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First-Class Mail and Electronic Mail

October 31, 2013

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Attorneys for Petitioner Silvia Lopez

Re: Case Name: Gerawan Farming, Inc.
Case No. 2013-RD-003-VIS

Dear Counsel:

I am writing to inform you that after investigating the above-referenced decertification petition ("Petition"), it has been determined that it is necessary to block the election because the outstanding unfair labor practice complaints against Gerawan Farming, Inc. ("Gerawan") make it impossible to conduct an election in an atmosphere where employees can exercise their choice in a free and uncoerced manner.

Our review of the Petition has shown that an adequate showing of interest has been made pursuant to the California Code of Regulations, title 8, section 20390(b). The Petitioner has submitted sufficient signatures to meet the showing of interest requirement. Furthermore, based on the information available to us, we have determined that the peak requirement has been met per Labor Code section 1156.3(a)(1). Lastly, the Board, in its October 30, 2013 Order in case 2013-MMC-003 denying the United Farm Workers' ("UFW") request to implement those approved portions of the mediator's report, has essentially determined that there is no contract bar to the holding of the election. *Gerawan Farming, Inc.*, Admin. Order No. 2013-15.

The reasons for blocking the decision, namely the existence of serious unremedied unfair labor practices that preclude the holding of a free and fair election (particularly as alleged in Complaint 2013-CE-027-VIS), would also prevent the Regional Director from finding that there is a bona fide question of representation. Unlawful employer assistance was one of the bases for a decision to dismiss a petition involving this same employer (2013-RD-002-VIS) on September 25, 2013 and these same violations

would tend to permeate the decertification process that followed shortly after¹. In addition, the General Counsel has not yet completed her investigation of numerous outstanding and recently filed charges against the employer alleging discrimination against union supporters (2013-CE-047 and 048-VIS), unlawful support and assistance in the de-certification petition (2013-CE-041, 042-VIS), a failure to provide employee contact information to the union (2013-CE-044-VIS), and the issuance of unlawful threats that the company will go out of business if the union obtains a contract (2013-CE-043-VIS). The General Counsel has continued to investigate the issues of fraud and forgery, but has been met with extremely obstructionist tactics. For example, after the General Counsel requested W-4s from Sunshine Agricultural Services, counsel for that company replied that the day before the documents were due, the office had been broken into and all of the W-4s, I-9s and computers had been stolen. Upon further investigation, Sunshine could produce no police report or notice to employees of the theft of their confidential and personal information. Our inquiry with the police has shown that there was never a police report filed nor is there evidence that the police were ever called to investigate.

The General Counsel's investigation of the pending ULP charges against Gerawan as well as her investigation of prior relevant charges, including, but not limited to 2013-CE-039-VIS, raise serious doubt as to whether a bona fide question of representation exists that would merit the holding of an election. Were there not a compelling basis for blocking the election based on the outstanding complaints, the Regional Director would contemplate dismissing the petition because of the detrimental effect of the employer's unfair labor practices on its employees' ability to exercise free choice during the decertification petition process.

In this case it is most appropriate to promptly block this potential election, thereby providing the parties the opportunity to seek expedited review with the Board, if they wish. During the pendency of the review, the General Counsel will expeditiously continue her investigation of all pending charges that may affect the finding of a bona fide question of representation in order to reach final conclusions on this matter as soon as possible. By issuing a prompt decision to block the election while continuing the investigation, the impact of any potential delay on the petition process will be minimal. It is our understanding from communications with counsel for the employer and with individual employees that the peak requirement will be met for several additional weeks.

Under Board precedent, upon the filing of a petition, the Regional Director "shall immediately investigate and determine whether any unfair labor practices alleged in an outstanding complaint against the employer(s) or union(s) involved in the representation proceeding will make it impossible to conduct an

¹ Well-established Board precedent states that the filing of a new petition does not cure the unremedied effects of unlawful employer involvement in the prior petition, particularly when there are charges that employer assistance and support for the petition has continued. See *Gallo Vineyards, Inc.* (2000) 30 ALRB No. 2 (stating that employer assistance, even with respect to a minority of the signature gathering effort will cause the employer to control and taint the entire process because news of the employer's position will spread through the workforce); *S&J Ranch, Inc.* (1992) 18 ALRB No. 10 (finding that unremedied employer instigation of a decertification effort, even two years after such unlawful action takes place, will still permeate the decertification process and nullify the possibility of a fair and free election.) Gerawan has identified one case from 1944, where the effects of supervisor support for an election petition were ostensibly cured in one month. *Toledo Stamping & Manufacturing Co.* 56 NLRB No. 1291. However, in that case no party, neither the employer nor a competing union, questioned the signatures or the method by which they obtained and so there was no issue raised as to the bona fide question of representation. *Id.* at 1293. Here, the UFW has disputed the legality of the decertification effort and filed numerous charges alleging unlawful employer involvement in the effort. The General Counsel's ongoing investigation of these charges has shown that there is evidence supporting the UFW's contentions.

election in an atmosphere where employees can exercise their choice in a free and uncoerced manner.” *Cattle Valley Farms* (“Cattle Valley”), (1982) 8 ALRB No. 24 at 14. The purpose of the blocking rule established in *Cattle Valley* is to preserve the integrity of the election process and the stability of an already-existing bargaining relationship. *Id.* at 11. In applying the *Cattle Valley* rule, the Board has endorsed a “probable effect” standard in determining whether an election should be blocked. *Conagra Turkey Company* (1993) 10 ALRB No. 11. In other words, the Regional Director must determine whether “the probable impact of the unremedied unfair labor practices alleged in the complaint would be to deprive the employees of a free and uncoerced choice in the election.” *S&J Ranch* (1992) 18 ALRB No. 10 at 3. If the Regional Director makes such a determination, the election must be blocked. *Id.*

In this case, the probable effect of the unremedied unfair labor practices alleged in three different outstanding unfair labor practice complaints against Gerawan would be to make it impossible to conduct an election in an atmosphere where employees can exercise their choice in a free and uncoerced manner. Because these unremedied unfair labor practices foreclose the possibility of a free and fair election, the election must be blocked until these outstanding matters are resolved and effectively remedied. *S&J Ranch, supra*, 18 ALRB No. 10.

Outstanding Allegations of Unlawful Employer Assistance in the Decertification Effort

The First Amended Complaint in the case *Gerawan Farming, Inc. 2013-CE-027-VIS* alleges, after an extensive investigation by the General Counsel, that Gerawan engaged in a significant and wide-spread effort to assist in the effort to de-certify the UFW as the exclusive bargaining representative for its employees. The complaint alleges that five different crew bosses from the company directly supported the decertification effort by encouraging workers to sign the decertification petition (¶¶ 12, 14, 16, 19), by directly soliciting signatures on the decertification petition (¶¶ 17, 20), by placing the petition in their vehicle or on the hood of the vehicle to assist in obtaining signatures by the workers (¶¶ 13, 19), and by issuing a threat and engaging in surveillance and interrogation related to Gerawan’s employees’ union activities (¶¶ 14, 15, 17). In addition, this complaint alleges that Gerawan encouraged and supported the decertification effort by allowing signature gathering within a few feet of the owner and other management employees while they were giving away free fruit and beverages to Gerawan employees². (¶ 21). The complaint alleges that Gerawan unlawfully assisted in the decertification effort by providing legal assistance and representation to employees pursuing decertification through the attorney that represents Gerawan’s farm labor contractors. (¶¶ 22-24). Finally, the complaint alleges that through his representation of the employees who were most active in the decertification effort, the employers’ attorney engaged in unlawful surveillance of employee union and decertification activity. (¶ 25). It should be noted that this same attorney continues to represent the petitioner in this matter³.

² The evidence will show that the fruit giveaway process was changed and broadened from past practice during the period of the decertification campaign.

³ There is evidence that Mr. Raimondo continues to represent other farm labor contractors, including T-Rod, Inc., who regularly provide labor to Gerawan. In its position statement, Gerawan misreads the holding of *Merritt v. Reserve Ins. Co.*, (1973) 34 Cal.App.3d 858 that states that an entity cannot be held vicariously liable for the legal malpractice of its independent trial counsel. *Id.* at 880. In this case, Mr. Raimondo had a long standing relationship with the farm labor contractors who have a direct economic interest in the outcome of this matter and whom he has sought to represent in the same matter (insisting on being present during interviews of the FLC supervisors and of the petitioner and other employees who he represents), while providing what may be free or subsidized legal representation to the Petitioner and numerous employees involved in the decertification process. Gerawan’s position ignores Mr. Raimondo’s representation of the employer and the employee in the

Labor Code section 1153(a) prohibits an agricultural employer from interfering with, restraining or coercing agricultural employees in the exercise of their rights to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining...” It is well established under the Act that “any employer assistance greater than ministerial in the solicitation of signatures for a decertification petition is a violation of Labor Code Section 1153(a). *Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2.

Employer assistance that affirmatively encourages employees to engage in a decertification effort or employer activities that actively support or assist a decertification effort are illegal. *Id.* Employer assistance in a decertification effort is recognized as inherently coercive because of the unequal power dynamics between the employer who has the power to hire and fire workers, and agricultural workers—considered the most vulnerable of the workforce—who rely on seasonal employment for subsistence. *Id.* at 18. When an employer has unlawfully instigated or assisted workers in a decertification campaign, it has interfered with its employees’ free exercise of their rights and has invalidated the potential election as a measure of employees’ free choice. *Peter D. Solomon and Joseph R. Solomon d/b/a Cattle Valley*, (1983) 9 ALRB No. 65, at 8, *citing Gold Bond, Inc.* (1954) 107 NLRB 1059 and *Bond Stores, Inc.* (1956) 116 NLRB 1929. A decertification petition which has been initiated or sponsored by an employer “cannot be said to have raised a question concerning representation.” *Sperry Gyroscope Co.* (1962) 136 NLRB 294, 297.

Here, as in *S&J Ranch, supra*, where an employer’s acts of instigation and assistance in a decertification campaign had not been fully remedied⁴ prior to the filing of a subsequent decertification petition, the Petition must be and is hereby blocked.

Outstanding Allegations of Bad Faith Bargaining

There are two outstanding complaints alleging bad faith bargaining by Gerawan, including 2013-CE-010-VIS (filed on May 17, 2013 and set for hearing for November 5, 2013) and 2012-CE-041,047-VIS /2013-CE-007,009,025-VIS (“2012-CE-041 et al”) (filed on October 30, 2013 after an extensive investigation).

Complaint 2013-CE-010-VIS (CE-010) alleges that Gerawan failed to bargain in good faith with the union by proposing and insisting throughout its negotiations that the terms of any collective bargaining agreement (“CBA”) be inapplicable to Gerawan’s employees hired through a farm labor contractor.

same matter, as evidenced by his open attempts to represent both sides. Gerawan also ignores that its attorney freely shared information with Mr. Raimondo as an attorney for multiple parties, during the course of the General Counsel’s investigation of petition 2013-RD-002-VIS. The General Counsel has never taken the position that the FLC’s attorney is an agent of the grower for “all purposes” as Gerawan claims. Gerawan misstates the General Counsel’s position and the record in this case.

⁴ Contrary to Gerawan’s assertions, the allegations of Complaint 027 have not been fully remedied by the issuance of a TRO and preliminary injunction by the Superior Court or by Gerawan’s cooperation with the ALRB to allow informational noticing to workers about their rights. There has not been a notice a reading stating that the employer has been found to be in violation of the law, nor has the employer ever admitted or accepted responsibility for its actions. Our ongoing investigation of employer involvement in the decertification effort, as alleged in several charges, has revealed continued employer involvement. In one instance, for example, a forewoman identified in the CE-027-VIS complaint as amended was seen and identified by a Board agent as a participant in the Gerawan worker protests against the ALRB and the UFW in Kerman, CA. According to some employees, this was the day when many of the signatures for the pending decertification petition were gathered.

Based on past representations from Gerawan, during various times of the year, these employees make up a significant number of Gerawan's workforce. By seeking to exclude employees of farm labor contractors from the CBA, Gerawan has committed an unlawful refusal to bargain over the terms and conditions of these employees. *Paul W. Bertuccio, dba Bertuccio Farms* (1984) 10 ALRB No. 16, ALJD at 21. A refusal to bargain with the Union over the terms and conditions of employment for undisputed bargaining unit members is an act that would tend to unlawfully undermine the Union's status as the bargaining representative and unlawfully communicates to workers that the collective bargaining process and union representation itself is futile. See *Cardinal Distributing Co. v. ALRB* (1984) 159 Cal.App.3d 758, 770; *Parkway Center Inn* (1979) 240 NLRB No. 192. The Board has previously held that an outstanding allegation that an employer has refused to bargain with the Union may be considered as a basis for blocking an election under *Cattle Valley. Arnaudo Bros. LP, supra*, 39 ALRB No. 9 at 9.

Complaint 2012-CE-041 *et al* alleges numerous unfair labor practices by Gerawan including a failure to provide the UFW with accurate employee contact information (§§ 12-20); the implementation of unilateral changes to the terms and conditions of employment (§ 32); intimidation and coercion of employees in the bargaining committee (§§ 28-30); and the engagement in an effort to undermine the UFW's status as the certified bargaining representative *vis a vis* Gerawan's employees (§§ 11, 21-26, 31, 33).

It is well established that unfair labor practices by an employer in the form of bad faith bargaining tend to have an effect on employee sentiment and make a fair election impossible. *NLRB v. Big Three Industries, Inc.* (1974) 497 F. 2d. 43, 53 citing *NLRB v. Kaiser Agricultural Chemicals*, (1973) 473 F.2d 374, 384. In *Cattle Valley*, the Board also recognized that bad faith bargaining may be the basis for a petition being dismissed and therefore a basis for blocking. *Cattle Valley, supra*, at 4-5. The Board has recently recognized that a failure to provide employee contact information to the union is a serious violation because it would impact the union's ability to communicate with employees. *Arnaudo Bros. LP, supra*, at 8-9. In that case, the Board upheld a decision to block an election.

In this case the unremedied unfair labor practices contained in complaint 2012-CE-041 *et al.* go far beyond what was alleged in *Arnaudo Bros. LP*. Apart from constraining the union's ability to communicate with workers, the complaint alleges that Gerawan has violated its duty to bargain with the UFW and undermined the UFW's status as the bargaining representative by implementing unilateral changes to the wages of its employees. Gerawan has also engaged in a series of actions and communications that have implicitly and explicitly denied to its employees the UFW's status as their collective bargaining representative for purposes of undermining the union and leading Gerawan's employees to believe that union-related and collective bargaining activities would be futile. Gerawan's actions, which have not been remedied, would make it impossible to have a fair and free election for Gerawan's employees. Gerawan's employees have been inevitably impacted by Gerawan's repeated efforts to undermine the union's status as its employees' bargaining representative and to intimidate and discourage employees from participating in the negotiation process. Furthermore, as noted earlier, the UFW has been impeded from fully communicating with Gerawan's employees because they have not been provided with accurate employee contact information. Under these circumstances, it is not possible to have a free and fair election until these violations are resolved and remedied.

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Because Gerawan's actions have created an atmosphere where its employees cannot exercise their choice in a free and fair way, the election is hereby blocked until the outstanding complaints are resolved and remedied. You may seek review with the Board within five days of service of this dismissal. Lab. Code § 1142(b); 8 CCR §20393.

Sincerely,

A handwritten signature in cursive script, appearing to read "Silas M. Shawver".

Silas M. Shawver
Regional Director

Cc: Ron Barsamian
David Schwarz
Mario Martinez
Antonio Barbosa
Sylvia Torres-Guillén