and its policies, the Board held in the present case (*Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4), as it has held in previous Board decisions, that past union absence or inactivity do not create an abandonment defense to the duty to bargain. In light of existing judicial construction of the ALRA as reflected in the Court of Appeal decisions noted above, the Board's position on this issue constituted a reasonable interpretation and application of the ALRA. Accordingly, the Board's decision on that discrete issue is hereby affirmed. Since Fanucchi had no valid defense to the duty to bargain, it follows that its refusal to bargain with UFW or to provide information constituted unfair labor practices, as the Board further held. We affirm these latter findings as well.

IV. Related Equitable Defenses

For the same reasons set forth above regarding abandonment, the related equitable defenses premised on the same underlying facts—namely, UFW's failure to bargain for 24 years—likewise did not constitute defenses to the duty to bargain under the ALRA. In substance, these equitable defenses raised by Fanucchi (*i.e.*, laches, unclean hands, and estoppel) were merely a reiteration under different labels of the same essential claim of abandonment. We affirm the Board's conclusion that UFW's past inactivity and/or absence did not create a defense to bargaining under these alternative equitable theories.

V. Make Whole Relief

We now consider whether make whole relief was appropriately ordered by the Board. We begin by providing a brief description of this unique remedy. If an employer is guilty of an unlawful labor practice for refusal to bargain in good faith, the Board has discretion under the ALRA to impose a make whole remedy against the employer to compensate the employees for losses incurred as a result of the delays in the collective bargaining process. (*See J.R. Norton Co.*, *supra*, 26 Cal.3d at pp. 27, 36.) The purpose of the make whole remedy is to put the parties and the employees in the economic positions that they presumably would have been in if the employer had not unlawfully refused to bargain. (*F&P Growers*, *supra*, 168 Cal.App.3d at p. 682.)

The statutory provision of the ALRA authorizing make whole relief is section 1160.3. Section 1160.3 provides in relevant part that whenever the Board finds an employer guilty of an unfair labor practice for refusal to bargain, the Board may enter an order "requiring such person to cease and desist from such unfair labor practice, [and] to take affirmative action, including . . . <u>making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain</u>, and to provide such other relief as will effectuate the polices of this part." (Italics added.) As the wording of the statute clearly indicates, make whole relief is discretionary in nature and is to be applied only where the Board determines it is appropriate under the circumstances. (*J.R. Norton Co.*, *supra*, 26 Cal.3d at pp. 37–38; *F&P Growers*, *supra*, 168 Cal.App.3d at pp. 680–682.)

In determining whether or not such relief is appropriate, the Board must consider the facts and equities of each particular case. (*J.R. Norton Co.*, *supra*, 26 Cal.3d at pp. 37–38.) Thus, it is not permissible to impose make whole relief on a per se basis, such as by imposing it automatically whenever an employer is found to have committed an unfair labor practice by refusing to bargain. (*Ibid.*) In *F&P Growers*, the Court of Appeal explained the implications in that case of this rule against per se relief: "[E]ven though the employer may have had no right to be involved in deciding whether it would or would not bargain with [UFW], the Board was still required to examine the employer's conduct for particular facts and circumstances to see if the make whole remedy was appropriate. The fact that we now hold that the employer was required to bargain with [UFW] regardless of its good faith belief does not negate the discretionary nature of the make whole relief under the statute. . . . Even though that belief is no defense for failure to bargain, the language of the statute is clear that the Board issue the make whole relief only when it 'deems' the relief appropriate." (*F&P Growers*, *supra*, 168 Cal.App.3d at p. 681.)

A special type of case in which the issue of make whole relief sometimes arises is where the employer has made a "'technical' refusal to bargain" as a means of obtaining judicial review of the validity of a representation election. (*J.R. Norton Co.*, *supra*, 26 Cal.3d at p. 27.) In *J.R. Norton Co.*, the Supreme Court considered the issue of make whole relief in the context of such a technical refusal to bargain. (*Id.* at pp. 27–40.) The court observed that the technical refusal to bargain procedure is necessary because election certification decisions by the Board are not subject to direct judicial review (*id.* at p. 27), and it is important to provide a check on arbitrary action by the Board in regard to representation elections (*id.* at p. 30). The court then discussed the standard to be applied by the Board regarding make whole relief in such cases. In particular, the court held that where an employer engages in a technical refusal to bargain but ultimately loses the election challenge after obtaining judicial review, the Board is required to evaluate whether to impose make whole relief under the following standard: "[T]he Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. We emphasize that this holding does not imply that whenever the Board finds an employer has failed to present a prima facie case, and the finding is subsequently upheld by the courts, the Board may order make-whole relief. Such decision by hind-sight would impermissibly deter judicial review of close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice." (*Id.* at p. 39.)[10]

In the case before us, contrary to Fanucchi's characterization of its actions, the refusal to bargain was not technical (in the *J.R. Norton Co.* sense) because the validity of the representation election and original certification of UFW based on that election were not at issue.

Where, as here, the employer's refusal to bargain was not technical, *F&P Growers*, provides an instructive analysis of the Board's generally followed approach to the issue of make whole relief in such cases.[11] In *F&P Growers*, the Board had adopted a particular

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[10] In *J.R. Norton Co.*, the Supreme Court concluded its discussion of make whole relief with the following words: "In short, a per se remedy is impermissible in this setting. Not only are there degrees of violations [citation] but, more fundamentally, other factors peculiar to labor relations may outweigh the appropriateness of make-whole relief in particular cases. [Citation.] The Board's remedial powers do not exist simply to reallocate monetary loss to whomever it considers to be most deserving; they exist, as appears from the statute itself, to effectuate the policies of the [ALRA]." (*J.R. Norton Co.*, *supra*, 26 Cal.3d at pp. 39–40.)

[11] The court in *F&P Growers* expressly acknowledged that "the case before us does not involve a 'technical refusal' to bargain . . . ." (*F&P Growers*, *supra*, 168 Cal.App.3d at p. 681.)

standard for deciding on whether make whole relief was appropriate. That standard was as follows: "[W]e consider on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the [ALRA], the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain." (*F&P Growers*, *supra*, at p. 682.) The Court of Appeal held that the above standard was a proper method for the Board to use in determining whether make whole relief was appropriate: "The Board used its own standards in determining appropriateness of the remedy in this particular case, and this they were entitled to do." (*Id.* at p. 682.) Nevertheless, in applying that standard as a framework for determining the appropriateness of the remedy, the Board still must reach its decision in a discretionary (not a per se) manner based on the facts and equities of the particular case. As the Court of Appeal stated: "Since the Board in the instant case did in fact examine the facts and circumstances of the particular case, and did not apply the make whole remedy per se or automatically, but applied it only after it exercised discretion and deemed that relief appropriate, the order herein was not an abuse of discretion. . . . [¶] The language of the Board's decision shows that they knew they had to examine each case individually, and the language of their decision indicates that they examined the case on a case-by-case basis." (*Ibid.*)

Here, the Board explicitly followed the standard that was approved in *F&P Growers*. The Board's written decision stated as follows: "Here, because [Fanucchi] is not seeking review of a certification election, *F&P Growers* applies, rather than *J.R. Norton*. The issue, therefore, is whether the public interest in [Fanucchi's] position outweighs the harm done to employees by its refusal to bargain. The position taken by [Fanucchi] is based principally on its contention the UFW forfeited its certification by abandoning the bargaining unit. As discussed above, this position is contrary to over 30 years of Board precedent holding that abandonment is not a defense to the duty to bargain. Accordingly, [Fanucchi's] position cannot be said to further the policies and purposes of the ALRA. [Citation.] [¶] . . . [¶] Based upon our review of the facts and circumstances and the equities of this case, we conclude, in agreement with the ALJ, that an award of makewhole is appropriate and that, under the circumstances presented in this case, '[Fanucchi], not the employees, should ultimately bear the financial risk of [Fanucchi's] choice to litigate rather than bargain.' [Citation.]" (*Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4, pp. 18, 20, fns. omitted.)

It is clear that the Board's decision to impose make whole relief was based solely on its legal evaluation or value judgment that Fanucchi's litigation of the abandonment issue herein—which was premised on UFW's 24 years of inactivity—did not further the policies and purposes of the ALRA. With all due deference to the Board regarding ALRA policy issues, we believe the Board was clearly wrong in its legal conclusion that Fanucchi's litigation efforts in this matter did not further the purposes and policies of the ALRA, as we now explain.

Although it is true that the Board's prior decisions stated that even "a prolonged period" of union absence or inactivity did not create an abandonment defense to the employer's duty to bargain (*e.g.*, *San Joaquin Tomato Growers, Inc.*, *supra*, 37 ALRB No. 5, p. 4; *Pictsweet Mushroom Farms*, *supra*, 29 ARLB No. 3, p. 14), no appellate court has (or had) decided that specific issue until, in this case, Fanucchi sought and obtained judicial review. Ultimately, it is the courts that must ascertain the intent of a statute so as to effectuate the purpose of the law. (*J.R. Norton Co.*, *supra*, 26 Cal.3d at p. 29; *Bodinson Mfg. Co. v. California E. Com.*, *supra*, 17 Cal.2d at p. 326 [the courts state the meaning of a statute finally and conclusively].) Moreover, notwithstanding the Board's prior decisions, we believe the question of how an appellate court would actually rule when confronted with the novel situation of such *long-term* union absence or <u>egregious</u> inactivity (*i.e.*, 24 years) as alleged here was far from certain.[12] Additionally, the question of UFW abandonment (or apparent abandonment) of bargaining units is not an isolated incident limited to the present case, but apparently has been a recurring problem, as reflected by the Board's own cases and the cases before this court in which the issue has been raised. For all of these reasons, and despite the Board's prior attempts to summarily dispose of the issue, the question has remained to a

12 As noted by Fanucchi, neither the Board nor the courts would be unconcerned that a union has apparently disregarded its statutory responsibilities to a bargaining unit for over two decades, as occurred here. It was not unreasonable to raise the issue of abandonment here, since such extreme dereliction would seem to be antithetical to the ALRA policies of having actual employee representation by the elected union and of promoting the collective bargaining relationship. (*See*, *e.g.*, §§ 1140.2, 1152, & 1155.2, subd. (a).)

significant degree unsettled and controversial. Against this larger backdrop, it is clear to us that judicial review of the issue was reasonably necessary and helpful to all parties concerned, including both unions and agricultural employers, for the beneficial purpose of clarifying and/or confirming the law. Therefore, Fanucchi's advancement of this litigation plainly furthered the broader purposes of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue. Accordingly, we conclude that the Board prejudicially erred when it ordered make whole relief in this case, and that portion of the Board's order is hereby reversed.

VI. Other Issues Need Not Be Reached

In view of the fact that we have decided, as a matter of law, the question of the nonavailability of Fanucchi's abandonment-related defenses to the duty to bargain, and that we have further concluded, as a matter of law, that make whole relief was improper in this case, we find it unnecessary to address Fanucchi's remaining contentions. Those remaining contentions, largely dealing with procedural and due process issues would not—even if correct—change our disposition of the principal legal issues as indicated above or otherwise require a different outcome. We therefore do not reach those additional matters.

DISPOSITION

The portion of the Board's decision in *Tri-Fanucchi Farms*, *supra*, 40 ALRB No. 4, which imposed make whole relief against Fanucchi is reversed. The balance of the Board's decision is affirmed. Each party to bear its own costs.

KANE, J.

WE CONCUR:

HILL, P.J.

LEVY, J.

DECISION AND ORDER OF THE CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD (APRIL 23, 2014)

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

TRI-FANUCCHI FARMS,

Respondent,

v.

UNITED FARM WORKERS OF AMERICA,

Charging Party.

Case Nos. 2013-CE-008-VIS, 2013-CE-014-VIS,
40 ALRB No. 4 (April 23, 2014)

Before: William B. Gould IV, Chairman,
Genevieve A. Shiroma, Member,
Cathryn Rivera-Hernandez, Member

On November 5, 2013, Administrative Law Judge Thomas Sobel (the "ALJ") issued the attached decision in the above-captioned matter, Thereafter, Respondent Tri-Fanucchi Farms (the "Employer") timely filed exceptions to the AKH's decision along with a brief in support of its exceptions. Charging Party United Farm Workers of America (the "UFW") and the General Counsel timely filed reply briefs responding to the Employer's exceptions.

The Agricultural Labor Relations Board (the "ALRB" or the "Board") has considered the record and the ALJ's decision in light of the Employer's exceptions and the parties' briefs and has decided to adopt the ALJ's rulings, findings, and conclusions except as modified herein. We find, in agreement with the ALJ, that the Employer refused to bargain with the UFW and refused to provide information relevant to bargaining in violation of Labor Code section 1153(a) and (e). We further agree with the ALJ that, under the circumstances of this case, an award of makewhole is appropriate.

1. Background

The Employer is an agricultural employer within the meaning of the Agricultural Labor Relations Act (the "ALRA" or "Act"). The UFW is a labor organization within the meaning of the ALRA and was certified by the ALRB as the bargaining representative of a bargaining unit of the Employer's agricultural employees in 1977.

Despite the UFW having been certified for over 35 years, the parties have never reached an initial contract. Some bargaining occurred after the UFW was certified. However, in 1981, the Employer refused to bargain with the UFW citing the results of a poll it had conducted among its employees that purportedly showed that the UFW had lost the support of a majority of the bargaining unit. (*See Joe G. Fanucchi & Sons/Tri-Fanucchi Farms* (1986) 12 ALRB No. 8.) The Board found that the Employer's refusal to bargain was unlawful and ordered it to bargain with the UFW and pay bargaining makewhole in 1986. (*Ibid.*)

The Employer claims that in 1988 it "indicated its willingness to bargain with the UFW." [Answer to Corrected Consolidated Complaint ("Answer") p. 2.]

The Employer further claims that the UFW told the Employer that it would set a date for bargaining when its negotiator returned from vacation but that the UFW never followed up on this communication and there was no bargaining for the next roughly 24 years. [Answer p. 2.]

On September 28, 2012, the UFW sent a letter to the Employer in which it asserted its status as the collective bargaining representative, proposed dates for collective bargaining negotiations and requested 10 categories of information from the Employer, including employee contact information. [Answer ¶ 6-7.] On October 19, 2012, the Employer sent a letter to the UFW in which it refused to bargain with the UFW. [Answer ¶ 5.] The Employer has admitted that it has not provided any of the requested information and that it has refused to meet with the UFW. [Answer ¶ 4-6]

The Employer contends that there were further communications between itself and the UFW after its October 19, 2012 refusal to bargain regarding potential resolution of the dispute, which continued into the spring of 2013. [Answer p. 3.] However, on March 7, 2013, the UFW filed the charge in 2013-CE-008-V1S alleging that the Employer refused to provide information in violation of the Act. On April 16, 2013, the UFW filed the charge in 2013-CE-014-VIS alleging that the Employer refused to bargain in violation of the Act.

On September 5, 2013, a corrected consolidated complaint (the "Complaint") was issued by the General Counsel alleging that the Employer unlawfully refused to bargain and refused to provide information in violation of Labor Code section 1153(e). [Complaint

¶15-18] The Complaint also alleged that the Employer violated Labor Code section 1153(a) by refusing to make itself available for bargaining at reasonable times and by refusing to provide employee contact information. [Complaint ¶ 11-14.] The Complaint prayed for an order directing the Employer to cease and desist from its unlawful conduct, to respond to the information requests and schedule bargaining dates, and for bargaining makewhole.

In its answer to the Complaint (the "Answer"), the Employer substantially admitted the factual allegations against it, including, specifically, that it refused to bargain with the UFW and failed to respond to the UFW's information requests. However, the Employer asserted that, at the time that it engaged in the alleged conduct, the UFW was no longer the bargaining representative because it had abandoned the bargaining unit and also alleged that relief was barred under the doctrines of unclean hands and laches. [Answer p. 5-6 (6th through 8th affirmative defenses).]

On October 16, 2013, the General Counsel filed a motion in limine seeking to exclude evidence relating to the Employer's asserted abandonment defense on the grounds that such a defense is not legally recognized under the ALRA. At the October 21, 2013 hearing, the ALJ heard arguments on the motion in limine and indicated that he intended to grant it. [Tr.18:2-19:3.] The ALJ concluded the unavailability of an abandonment defense eliminated the Employer's equitable defenses of unclean hands and estoppel as well. [Tr. 19:4-7.] Finally, the ALJ concluded that, given that the Employer's defenses had been stricken, he was vested with the inherent power to grant judgment on the pleadings in favor of the General Counsel and the UFW. [Tr. 21:15-22:7.]

No post-hearing briefs were filed. On November 5, 2013, the ALJ issued his decision in the case, to which the ALJ attached his ruling on the General Counsel's motion in limine. In his ruling on the motion in limine, the ALJ stated that he was treating the motion as "akin to a demurrer to the answer or a motion for judgment on the pleadings."[1] [Ruling on General Counsel's Motion In Limine p. 11-12.] The ALJ concluded that "a defense of abandonment that relies solely on either a prolonged period of union inactivity in bargaining or on a union's long 'absence from the fields', does not establish either defunctness or disclaimer of interest and, therefore, that such inactivity or absence is not a defense to a refusal to bargain charge." [*Id.* at 14.]

The ALJ also addressed and rejected the Employer's equitable defenses, namely, laches, unclean hands, and equitable estoppel. The ALJ found that each of these defenses required that the Employer demonstrate that it was injured by the UFW's conduct. [Ruling on General Counsel's Motion In Limine p. 22.] The ALI noted that the Board had previously held that an employer's freedom from the bargaining obligation is not an injury, but rather a benefit. [*Id.* at 22 (citing *Joe G. Fanucchi & Sons/Tri-Fcmucchi Farms, supra,* 12 ALRB No. 8.)] Accordingly, because the Employer did not demonstrate harm, the ALJ rejected the equitable defenses.

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[1] In so doing, the ALJ assumed the facts that the Employer sought to prove to be true and examined whether those facts constituted a viable defense. [Ruling on General Counsel's Motion in Limine p. 11-12.]

In the decision itself, the ALJ found that, with the Employer's abandonment and equitable defenses having been dismissed, what remained were the Employer's admissions that it had refused to respond to the information request and had refused to meet and bargain. Accordingly, the ALJ found that the unfair labor practices alleged in the Complaint were established. [Decision of the Administrative Law Judge ("ALJ Dec.") p. 3-4.] Additionally, the ALJ found that the Employer should be made to pay bargaining makewhole. [ALJ Dec. 4-6.]

On November 20, 2013, the Employer filed 15 exceptions to the ALJ's Decision and a brief in support thereof. On December 16, 2013, both the UFW and the General Counsel filed reply briefs opposing the exceptions.

2. Discussion

a. The ALJ's Authority to Consider Dispositive Motions

We must first consider the Employer's contention that the ALJ lacked the authority to treat the General Counsel's motion in limine as a demurrer to the answer or motion for judgment on the pleadings. [Exception Nos. 6 & 7.] The Employer argues that such a motion is not provided for in the Board's regulations and that Board regulation section 20243 required the ALJ to permit the Employer to submit evidence before granting a motion for a decision based on lack of evidence.[2] [Respondent's Brief In Support

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[2] The Board's regulations are set forth at California Code of Regulations, title 8, section 20100 *et seq.*

of Exceptions to the Decision of the Administrative Law Judge ("R. Br.") p. 4.]

Board regulation section 20243 contains the procedure for a "motion for decision for lack of evidence." (Cal. Code Regs., tit. 8, § 20243(a).) While Board regulation section 20243 does describe a motion akin to a motion for directed verdict or motion for judgment as a matter of law (*i.e.* a dispositive motion made after a party has rested its case), it does not preclude the making of other types of motions. In fact, Board regulation section 20262 empowers ALJs to generally "dispose of procedural requests, motions, or similar matters." (Cal. Code Regs., tit. 8, § 20262(g).) The Board has previously ruled that it "utilizes a procedure similar to civil summary judgment when no factual conflicts must be resolved prior to ruling on the legal rights of the parties?" (*Mario Saikhon, Inc.* (1989) 15 ALRB No. 8, p. 6.) (*See also F&P Growers Assoc.* (1983) 9 ALRB No. 22, p. 2-3 (considering general counsel's motion for summary judgment and to strike answer); *Bacchus Farms* (1978) 4 ALRB No. 26, p. 3 (considering motion for judgment on the pleadings).)'

The power of the ALJ to consider a demurrer to the answer or motion for judgment on the pleadings is reasonably encompassed within the ALJ's authority to regulate hearings and dispose of motions and is consistent with prior Board decisions that have allowed motions in the nature of summary judgment and judgment on the pleadings. Accordingly, Exception Nos. 6 and 7 are dismissed.

b. The Employer's Abandonment And Equitable Defenses

i. Abandonment

The Employer asserts that, in 1988, it informed the UFW that it was willing to bargain and that the UFW indicated that it would schedule bargaining dates when its negotiator returned from vacation. The Employer contends that the UFW took no further action to schedule bargaining and bargaining remained in hiatus for roughly the next 24 years. [R. Br. p. 2-31 Based upon this, the Employer argues that the UFW should be held to have forfeited its certification by abandoning the bargaining unit. [R. Br. p. 8-9.]

We, like the ALJ, reject the Employer's abandonment defense. The Board's previous decisions have been very clear that, under the ALRA, the fact that a labor organization has been inactive or absent, even for an extended period of time, does not represent a defense to the employer's duty to bargain. (*Dole Fresh Fruit Co., Inc.* (1996) 22 ALRB No. 4; (2003) 29 ALRB No. 3; *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5.) The Board recently reaffirmed its holdings on abandonment and confirmed 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. (*Arnaudo Brothers, LP* (2014) 40 ALRB No. 3 pp. 9-12.)[3] These principles stem from

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[3] We concur with the ALJ that, insofar as our decisions have referred to a union's inability or unwillingness to represent a bargaining unit, those concepts are coextensive with defunctness

the legislative intent inherent in the ALRA that the power to select and remove unions as bargaining representatives should reside with agricultural employees and not with their employers. (*F&P Growers Assoc. v. Agricultural Labor Relations Board* (1985) 168 Cal. App.3d 667, 676.) The facts alleged by the Employer fall squarely within this well-established rule.

In cases where a union is failing to adequately carry out its duties as bargaining representative and employees' appeals to the union itself are insufficient to resolve the situation, the remedy for such dereliction is for the members of the bargaining unit to seek to decertify the union or replace it with another union through the ALRA's election procedures. Bargaining unit members may also, where appropriate, seek to enforce their union's duty of fair representation. (*Vaca v. Sipes* (1967) 386 U.S. 171.) While these procedures are unavailable to the employer, it need not stand idly by if a certified union refuses to come to the bargaining table but may use the ALRA's unfair labor practice procedures to assert a claim that a union is unlawfully refusing to bargain. *(Dole Fresh Fruit Co., Mc., supra,* 22 ALRB No. 4, pp. 17-18.) Additionally, a union that fails to respond to changes to terms and conditions of employment proposed by the employer may be held to have waived its right to bargain over those changes, privileging the employer to implement them without bargaining. (*Ibid.*) However, what the employer may not do is impose its own choice on employees by unilaterally determining that it will no longer bargain with the union.

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and disclaimer. (*See Arnaudo Brothers, LP, supra,* 40 ALRB No. 3, p. 10 fn. 2.)

> Accordingly, the Employer's claim that it was not obligated to bargain with the UFW due to an alleged period of inactivity by the UFW does not represent a legally cognizable defense to the duty to bargain under the ALRA. The ALJ did not err in rejecting that defense.

ii. Laches

Exception 15 challenges the ALJ's decision to reject the Employer's laches defense on the grounds that the defense requires proof of injury, which the Employer did not show. Although the Employer filed an exception on this issue, its supporting brief contains no argument or authority on this issue. Therefore, the Employer has waived this issue.

Even if the Employer had preserved this issue, laches is not available as a defense to an unfair labor practice allegation under the ALRA. When the ALRB pursues unfair labor practice allegations, it acts in the public interest to effectuate the policies underlying the ALRA. The benefits that the Board's orders confer on individual employees, "are only incidental to the exercise of its power to effectuate the policies of the [ALRA] by remedying conditions created by unfair labor practices." (*Stamoules Produce Co.* (1990) 16 ALRB No. 13, p. 4 (*quoting Colorado Milling and Elevator Co.* (1939) 11 NLRB 66, 68.) (bracketed material supplied)) "It is well settled that the equitable principle of laches is not applicable to the government acting in the public interest." (*Ibid.*) (*See also* R. *E. Dietz Co.* (1993) 311 NLRB 1259, 1265 (National Labor Relations Board ("NLRB") complaint alleging refusal to bargain "was issued to vindicate a public right, not a private right, so any actions of the Charging Party can in no way constitute laches, since laches does not run against the Government"); *Briggs Manufacturing Co.* (1947) 75 NLRB 569, 573 ("the equitable doctrine of laches is not applicable to the [NLRB] as a Government agency acting in the public interest") (bracketed material supplied).)

Furthermore, even if the defense of laches were available in an unfair labor practice case, we would find, in agreement with the ALJ that the defense was not established here. Although unreasonable delay is an essential component of the defense of laches, as the ALJ correctly noted, a showing of delay alone is not sufficient. It must also be shown that the delay caused prejudice to the other party. (*Marriage v. Keener* (1994) 26 Cal.App.4th 186, 191; *Gibson v. Mitchell* (1937) 9 Cal. 2d 718, 725-726 ("Laches is dependent not only upon delay, but also upon injury occasioned by the delay."); *Wilkerson v. Thomas* (1953) 121 Ca1.App.2d 479, 490 ("The doctrine of laches has been defined not merely as a delay in asserting one's rights, but such a delay as redounds to the disadvantage of another").)

In *Joe G. Fanucchi & Sons/Tri-Fanuechi Farms,* the Board rejected the Employer's argument that the UFW should be equitably estopped from pursuing refusal to bargain charges due to the UFW's delay in requesting bargaining. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 5-6.) The Board held that,

> [E]stoppel will not lie in this case since Respondent has not shown that any detriment resulted from its reliance on the Union's neglect of its representational responsibilities.

> To the contrary, Respondent was left free for extended periods to unilaterally determine the wages, hours, and working conditions of its employees without being called to task by the Union, either across the bargaining table or via the Board's processes.

(*Id.* at 6.)

> The Employer does not explain how it was harmed by the UFW s delay in asserting its bargaining rights except to allege that the UFW filed a notice of intent to take access in 1990 and again in 1992. While the Employer claims that these actions caused "great confusion" this would not constitute harm sufficient to invoke the doctrine of laches, even if available, particularly because the events cited by the Employer would have occurred some 20 years prior to the UFW's renewed demand for bargaining.

iii. Unclean Hands

The Employer excepts to the ALJ's rejection of its unclean hands defense. However, like the defense of laches, the equitable defense of unclean hands is not available as a defense to unfair labor practice allegations under the ALRA. In *United Farm Workers of America* (*California Table Grape Commission*) (1993) 19 ALRB No. 15, the Board noted that the United States Supreme Court had held that "Dubious character, evil or unlawful motives, or bad faith of the informer" does not deprive the NLRB of its jurisdiction to conduct inquiries into unfair labor practice charges and rejected the proposition "that similar misconduct by a litigant before this Board would deprive the Board of its jurisdiction." (*Id.* at p. 7 (citing *National Labor Relations Board v. Indiana & Michigan Electric Co.* (1943) 313 U.S. 9).) This ruling is in accord with NLRB precedent holding that the unclean hands of a charging party is not a defense to an unfair labor practice allegation under the National Labor Relations Act ("NLRA") because unfair labor practice proceedings "are not for the vindication of private rights, but are brought in the public interest and to effectuate the statutory policy." (*Cal. Gas Transport, Inc.* (2006) 347 NLRB 1314, 1326; *International Brotherhood of Teamsters* (*Island Dock Lumber, Inc.*) (1963) 145 NLRB 484, 492 fn. 9.) It is also in accord with California state court precedent holding that the unclean hands defense does not apply where the defense "would result in permitting an act declared by statute to be void or against public policy." (*Kofsky v. Smart & Final Iris Co.* (1955) 131 Cal.App.2d 530, 531-532 (no unclean hands defense to allegation that defendant violated that Unfair Practices Act); *Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, 279, 279 (unclean hands defense not available to an allegation of violation of the Immigration Consultants Act as it would "undermine the protective purposes of the legislation."); *Pepper v. Superior Court* (1977) 76 Cal.App.3d 252, 259 ("The bar of unclean hands is limited, if policy considerations favor substantive relief.").)

> Even if unclean hands constituted a defense to an unfair labor practice allegation under the ALRA, the Employer failed to establish the defense. California courts have required a showing of prejudice in connection with the unclean hands defense. (*See Soon v.*

> *Beckman* (1965) 234 Ca1.App.2d 33. 36 ("The unconscionable conduct must be of such a nature that it would, if permitted to go unnoticed, result in prejudice to the other party."); *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978 ("The misconduct must prejudicially affect the rights of the person against whom the relief is sought.") (internal punctuation omitted); *Brown v. Grimes* (2011) 192 Cal. App.4th 265, 283-284 (unclean hands defense rejected due to lack of prejudice).) As noted above, the Board has held that inactivity by a union that leaves the employer free to unilaterally determine terms and conditions of employment does not constitute a detriment to the employer. (*Joe G. Fanucchi & Sons/ Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 5-6.)

iv. Exclusion of Evidence Concerning Abandonment and Equitable Defenses

The Employer asserts that it should have been permitted to introduce evidence in support of its abandonment, laches, and unclean hands defenses. The ALJ did not admit any of the employer's proffered evidence on these issues. As discussed above, abandonment is not a defense to the duty to bargain with a certified union under the ALRA. Accordingly, any evidence offered in support of such a defense would be irrelevant and the ALI properly excluded it. The same conclusion applies with respect to laches and unclean hands, neither of which constitutes a defense to unfair labor practice allegations under the ALRA. Furthermore, as discussed above, even if they applied, both of these defenses require a showing of harm. Other than claiming that it was confused when the UFW filed notices of intent to take access, the Employer did not identify any evidence, or even a theory, as to how it was harmed by the alleged absence of the UFW. As noted previously, the Board has held a union's inactivity that leaves the employer free to set terms and conditions of employment without bargaining does not constitute harm to the employer. (*Joe G. Fanucchi & Sons/Fanucchi Farms, supra,* 12 ALRB No. 8, p. 6.) Accordingly, even if the defenses of laches and unclean hands were available, the ALJ did not err by not admitting the Employer's evidence.

For the foregoing reasons, the ALJ properly rejected the Employer's abandonment, laches, and unclean hands defenses and properly declined to take evidence on those issues. Accordingly, Exceptions 3-5, 9 & 12-15 are dismissed.

c. Disclaimer of Interest

The Employer takes exception to the ALJ's failure to find that "by its 24 years of failing to fulfill its statutory duty that the [UFW] did not exhibit a 'disclaimer of interest.'" [Exception No. 11 (bracketed material supplied).] Respondent, however, did not allege in the Answer that the UFW disclaimed interest in representing the bargaining unit, nor did it urge such a theory during the hearing. The issue, therefore, was not preserved. Furthermore, even if the Board were to consider the Employer's exception, we would dismiss it. In order to be effective, "a disclaimer by a union must be unequivocal and must have been made in good faith." (*Arnaudo Bros., LP, supra,* 40 ALRB No, 3, p. 14 (internal punctuation omitted).) In order for a disclaimer to be effective, the union's conduct "must not be inconsistent with its alleged disclaimer." (*Ibid.*) The party asserting disclaimer of interest bears the burden of proving the disclaimer occurred. (*Ibid.*)

The Employer devotes almost no attention in its brief to its disclaimer argument. It does not cite to any statement by the UFW that it claims constituted an unequivocal disclaimer of interest in representing the bargaining unit. The Employer claims that the UFW filed a notice of intent to take access in 1990 and again in 1992 and argues that this shows that the UFW did not believe itself to be the certified bargaining representative. [R. Br. p. 11.] However, the filing of the notices was not an unequivocal statement that the UFW no longer wished to represent the unit. In fact, as the ALJ pointed out, the Board in *Dole Fresh Fruit* treated the filing of access notices by a certified union as evidence that the union had continued interest in representing the employees. (*Dole Fresh Fruit Company, supra,* 22 ALRB No. 4, p. 13.) (*See also Oil Capitol Electric* (1992) 308 NLRB 1149, 1149 (representation petition filed by union when it was already certified was due to a mistake of fact and did not provide a basis for employer to withdraw recognition); *Sierra Development Company* (1977) 231 NLRB 22, 23 (although union was attempting to organize employees it was certified to represent, employer did not have a good faith basis to question union's continued majority support).)

The Employer contends that it should have been permitted to introduce evidence on the issue of disclaimer. As noted, however, the Employer did not contend at the hearing that the UFW disclaimed interest. Furthermore, the Employer does not claim that, apart from the alleged bargaining hiatus and filing of notices of intent to take access by the UFW, there was any evidence of a disclaimer of interest. None of the documentary evidence the Employer sought to introduce related to a statement of a disclaimer, nor did the Employer contend that any of its witnesses would testify to such a statement.

The Employer's case for disclaimer appears to be grounded almost exclusively on its allegation that the UFW did not engage in bargaining for over 20 years. However, as discussed above, the Board has been clear that an extended bargaining hiatus does not result in the forfeiture of a union's certification. It follows that such conduct, standing alone, also does not constitute a disclaimer of interest.

Accordingly Exception No. 11 is dismissed.

d. Bargaining Makewhole

The Employer excepts to the ALJ's decision to award bargaining makewhole. [Exception No. 8.] The Employer also specifically excepts to the ALJ's decision not to take into account that the Employer's efforts to expedite the processing of the case, which efforts, the Employer argues, were allegedly stymied by the General Counsel and the UFW resulting in substantial delay. [Exception No. 10; R. Br. p. 13.] Finally, the Employer argues that it should have been permitted to introduce evidence establishing that its refusal to bargain represented a good faith "technical refusal to bargain" to test the UFW's certification.[4] [Exception

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[4] Specifically, the Employer argues that had it been able to present witnesses, "it would have been able to further demonstrate its good faith in engaging in the technical refusal to bargain and its

No. 2; R. Br. p. 12] In this regard, the Employer argues that the case is governed by *J.R. Norton Co. v. Agricultural Labor Relations Board* (1979) 26 Ca1.3d 1.

Bargaining makewhole is authorized by Labor Code section 1160.3 which states that the Board may enter orders in unfair labor practice cases "making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain." (Lab. Code § 1160.3.) In *J.R. Norton,* the California Supreme Court held that the Board may not automatically award makewhole in cases where an employer refuses to bargain in order to challenge the validity of an election. The court held that the Board must "determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted." (*J.R. Norton Co. v. Agricultural Labor Relations Bd, supra,* 26 Ca1.3d 1, 39.)

In *F&P Growers Assoc., supra,* 9 ALRB No. 22, the Board clarified that the *J.R. Norton* "reasonableness and good faith" analysis does not apply outside of the context of an employer's refusal to bargain for the purpose of seeking court review of a certification election. When an employer refuses to bargain "but neither the conduct of the election nor the agency's decision

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efforts to expedite the matter and the dilatory tactics of the UFW and General Counsel that were designed to thwart [the Employer's] efforts to expedite the matter." [R. Br. pp. 13-14 (bracketed material supplied).]

to certify the union is at issue, the 'reasonableness' of the employer's litigation posture and the employer's 'good faith' do not control oar decision as to whether to impose makewhole." (*F&P Growers Assoc., supra,* 9 ALRB No. 22, p. 7; affirmed at *AO Growers Ass'n v. Agricultural Labor Relations Bd., supra,* 168 Cal.App.3d 667.) Instead, the Board is to "consider on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain." (*Id.* at 7-8.) Except in cases where the employer's position furthers the policies and purposes of the ALRA, "the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain." (*Id.* at 8.)

Here, because the Employer is not seeking review of a certification election, *F&P Growers* applies, rather than *J.R. Norton.* The issue, therefore, is whether the public interest in the Employer's position outweighs the harm done to employees by its refusal to bargain. The position taken by the Employer is based principally on its contention the UFW forfeited its certification by abandoning the bargaining unit. As discussed above, this position is contrary to over 30 years of Board precedent holding that abandonment is not a defense to the duty to bargain. Accordingly, the Employer's position cannot be said to further the policies and purposes of the ALRA. (*See Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 9-10 (ordering makewhole where Employer raised defenses that had already been rejected under existing case law).)

The Employer asserts that the ALJ failed to consider the Employer's efforts to expedite the processing of the case, complaining that neither the UFW nor the General Counsel would agree to submit the case on stipulated facts. [R. Br. p. 13.] While parties are given the option under the Board's regulations to file stipulated facts with the Board where there is no conflict in the evidence, the use of this procedure is not mandatory.[5] (Cal. Code Regs., tit, 8, § 20260.) The Employer further argues that the UFW delayed filing a charge after the Employer refused to bargain. The charge was, however, filed within the applicable, and relatively short, six-month statutory limitations period and the UFW was not required to adhere to the Employer's timetable in filing its charge. (Lab. Code § 1160.2) The Employer argues that, "for unexplained reasons," the General Counsel delayed issuing a complaint for approximately five months after the UFW filed its charge. [R. Br. p. 13.] While the Employer claims in its brief that this conduct constituted "dilatory tactics" the Employer did not assert that there was any evidence of such other than the bare fact of the "delay" itself. It is well-established that agency delay does not toll, much less negate, an employer's makewhole liability.[6] (*San Joaquin Tomato*

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[5] Furthermore, given that the Employer's case revolved around an abandonment theory, and the General Counsel correctly regarded the alleged facts relating to that theory as irrelevant, it appears that there would have been a reasonable basis for the General Counsel and the UFW to decline to stipulate to such facts.

[6] This is not to say that evidence of delay and/or dilatory tactics would never be sufficient to negate or reduce a makewhole award. We have previously held that delays in processing a case may become sufficiently extreme to justify modifying the amount of makewhole that would otherwise be owed. (*San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 4.)

Growers, Inc. (2012) 38 ALRB No. 4, p. 20-21; *Harding Glass Co., Inc.* (2002) 337 NLRB 1116, 1118 (two-year delay by NLRB in issuing amended back-pay specification did not toll employer's back-pay liability); *National Labor Relations Rd. v. J.H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 265 ("the [NLRB] is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.") (bracketed material supplied).)

Based upon our review of the facts and circumstances and the equities of this case, we conclude, in agreement with the ALJ that an award of make-whole is appropriate and that, under the circumstances presented in this case, "the employer, not the employees, should ultimately bear the financial risk of [the Employer's] choice to litigate rather than bargain." (*F&P Growers Assoc., supra,* 9 ALRB No. 22, p. 8 (bracketed material supplied).)

Accordingly, Exception Nos. 2, 8, and 10 are dismissed.[7]

i. Calculation of Interest on Makewhole Award

In paragraph 2(c) of the ALJ's recommended order, the ALJ stated that makewhole was to be awarded with interest to be calculated in accordance with the Board's decision and order in *E.W. Merritt Farms* (1988) 14 ALRB No. 8. The Board has held

[7] Inasmuch as we have found that each of the Employer's defenses were either not preserved, not legally cognizable, or, even, taking the Employer's allegations as true, were insufficient, we also dismiss Exception No. 1.

that it now follows the more recent NLRB precedent set forth in *Kentucky River Medical Center* (2010) 356 NLRB No. 8 as clarified in *Rome Electrical Services, Inc.* (2010) 356 NLRB No. 38 calling for interest to be calculated on a compounded daily basis rather than the simple interest method formerly used by the NLRB and the ALRB. (*H&R Gunland Ranches, Inc.* (2013) 39 ALRB No. 21, p. 6 fn. 4.) The ALJ s recommended order shall be modified accordingly.

ORDER

The Employer's exceptions are DISMISSED. The decision and order of the Administrative Law Judge is AFFIRMED except as noted above.

DATED: April 23, 2014

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

CHAIRMAN GOULD, concurring:

The problem of agency delay is a concern I have had for decades. In recent years, it has posed problems both vexatious and perilous to effective labor law administration. In my view, the problem of agency delay is as pernicious as dilatory conduct by private parties which appear before administrative agencies. The federal judiciary, in denying statutory relief has had occasion to characterize some NLRB delays as "inexplicable' (*NLRB v. Thin, Inc.* (7th Cir. 1992) 980 F.2d 1137, 1141 (Judge Richard Posner speaking of an eight year delay by the NLRB); *see generally* William B. Gould IV, *Labored Relations: Law, Politics, and the NLRB* (2000) and William B. Gould IV, *A Primer on American Labor Relations* (5th ed. 2013).) That must never happen here at the ALRB.

Although there is no time limitation for agency action in a ULP matter under the NLRA, and similarly no time limitation under the ALRA, as the U.S. Supreme Court noted "inordinate delay in any case is regrettable." (*NLRB v. Katz* (1961) 369 U.S. 736, 748 fn. 16.) I concur that the facts of this particular case do not show that there was a delay that would warrant denying the remedy ordered by the Board. I write separately to emphasize that the need for prompt and expeditious agency action applies not only to the General Counsel of the ALRB—who was alleged in this case not to have met the above-noted standard — but also to the Board itself, and that under other facts showing delay, the Board risks giving up important remedies. (*Emhart Industries, Hartford Division v. NLRB* (2nd Cir. 1990) 907 F2d 372, 378; *NLRB v. Ancor Concepts* (2nd Cir. 1999) 160 LORM 2304, 2308; *Local Joint Executive Bd. of Las Vegas v. NLRB* (9th Cir. 2011) 657 F.3d 865, 867; *NLRB v. Int'l Bhd. Of Teamsters Local 251* (1st Cir. 2012) 691 F.3d 49, 61; *NLRB v. Mountain Country Food Store* (8th Cir. 1991) 931 F.2d 21; *NLRB v. Hanna Boys Ctr.* (9th Cir. 1991) 940 F.2d 1295, 1299.) The public deserves a vigilant Board, and I intend to meet that standard myself and facilitate its implementation while I serve here in Sacramento.

DATED: April 23, 2014

William B. Gould IV, Chairman

DECISION OF THE ADMINISTRATIVE LAW JUDGE (NOVEMBER 5, 2013)

STATE OF CALIFORNIA,
AGRICULTURAL LABOR RELATIONS BOARD

IN THE MATTER OF TRI-FANUCCHI FARMS,

Respondent,

v.

UNITED FARM WORKERS OF AMERICA,

Charging Party.

Case Nos. 2013-CE-008-VIS 2013-CE-014-V1S

Before: Thomas Sobel, Administrative Law Judge

Appearances:

General Counsel
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Charging Party

Edgar Ivan Aguilasocho
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United Farm Workers Of America
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Respondent
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DECISION OF THE ADMINISTRATIVE LAW JUDGE

Thomas Sobel, Administrative Law Judge: This case was heard by me on October 21, 2013 in Visalia, California.

JURISDICTION

By a complaint issued on September 5, 2013, General Counsel alleged that Tri-Fanucchi (hereafter Respondent) refused to provide information to, to meet with, and to recognize the United Farmworkers of America, (UFW) AFL-CIO, (hereafter UFW or the Union) as the collective bargaining representative of its employees.

FACTS

By answer dated August 27, 2013,[1] Respondent admitted that it is an agricultural employer, that the UFW is a labor organization under the Act, and that the UFW was certified as the collective bargaining representative of its employees in 1977. Respondent admitted that on or about September 28, 2012, the

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1 As noted in the attached ruling on the Motion in Limine, in speaking of Respondent's Answer, I am also referring to any averments in Respondent's Explanation and Background Information contained within it, as well the Exhibits referred to the Background Information. Board Regulations permit explanations to be included in answers. *See*, 8 CCR Section 20232.

UFW requested that it provide information; that on or about September 28, 2012, the UFW requested bargaining; and that on or about October 19, 2012, Respondent refused to recognize and bargain with the UFW in order "to seek judicial review of the status of the UFW as the exclusive bargaining representative of Respondent's employees." Respondent's refusal was based upon the grounds that, by the Union's lack of representational activity from 1988 until 2012, it must be held to have abandoned the unit and, as a result, Respondent is justified on both statutory and equitable grounds in withdrawing recognition from it.

DECISION

In advance of hearing, General Counsel filed a Motion in Limine to exclude any evidence relating to the conduct of the Union prior to the specific violations alleged in the complaint and admitted in the Answer. I heard the Motion at the opening of hearing and, ruling that the Board does not recognize the defense of abandonment,[2] I indicated I would issue an Order on the Pleadings and state my reasons in a written ruling, which is attached to this decision.

On the basis of Respondent's admissions, which remain after rejection of its defense, I find that the Union was certified as collective bargaining representative of Respondent's employees in 1977, that it made the requests for information and for meetings for the purpose of bargaining as alleged in the complaint, and that Respondent has refused to pro-

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[2] An effect of my ruling was to moot out any issue of the Union's compliance with Respondent's subpoena. The subpoena sought information concerning the Union's activities on behalf of, and correspondence unit employees from 1988 until 2012.

vide information to, and to recognize and bargain with, the Union. Although Respondent has not contended that the information requested by the Union was not relevant, I find that the information was presumptively relevant to the Union's function as bargaining representative. *See*, The Developing Labor Law, Fourth Ed. Vol. I, pp. 864-65. I also find that the failure to recognize and to meet with the Union constitute per se refusals to bargain. Labor Code Sections 1153(e), 1155.2.

Accordingly, I will order Respondent to provide complete and accurate responses to the Union's request for information and to recognize and meet with the Union for the purpose of collective bargaining.

General Counsel also seeks makewhole. Because the availability of the remedy requires the exercise of discretion in its application, I must consider Board precedent on the application of the remedy in cases like this. Respondent argues that since it has refused to bargain in order to obtain judicial review of the (continued) certification of the Union, and that it has sought review with dispatch, the standards applicable to technical refusals to bargain laid out in *JR Norton v Agricultural Labor Relations Board* (1979) 26 Cal 3d 1, should be applied.

The Board has repeatedly held that a challenge to the "continued" certification of a union of the kind made by Respondent here is not to be judged by Norton-technical-refusal-to-bargain standards. In *F & P Growers Association* (1983) 9 ALRB No. 22, the Board held:

> Where, as in the instant case, an employer refuses to bargain but neither the conduct of the election nor the agency's decision to

> certify the union is at issue, the "reasonableness" of the employer's litigation posture and the employer's "good faith" do not control our decision whether to impose makewhole.
>
> Cognizant of our duty under section 1160.3 to exercise discretion in the imposition of the makewhole remedy, we consider on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the Act, the employer, not the employees, should bear ultimately bear the financial risk of its choice to litigate rather than to bargain.

F & P Growers, supra, at pp. 7-8

This standard for imposing makewhole was upheld in *F & P Growers v. Agricultural Labor Relations Board* (1985) 168 Cal App 3d 676, 682. The Board applied this standard in *Joe G. Fanucchi Sons/Tri-Fanucchi* (1986) 12 ALRB No. 8, an earlier case in which this Respondent withdrew recognition on the grounds of "good faith doubt" and on some of the same equitable grounds upon which it relies in this case. The Board wrote:

> The standard for awarding makewhole, where section 1153(e) is violated in a "non-technical" bargaining situation, is applied on a case-by-case basis, according to the extent to which the public interest in the employer's position weighs against the harm done

> to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the Act, the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than to bargain. [Citation omitted.]
>
> As we held in *F & P* [9 ALRB No. 22] and *Ventura County Fruit Growers* [10 ALRB No. 45]: once the Board had clarified the exclusivity of the decertification process . . . the employer could claim no public interest in refusing to bargain based on good faith doubt of the Union's majority support, especially while its employees had sought no decertification or rival union election. . . . [L]itigation of the claim of loss of majority support could not possibly further the policies and purposes of the ALRA.

Joe G. Fanucchi/Tri-Fanucchi, supra, at pp. 6-7.

Since the Board construed the contentions in that case as essentially raising the defense of abandonment and rejected both that defense and the equitable defenses that depended on it, and ordered makewhole as the 'price' for raising them, I reject Respondent's contention that makewhole should not be imposed in this case. Paraphrasing the Board in the previous *Tri-Fanucchi* case: Since the Board has made it clear in *Dole Fresh Fruit Company* (1996) 22 ALRB No.4, that absent proof of union defunctness, disclaimer or a its ouster in an election, a once certified union remains certified, Respondent's efforts to obtain court resolution of an issue the Board regards as settled cannot be said 'to further the policies and purposes of the Act."

Makewhole shall be applied from October 19, 2012 when Respondent made known its intention to refuse to recognize the Union.

ORDER

Pursuant to Labor Code section 1160.3, Respondent Tri-Fanucchi Farms, Inc. its officers agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Failing and refusing to provide the United Farm Workers of America, AFL-CIO, with the information it requested in Paragraph 6 (A-J) of the Complaint, or with any other information relevant to its obligation to provide the Union with such requested information as may be necessary to fostering informed collective bargaining.

(b) Failing or refusing to recognize, meet with and to bargain collectively with the United Farm Workers of America, AFL-CIO (UFW) as the collective bargaining representative of its employees;

(c) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed in section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the purposes of the Act:

(a) Upon request, furnish to the Union the information it requested in Paragraph 6 (A-J) of the Complaint and all other information relevant to its obligation to provide the Union with such requested information as may be necessary to fostering informed collective bargaining.

(b) Upon request, meet and bargain collectively in good faith with the UFW, as the exclusive representative of its agricultural employees.

(c) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in E.W. Merritt Farms (1988)

14 ALRB No. 8, the period of said obligation to extend from October 19, 2012 and continuing thereafter until such time as Respondent commences good faith bargaining with the UFW which results in a contract or a bona fide impasse in negotiations.

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

(e) Mail copies of the Notice in all appropriate languages within 30 days after the issuance of this order to all employees employed by Respondents at any time after September 12, 2012 at their last known correct addresses.

(f) Provide a copy of the Notice to each agricultural employee hired to work for the Respondent during the twelve-month period following the issuance of a final order in this matter.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in all appropriate languages to all of its employees on company time and property at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity outside the presence of supervisors and management, top answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost at this reading and during the question and answer period.

(h) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

Dated: November 5, 2013
/s/ Thomas Sobel
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed by the United Farm Workers of America, in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by failing to supply the Union with information to which it was entitled under the Act

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;

2. To form, join or help a labor organization or bargaining representative;

3. To vote in a secret ballot election to decide whether you want a union to represent you;

4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;

5. To act together with other workers to help and protect one another; and

6. To decide not to do any of these things. Because you have these rights, we promise that:

WE WILL NOT refuse to provide the Union with information necessary to foster informed collective bargaining.

WE WILL NOT refuse to meet and to bargain collectively and in good faith with the Union as the representative of our employees for the purpose of collective bargaining.

WE WILL NOT in any like or related manner, refuse to bargain with the Union over wages, hours or conditions of employment, or interfere with, restrain or coerce employees from exercising their right under the Act DA1ED:

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board.

RULING ON GENERAL COUNSEL'S MOTION IN LIMINE

The grounds for asserting abandonment are contained in Respondent's Answer, which included a statement of "Background Information Concerning Respondent and the UFW's 24 Years of Abandonment", and in a letter by Respondent's attorney, Howard Sagaser, attached as Exhibit C to Respondent's "Background Information."[3] The background information states:

> In 1988, [Respondent] indicated its willingness to bargain with the UFW. In 1988, the UFW responded as soon as their negotiator came back from vacation, a date would be set. Thereafter, the UFW failed to follow through and there were no bargaining sessions. * * [M] ore than 35 years have passed since the election and more than 24 years have passed from the time [Respondent] indicated a willingness to bargain. The UFW never actually made a request to bargain until September of 2012. This raised questions regarding the Union abandoning a statutory duty to represent [Respondent's] employees and whether the UFW by requesting bargaining 35 years after the election had unclean hands. *See* Answer, Background Information Concerning [Respondent] and the UFW's 24 Years of Abandonment

[3] Title 8 CCR Section 20232 permits an answer to make an explanation of the circumstances surrounding the facts in the complaint.

The Sagaser letter states that the UFW filed Notices of Intent to Take Access in 1990 and 1992, and argues from the Union's resort to these procedures for taking organizational access that even the Union did not believe it was certified.

Upon receipt of the Motion, I reviewed Board precedent on the issue of abandonment as a defense. Based upon that precedent, I granted the motion on the grounds that the Board has repeatedly held that what Respondent sought to prove was nota defense to a refusal to bargain under the ALRA. In doing so, I was, in effect, treating the motion as akin to a demurrer to the answer or a motion for judgment on the pleadings, *See*, *e.g.*, *Edwards v Centex Real Estate Corp.* (1997) 53 Cal App 4th 15, *Miller v McLagen* (1947) 82 Cal App 2d 299; in other words, accepting the facts Respondent sought to prove as true, I concluded they did not establish a defense to its refusal to bargain. I, therefore, told the parties that I did not see what remained to be litigated in view of the admissions contained in Respondent's answer, and that I would issue an Order based upon the pleadings.

My reasons for granting the motion follow.

1. Hiatus in bargaining

a. Abandonment v. Defunctness or Disclaimer

Respondent's primary reason for refusing to provide information to, and to recognize and bargain with, the Union is the lack of any Union request to bargain between 1988, when Respondent made its last offer to bargain, and 2012, when the Union made the requests at issue in this case. According to Respondent, this hiatus means the Union must be held to have abandoned the unit and to justify Respondent's refusal to recognize it. (I will later consider the same contention framed in equitable terms.) In *Pictsweet Mushrooms Farms* (2003) 29 ALRB No. 3, the Board explained that "only two events aside from decertification in a Board election have been recognized as effective to terminate a certification: (1) a disclaimer by the certified union of its status as collective bargaining representative or (2) the union's "defunctness," *i.e.*,. its institutional death and inability to represent the employees. (*Bruce Church, Inc.* (1991) 17 ALRB No.1)[4]

In *San Joaquin Tomato Growers* (2011) 37 ALRB No. 5, the Board rejected a claim of abandonment based on the union's "absence from the fields" since 1998. It wrote:

> The Board noted that in *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4, it had clarified that under the ALRA, the concept of abandonment has no significance beyond a union disclaimer of interest or union defunctness. This is consistent with the established principle under the ALRA that employers can not withdraw recognition of the union based on a reasonable belief of loss of majority support. Rather, the contin-

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[4] "Defunctness" as a reason for cessation of the bargaining obligation rests on obvious grounds. Under the NLRA, a "disclaimer of interest" is generally deployed by a union to moot the existence of a question concerning representation when an employer seeks an election on the grounds that "one or more individuals or labor organizations have presented a claim for recognition. . . . " 29 USC Sec. 159(c)(1)(B), or where a union contends there is no recognitional or organizational object for its picketing under 29 USC 158(b)(7). *See*, *generally*, The Developing Labor Law, Fourth Ed. Vol., pp 511-513; Volume II, pp. 1575 et seq.

> ued representation status of the union may be tested via a decertification election. Moreover, in *Dole Fresh Fruit Company,* the Board specifically held that a period of dormancy in bargaining, even a prolonged period, did not establish "abandonment" of a certification. Finally, the Board pointed out that the presentation of an abandonment defense has no relevance where, as here, bargaining has resumed after a period of dormancy.[5]

I do not see how I can read these cases as saying other than that a defense of abandonment that relies solely on either a prolonged period of union inactivity in bargaining or on a union's long "absence from the fields", does not establish either defunctness or a disclaimer of interest and, therefore, that such inactivity or absence is not a defense to a refusal to bargain charge.

It remains to consider whether Respondent's has alleged facts sufficient to establish that the union was either defunct or had disclaimed of interest.

As indicated above, the Board has defined "defunctness" as "institutional death." I can take notice under Evidence Section 452(g), as a fact of common knowledge within the jurisdiction of the Board, that the Union was not "dead" during the period Respondent seeks to put its activities at issue in this case.

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[5] 'The Board's shorthand for the complex of doctrines elaborated above is that "a union remains certified until decertified."

The Board has never defined "disclaimer of interest,"[6] but the NLRB has identified effective disclaimers of interest in various contexts. Generally speaking, they must be "clear and unequivocal." Examples of disclaimers held "clear and unequivocal" are: the one made by the union in *VFL Technology Corp.* (2001) 332 NLRB 1443, in which the union advised the employer that "it renounced any intention to act as the employees" bargaining representative; that it would cease and desist from acting in any way as the employees' bargaining representative; and that it would not seek to be the employees' bargaining representative"; the one made by the union to the employer in *Miratti's Inc.* (1961) 132 NLRB 699, 700, that it was not "claiming to represent the employees 'in any way, shape or form"; and the one in *IBEW, AFL-CIO-CLC Local No. 58* (1978) 234 NLRB 633,636, in which the union telegrammed the employer that "IBEW Local 58 herewith disclaims, fully and unequivocally any and all representative rights with respect to [certain employees.]"

Respondent has not contended that the Union has "clearly and unequivocally" disclaimed interest along the lines of any of these models. Rather, its defense is that the lack of Union activity "raised questions about" the Union's abandonment of the unit. *See*, Para. 7, Declaration of Howard Sagaser, Exhibit C, attached to the Answer. This is the language of doubt and inference and not of certainty based upon the clear expression of the Union's intentions. Respondent has not, therefore, met either of the standards set by the Board to justify its withdrawal of recognition.

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[6] *But see*, *Dave Walsh Company,* (1988) 4 ALRB No, 84, in which the Board recognized one.

b. Partial v. Total Abandonment

At the hearing on the motion, Respondent contended that the *San Joaquin Tomato, Dole Fresh Fruit,* and *Bruce Church* cases are not apposite in that they are cases of 'partial abandonment', in which some representational activity took place, and that this case, by way of contrast, involves abandonment for the 'whole' period. I read those cases as finding that 'abandonment' cannot be proved as a matter of fact when a union shows some representational activity. I read the line of cases on abandonment beginning with *Dole Fresh Fruit Company,* and culminating in the most recent ones, as holding that the test of union "inability" to represent employees means only "union defunctness", that the test for union "unwellingness" to represent employees means only "union disclaimer", and, finally, that outside a showing of either of those facts, "abandonment" as a defense does not exist *as a matter of law.*

Respondent contends that no court has ever explicitly accepted the Board's rejection of any grounds for withdrawal of recognition besides defunctness or a disclaimer of interest or through the election process. However, the only cases Respondent has cited in support of its argument that abandonment is a defense to a refusal to bargain are cases involving union inactivity as one element of an employer's good faith doubt, and the Board's rejection of that defense has, in fact, been upheld in *F & P Growers Association v Agricultural Labor Relations Board* (hereafter *F & P Growers Association*) (1985) 168 Cal App 3d 677. Accordingly, to the extent abandonment is to be treated as springing full blown and independent from its role as an element of 'good faith doubt', Respondent's argument essentially reduces to the proposition that, even though a court has rejected the whole of the defense, it did not reject a part of it. The Board has not accepted this argument.

2. Filing Notices of Intent to Take Access

In refusing to treat evidence that the Union filed Notices of Intent to Take Access in 1990 and 1992 as proof of abandonment, I am relying on the Board's decision in *Dole Fresh Fruit Company, supra.* In that case, the UFW filed approximately six Notices of Intent to Take Access at various fields, including those farmed by Dole, where the Union was certified. While the Board acknowledged that the Union's seeking to take access under the Board's Organizational Access Regulation created confusion, the Board not only rejected the use of Organizational Access as proof of abandonment, but treated it as "demonstrating . . . continued interest in representing those same employees." *Dole Fresh Fruit Company, supra*, at p. 13; *San Joaquin Tomato Growers, supra*, (Defense of abandonment has no relevance <u>once</u> a union seeks to resume bargaining.); *see also*, *Oil Capitol Electric* (1992) 308 NLRB 1149 (Even if a union mistakenly seeks to have an election at a unit for which it is certified, such a mistake proves its representational interest.)

3. The Effect of Labor Code Section 1156.3(f)

Respondent made one other argument at the Pre-Hearing Conference that I have not been able to discover the Board has directly addressed and which, therefore, I must, namely, that the addition of Labor Code Section 1156.3(f) [Added by Stats. 2011, SB 126] undercuts the Board's rationale for its "certified until decertified rule." Under section 1156.3(f), the Board may now certify a union in cases where it finds both that employer misconduct 1) has affected the results of an election and 2) that such misconduct would "render slight" the chances of a new, fair election.

> The legislative history behind section 1156. 3(f) reveals that it was designed to provide a remedy for a problem identified by the Board in *Giumarra Vineyards Corporation* (2006) 32 ALRB No. 5. In that case, the Board noted a systemic problem with the adjudication of election objections where . . . there is an ostensible "No Union" victory and no parallel unfair labor practice charges are filed. In these instances, the Agricultural Labor Relations Act (ALRA) confers on the Board only the authority to uphold or set aside the election. The statute does not provide for any other sanctions for engaging in misconduct affecting the results of an election. * * * Where, as is common in complex cases involving numerous disputed issues, resolution of challenged ballots and election objections may take more than a year, the election bar has expired. Even where the disputed issues are resolved in less than a year, all that is at stake is a diminishing portion of the one-year election bar.
>
> In these circumstances, due to the lack of any sanctions other than setting aside the election, there is no method of removing the taint on employee free choice created by the election misconduct. As a result, the setting aside of the election merely returns the situation to the status quo before the elec-

> tion petition was filed, but with the residual effect on free choice from the misconduct. Obviously, this allows wrongdoers to profit from their misconduct even if it results in the setting aside of the election.
>
> Thus, we are forced to conclude that the election objections process where, as here, the tally of ballots indicates an ostensible "No Union" victory, is all but a meaningless exercise in terms of its [sic] affect on the rights of the parties and the employees. Regrettably, the statute in its present form does not provide the Board with remedial authority through which it might address this problem. Consequently, it is a problem that may be addressed only by the Legislature.

SB 126 sought "to address this [Giumarra] problem by requiring [among other things] the ALRB to issue bargaining orders if an employer is found to have coerced an election outcome, compelling the employer to negotiate with the labor organization aggrieved by the election misconduct." Senate Floor Analysis, SB 126, September 9, 2011, p. 7.

Respondent contends that, by permitting the Board to certify a union outside of its having won an election, the Act must also now be read to give the Board the authority to recognize employer withdrawals of recognition where there has been a prolonged failure on the part of the union to assert bargaining rights. However, the fact that the Legislature created a new avenue for certification in cases of <u>employer misconduct</u> casts no doubt on the Board's general rule that, absent defunctness or disclaimer, termination of representative status must be pursuant to explicit statutory procedures. *See*, *e.g.*, *Harry Carian Sales v Agricultural Labor Relations Board* (1985) 39 Cal 3d 209 (Board's issuance of bargaining orders as a remedy for employer misconduct, not inconsistent with the Act's "ordinary" electoral scheme, 39 Cal 3d at 228.)[7] Indeed, the addition of a remedy for employer mischief in the election process seems to reinforce the Board's rejection of abandonment as a defense since the ground of that rejection has always been that the Legislature intended to prohibit employers from playing any role in determining whether or not to bargain with a union. The Board's reasoning in this respect has been upheld in *F & P Growers Association v Agricultural Labor Relations Board* (*1985*) 168 Cal App 3d 667, 676:

> We therefore agree with the Board. . . . that the NLRA precedent [concerning good faith doubt] is inapplicable here because of California's legislative purpose and because of the differences in the two acts. *** [I]t does appear that Legislature's purpose in enacting the ALRA was to limit the employer's influence in determining whether or not it shall bargain with a particular union. Therefore, to permit an agricultural employer to rely on its good faith belief in order to avoid bargaining with an employee chosen agricultural union, indirectly would give the employer over those matters in which the Legislature clearly appears to have removed

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[7] The Board has also been given express statutory authority to decertify a union when a union has been found to have violated either state or federal anti-discrimination laws. Labor Code Section 1156.3(h)(1)and (2.)

> employer influence. This court will not permit the agricultural employer to do indirectly, by relying on the loss of majority support defense, what the Legislature has clearly shown it does not intend the employer to do directly.

Ibid. [8]

Finally, to construe Section 1156.3(f) in the way Respondent would have me construe it would be inconsistent with the procedure for Mandatory Mediation and Conciliation (MMC.) The legislative history reveals that MMC was enacted to cure what propo-

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[8] Since Section 1156.3(f) did not alter the statutory scheme that precluded employers from playing any role in whether or not to recognize a union, the Legislature must be presumed to have acquiesced in the court's interpretation of the ALRA which, on the basis of that scheme, ruled out employer "doubt." *Marina Point, Ltd v Wolfson* (1982) 30 Cal 3d 721, 734 ("[W]hen the Legislature amends a statute without altering portions of the provision that that have been judicially construed, it is presumed to have been aware of and to have acquiesced in the previous judicial construction.")

I might add that to the extent that the Board's "certified until decertified rule" can be considered, as Respondent's argument would have it, as an extension of the judicially-approved rejection of the 'good faith doubt' defense, the Board's rule comes with its own presumption of correctness: "The Legislature is presumed to be aware of a long-standing administrative practice. . . . If the Legislature . . . makes no substantial modifications to the act, there is a strong indication that the administrative practice [is] consistent with the legislative intent." *Thornton v Carlson* (1992) 4 Cal App 4th 1249, 1257. The fact that the "employers hands-off' electoral scheme has been strengthened by Section 1156.3(f) without any explicit change to the "certified until decertified" rule strongly indicates the Legislature approves of the Board's construction.

nents of the measure characterized as "lost decades" during which the purpose of the Act to provide collective bargaining rights for agricultural employees was not fulfilled:

> Proponents of this bill assert that elections determining labor union representation for agricultural employees are meaningless unless employers come to the bargaining table to negotiate post-election contracts. Proponents further assert that this bill is necessitated by the continued refusal of agricultural employers to come to the bargaining table once an election has occurred. Without this measure, proponents contend, already represented employees will continue to languish without the negotiated contracts they have elected to secure.
>
> Proponents argue that this bill is necessary to help farm workers who have waited for years while negotiations for union contracts drag on without hope of progress. Of the 428 companies where farm workers voted for the United Farm Workers in secret elections since 1975, only 185 have signed union contracts.
>
> Proponents assert that efforts by ALRB bring employers to the bargaining table were successful in the early years of ALRB's existence. However, enforcement in the '80s and '90s was almost non-existent and bad faith bargaining became the rule rather than the exception. This bill's adoption of an alternative dispute resolution process seeks to correct that.

Off. of Assem. Floor Analyses, 3rd Reading of SB 1156 (2001-2002 Reg. Sess, August 31, 2002, pp. 7-8; Off. of Assem. Floor Analysis, conc. In Sen. Amendments of Assem. Bill No. 2596 (2001-2002 Reg. Sess.) August 31, 2002, pp. 6-7.

Under Labor Code Section 1164.11, the only criteria a union certified before 2003 must meet in order to invoke MMC are that 1) it has failed to reach agreement with the employer for at least one year after the date on which it made its initial request to bargain; (2) the employer has committed an unfair labor practice; and (3) the parties have not previously had a binding contract between them. Missing from these requirements is one that a union must demonstrate a history of representational activity in order to invoke MMC.[9] It seems clear from the bill analyses that the Legislature concluded that employer unfair labor practices combined with problems in enforcement spoiled the possibilities for fruitful collective bargaining. Accordingly, it seems inconsistent with the intent of the Legislature in creating MMC to read Section 1156.3(f) to permit an employer to withdraw recognition based on lack of union representational activity that began in the very period during which the Legislature recognized that the collective bargaining process had broken down and for which it provided MMC as a remedy.[10]

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[9] Conversely, the Board has held that a defense to MMC on the grounds of abandonment does not defeat a petition for MMC which meets the statutory requirements of Sections 1164 and 1164.11, *See, e.g. San Joaquin Tomato Growers, supra.*

[10] I am only construing MMC in light of Respondent's specific argument that the Act has been amended to require the Board

For all these reasons, I do not read Labor Code Section 1156.3(f) to affect the rule that a union remains "certified until decertified."

C. The Equitable Defenses [sic, re: section numbering]

Respondent also contends that the Union's lack of activity for 24 years privileges its withdrawal of recognition on the grounds of laches, unclean hands, and equitable estoppel.

Assuming, arguendo, that any of these defenses is available before the Board, all of them require some proof of injury. *Gibson v Mitchell* (1937) 9 Cal 2d 718, *Estate of Hartoonian* (1945) 38 Cal2d 242; *Driscoll v City of Los Angeles* (1967) 67 Cal 2d 297, 30; *Abbott v City of Los Angeles* (1958) 50 Cal 2d 438. Since the Board has stated that an employer's freedom from the bargaining obligation is not an injury, but rather a benefit.[11] *Tri-Fanucchi Farms*

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to recognize the defense of abandonment. I am not addressing whether or not MMC is available to this union.

[11] In *Abbott v City of Los Angeles* (1958) 50 Cal 2d 438, various plaintiffs, recipients of pensions from the City of Los Angeles, which were based on service and earnings prior to 1925 or 1927, brought an action for declaratory relief to the effect that each of them was entitled to a fluctuating pension upon the grounds that city charter amendments of 1925 and 1927, which had the effect of substituting fixed pensions for previously provided fluctuating pensions, were unconstitutional. They also sought money judgments for the difference between the pension amounts they might have been owed if the pensions had been calculated under a fluctuating system and the amounts they received under the fixed pension system. The action was filed in 1955, decades after any of the plaintiffs had begun to be paid under the fixed formula, and at least 12 years after the change in calculation method made a difference to any of them. The court rejected the city's defense of laches: "It . . . appears that no

(1986) 12 ALRB No. 8, Respondent's equitable defenses are unavailing.[12]

The Motion in Limine, construed as a demurrer to the Answer, is granted. Respondent's evidence of abandonment is excluded. The allegations as admitted by Respondent are taken as true and General Counsel is entitled to an Order.

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injury has been shown to have been occasioned to defendant city and the defense of laches is therefore not supported." *Abbott,* ibid, 50 Cal 3d at 459 The court noted that because any money claims could not extend beyond the three year statute of limitations, the City actually "gained an advantage" for the years between when any of the plaintiffs first suffered injury and when they brought their claims within the statute.

12 It is settled that unclean hands may only be asserted in connection with the very subject matter concerning which the complaint is made, which, in this case, concerns only the various refusals of 2012, and that laches cannot be used to defeat a cause or claim brought within the appropriate statute of limitations, *Unilogic v Burroughs* (1992) 10 Cal App 4th 612, as the charges in this case were.