

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC.,)	Case No.	2013-RD-003-VIS
)		(39 ALRB No. 20)
)		(42 ALRB No. 1)

Employer,

and

SILVIA LOPEZ.

Petitioner,

and

UNITED FARM WORKERS OF AMERICA,

Certified Bargaining Representative.

GERAWAN FARMING, INC.,

Respondent,

and

UNITED FARM WORKER OF AMERICA,

Charging Party.

Case No. 2012-CE-041-VIS, et al.

[44 ALRB No. 10]

(September 27, 2018)

SUPPLEMENTAL DECISION AND ORDER ON REMAND

On May 30, 2018, the California Court of Appeal for the Fifth Appellate District issued an opinion reversing portions of our decision found at *Gerawan Farming, Inc.* (2016) 42 ALRB No. 1, and vacating our order dismissing the decertification petition

and setting aside the election held in the above captioned matter. (*Gerawan Farming, Inc. v. ALRB* (2018) 23 Cal.App.5th 1129.) The appellate court remanded the matter to us to reconsider our decision in the election proceeding in light of its opinion. In accordance with the court's remand order, we issue the following Supplemental Decision and Order.

Background

On October 25, 2013, Silvia Lopez (Petitioner) filed a petition to decertify the United Farm Workers of America (UFW) as the exclusive bargaining representative of the agricultural employees of Gerawan Farming, Inc. (Gerawan). The Agricultural Labor Relations Board (Board) ordered that an election be held and the ballots cast in the election be impounded pursuant to section 20360, subdivision (c) of the Board's regulations pending resolution of any election objections and related unfair labor practice complaints. (*Gerawan Farming, Inc.* (Nov. 1, 2013) ALRB Admin. Order No. 2013-46; Cal. Code Regs., tit. 8, § 20360, subd. (c).) The election was held on November 5, 2013, and the resulting ballots were impounded.

After a consolidated hearing on objections to the election and related unfair labor practice allegations, an administrative law judge (ALJ) dismissed claims Gerawan instigated the decertification movement but determined that Gerawan committed multiple unfair labor practices and engaged in other objectionable conduct by providing unlawful assistance to the efforts to decertify the UFW. The ALJ recommended setting aside the election and dismissing the decertification petition based on these findings. On April 15, 2016, the Board issued a decision upholding the ALJ's order setting aside the election

and dismissing the decertification petition. (*Gerawan Farming, Inc., supra*, 42 ALRB No. 1.)

Gerawan sought review of the Board’s decision in the Fifth District Court of Appeal. As indicated above, the court reversed certain portions of the Board’s unfair labor practice findings. The court additionally vacated the Board’s order setting aside the election and dismissing the petition, and remanded this portion of the case to the Board to reconsider its order regarding the election. (*Gerawan Farming, Inc. v. ALRB, supra*, 23 Cal.App.5th at p. 1241.) In performing this task, the court specifically directed the Board to apply an outcome-determinative standard in light of the findings set forth in its opinion. (*Id.* at pp. 1240-1241.) In applying this standard, the court further directed the Board to conduct a tally of the impounded ballots and to weigh the margin of victory from that tally as a “significant factor” in determining whether Gerawan’s misconduct had an effect on the election. (*Ibid.*)

The appellate court issued its remittitur on September 13, 2018, and on September 14 the Board issued Administrative Order No. 2018-12, ordering the Regional Director of the Visalia Regional Office to open and count the ballots cast in the election and prepare a tally of ballots in accordance with section 20360, subdivision (a) of the Board’s regulations. (Cal. Code Regs., tit. 8, § 20360, subd (a).) On September 18, the ballots were opened and counted with the following tally:

Certified Bargaining Representative (UFW)	197
No Union	1,098
Void	18
<u>Unresolved Challenged Ballots</u>	<u>660</u>
Total Valid Ballots Cast	1955

As the unresolved challenged ballots were insufficient in number to affect the outcome of the election, it was unnecessary to resolve them.

Discussion and Analysis

“[T]he party objecting to an election bears a heavy burden of demonstrating not only that improprieties occurred, but that they were sufficiently material to have impacted the outcome of the election.” (*Oceanview Produce Co.* (1994) 20 ALRB No. 16, p. 6, citing *Nightingale Oil Co. v. NLRB* (1st Cir. 1990) 905 F.2d 528.) “The burden is not met merely by proving that misconduct did in fact occur, but rather by specific evidence demonstrating that it interfered with the employees’ exercise of their free choice to such an extent that the conduct changed the results of the election.” (*Oceanview Produce Co., supra*, 20 ALRB No. 16, p. 6, citing *Kux Manufacturing Co. v. NLRB* (6th Cir. 1989) 890 F.2d 804; *Premiere Raspberries, LLC* (2017) 43 ALRB No. 2, pp. 5-6.)

“In determining whether misconduct could have affected the results of the election, relevant considerations may include, but are not limited to, the pervasiveness of the conduct, the size of the voting unit, the proximity of the conduct to the election, and the closeness of the election results.” (*Premiere Raspberries, LLC, supra*, 43 ALRB No. 2, p. 6; *Nash De Camp Co.* (2000) 26 ALRB No. 4, IHE Dec. p. 41, citing *Anderson Farms Co.* (1977) 3 ALRB No. 67.) Generally speaking, the objecting party’s burden “is made more difficult” where the margin of victory is wide. (*NLRB v. Rolligon Corp.* (5th Cir. 1983) 702 F.2d 589, 592.) Nevertheless, the converse proposition is also true, that a wide margin of victory itself may be evidence of a party’s successful efforts to undermine

the employees' free choice. (*Ibid.*, citing *NLRB v. Trancoa Chemical Corp.* (1st Cir. 1962) 303 F.2d 456, 458, fn. 1.) Finally, allegations of misconduct that could affect the results of an election are evaluated under an objective standard, rather than by the subjective individual reactions of employees, and thus the inquiry is whether the conduct was such that it reasonably would tend to interfere with employee free choice in the election. (*L.E. Cooke Co.* (2009) 35 ALRB No. 1, p. 13, citing *Oceanview Produce Co.*, *supra*, 20 ALRB No. 16, p. 6; *Triple E Produce Co. v. ALRB* (1983) 35 Cal.3d 42, 54-55.)

Under the appellate court's findings in this matter, Gerawan committed several unlawful acts prior to the November 5, 2013 election as follows:

- 1) Unlawful Direct Dealing: Gerawan engaged in direct dealing with its employees by unilaterally implementing two wage increases in March 2013 and distributing flyers to its employees advising that Gerawan had made the decision to grant the wage increases on its own and that it hoped the union would not delay or obstruct the increases (*Gerawan Farming, Inc. v. ALRB*, *supra*, 23 Cal.App.5th at p. 1211);
- 2) Unlawful Assistance: Gerawan provided unlawful assistance to the circulation of the decertification petition: (1) when crew boss Leonel Nuñez gathered his crew together on one occasion in October 2013 during worktime at the request of Virginia Chairez, a worker heavily involved in the gathering of signatures for the decertification petition, allowing her to request signatures from the crew members (*id.* at pp. 1167-1168), and (2) by disparately enforcing its attendance policy and allowing Lopez and her daughter Belen Solano extended absences from work to

gather signatures for the showing of interest for almost two-and-a-half months (*id.* at pp. 1179-1183); and

- 3) Unlawful October 25, 2013, Piece Rate Increase: Gerawan unilaterally implemented a temporary wage increase to grape packing employees on October 25, 2013 — the same day the decertification petition was filed (*id.* at pp. 1211-1215).

In light of the foregoing findings, we turn now to an evaluation of whether Gerawan’s unlawful conduct interfered with the employees’ free choice to such an extent that it could have affected the results of the election.

Unlawful Direct Dealing

In upholding the Board’s conclusion that it was unlawful for Gerawan to unilaterally implement the wage increases in March 2013, the court cited to the well-settled rule that “the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that employer who deals directly with its unionized employees ... regarding terms and conditions of employment violates the [the Act].” (*Gerawan Farming, Inc. v. ALRB, supra*, 23 Cal.App.5th at p. 1210, citing *Allied-Signal, Inc.* (1992) 307 NLRB 752, 753.)

Gerawan’s March 2013 flyers announcing its unilaterally granted wage increases to the employees likely would weaken or erode employee support for the union, particularly given the message of the flyers that the union was an obstacle to Gerawan’s efforts to bestow its generosity on its employees. (*Georgia Power Co. v. NLRB* (11th Cir. 2005) 427 F.3d 1354, 1359-1360; see also *Reed & Prince Mfg. Co.*, (1951) 96 NLRB

850, 856 [even after a lawful impasse, wage increases “must not be put into effect in such a way as to disparage the bargaining agent or undermine its prestige or authority”]; *Hardesty Co., Inc.* (2001) 336 NLRB 258, 261, 269 [employer’s unilateral action sought “to communicate to employees that there is no need for the Union as their collective-bargaining representative” and “served to undermine the Union[’]s status as collective bargaining agent with the obvious objective of causing disaffection of its membership”], *enfd. NLRB v. Hardesty Co., Inc.* (8th Cir. 2002) 308 F.3d 859.)

While this was a serious violation that impacted a large portion of the bargaining unit, it occurred well before there was a campaign underway to decertify the UFW and more than seven months before the election. (*NLRB v. Earle Industries* (8th Cir. 1993) 999 F.2d 1268, 1273 [the lapse of time between the incidents of misconduct and the election date is a factor that must be considered]; *UFW (Corralitos Farms, LLC)* (2014) 40 ALRB No. 6, p 8 [no effect on free choice where a benefit was conferred six weeks prior to election]; but see *Corralitos Farms, LLC* (2013) 39 ALRB No. 8, p. 4, fn 3 [there is not a particular time frame before an election when unlawfully motivated changes will be considered too remote to have impacted free choice in all cases, rather the determination depends on all applicable facts and circumstances].) On the record before us and in light of the passage of time and the large margin of the “no union” victory in the election, we cannot conclude that this unfair labor practice violation interfered with the employees’ free choice to such an extent that it affected the results of the election.

Unlawful Assistance

With respect to unlawful assistance with the circulation of the petition in Leonel Nuñez's crew, it is well-settled that an employer must stay out of any effort to decertify an incumbent union, including the facilitation of the solicitation of signatures for the petition. (*Cattle Valley Farms* (1983) 9 ALRB No. 65, p. 8; see *F&P Growers Association v. ALRB* (1985) 168 Cal.App.3d 667, 676; *SFO Good-Nite Inn, LLC* (2011) 357 NLRB 79, 80.) The law is clear that an employer may not solicit its employees to circulate or sign decertification petitions, and it may not threaten or otherwise coerce employees in order to secure their support for such petitions. (*Process Supply, Inc.* (1990) 300 NLRB 756, 758; *Eastern States Optical Co.* (1985) 275 NLRB 371, 372.) The decision regarding decertification and the responsibility to prepare and file a decertification petition belongs solely to the employees. "Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate or to facilitate it." (*Armored Transport, Inc.* (2003) 339 NLRB 374, 377, citing *Harding Glass Co.* (1995) 316 NLRB 985, 991.)

Crew boss Nuñez's conduct helped facilitate the gathering of signatures for the decertification petition, and thus, at least in some measure, aided in the decertification proponents' efforts to obtain an adequate showing of interest for the petition. However, the record does not support the conclusion that free choice in the election was impacted by this conduct, which occurred in a crew of only 30 to 38 people (TR: 83:94) at least several weeks before the election. In light of the approximately 900 vote margin of

victory for the “no union” choice, we find that this unlawful conduct did not affect the outcome of the election.

Gerawan’s unlawful preferential treatment of Lopez and Solano in allowing them to skip work in extreme amounts without consequence to solicit signatures for the decertification petition also facilitated the decertification proponents’ efforts to make the showing of interest necessary for an election to be held. While the record contains no evidence Gerawan paid Lopez and Solano or provided them with financial assistance for the time they were absent from work to engage in their signature gathering efforts (see *Abatti Farms, Inc.* (1981) 7 ALRB No. 36, p. 6), it did aid in their efforts by allowing them a “virtual sabbatical” from work and free access to its fields to gather signatures during times they otherwise should have been performing actual work. While Gerawan’s unlawful assistance to the decertification proponents’ signature gathering efforts certainly casts some doubt on the validity of the petition’s showing of interest (see Cal. Code Regs., tit. 8, § 20300, subd. (j)(4)), we are unable to find on the record before us that the employees’ free choice in the subsequent election was impacted to such a degree it affected the outcome of the election. While the conduct of Lopez and Solano was not isolated but rather occurred over a period of months, we have found that the record does not support a finding of instigation against Gerawan or that Lopez and Solano were acting as agents of Gerawan. The record also contains no evidence of threats, reprisals, or intimidation, or of any promises of benefit made, during the signature gathering conducted by Lopez that could have continued to influence workers when they cast their ballots. (*NLRB v. Media Gen. Operations, Inc.* (4th Cir. 2004) 360 F.3d 434, 444, fn. 10

[no evidence employees who signed petition coerced or misled into believing they must vote a particular way in the subsequent election].)

October 25, 2013 Piece Rate Increase

The court affirmed the Board's conclusion that the piece-rate increase given to the field grape packers before the election was an unfair labor practice, and agreed that permissible inferences from the record support a finding of improper motive for the increase. (*NLRB v. Anchorage Times Pub. Co.* (9th Cir. 1981) 637 F.2d 1359, 1367 [“the law is well established that there is a presumption of illegal motive adhering to wage increases granted prior to an election”].) However, the court distinguished this particular violation from the types of pre-election wage increases that are deemed “hallmark” violations, finding the unique circumstances surrounding the increase here¹ did not warrant a finding of any presumed coercive effect the increase may have had on employee free choice in the election. (*Gerawan Farming, Inc. v. ALRB, supra*, 23 Cal.App.5th at p.1215; cf. *NLRB v. Exchange Parts Company* (1964) 375 U.S. 405, 409; *NLRB v. Stephen Dunn & Assoc.* (9th Cir. 2001) 241 F.3d 652, 666 [“a wage increase (or grant of a benefit) designed to impact the outcome of a representation election is a ‘hallmark’ violation of the NLRA and is as ‘highly coercive’ in its effect as discharges or threats of business failure”].)

¹ The court stated in this respect, “Here, we are dealing with a very brief (i.e., only one day), relatively modest (i.e., 25 cents per box) increase in the piece rate for a subset of workers (i.e., grape packers) under circumstances in which there was an apparent need to get a considerable volume of grapes packed with fewer workers on hand.” (*Gerawan Farming, Inc. v. ALRB, supra*, 23 Cal.App.5th at p. 1215.)

Under the unique circumstances present here, given the fact that the increase was temporary, affected only a small portion of the workforce, and in light of the large margin of the “no union” victory in the election, we conclude the record does not support a finding that this violation impacted free choice to such an extent that it affected the results of the election.

Conclusion

On the record before us on remand, we find that Gerawan’s unlawful conduct did not interfere with the employees’ free choice to such an extent that it affected the outcome of the election.²

CERTIFICATION OF ELECTION RESULTS

IT IS CERTIFIED that a majority of the valid ballots have been cast for “No Union” in the representation election conducted on November 5, 2013, among the agricultural employees of Gerawan Farming, Inc., in the State of California, and that the

² The appellate court upheld the Board’s rejection of Gerawan’s *Passavant* defense based on noticing and trainings that occurred at its worksites in August 2013 because violations were found to have been committed after that time. (*Gerawan Farming, Inc. v. ALRB, supra*, 23 Cal.App.5th at pp. 1174-1175.) Nevertheless, the court instructed the Board on remand to consider whether the noticing and training conducted by the Regional Director, as well as his statements to the Fresno County Superior Court in the TRO litigation against Gerawan, had any remedial effect on the ability of employees to exercise free choice in the subsequent election. (*Id.* at p. 1175.) The Regional Director’s opinions as to the effectiveness of the trainings are not binding on the Board, as the court agreed. (*Ibid.*; see also *Ivaldi v. NLRB* (9th Cir. 1994) 48 F.3d 444, 451; *Capitol Temptrol Corp.* (1979) 243 NLRB 575, 589, fn. 59; *Stokely Van Camp, Inc. and Bordo Products, Inc.* (1961) 130 NLRB 869, 871.) In any event, we find it unnecessary to reach these issues based on our findings above that Gerawan’s conduct, in light of the court’s findings, did not impact employee free choice to such an extent that it affected the outcome of the election.

United Farm Workers of America thereby lost its prior status as the exclusive representative of the employees for the purpose of collective bargaining, as defined in Labor Code section 1155.2, subdivision (a).

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board (Board) hereby orders that respondent Gerawan Farming, Inc. (Respondent), its officers, agents, successors, and assigns shall:

1. Cease and desist from interfering with, restraining or coercing any agricultural employees in the exercise of their rights guaranteed by California Labor Code section 1152.
2. Take the following affirmative actions necessary to effectuate the policies of the Act:
 - (a) Upon request of the Regional Director, sign the attached Notice to Agricultural Employees (the "Notice") and, after its translation by an ALRB agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.
 - (b) Mail signed copies of the Notice to the last known address of all agricultural employees they employed, including those employed by farm labor contractors, during the period from March 1, 2013, to October 25, 2014.
 - (c) Grant ALRB agents access to work sites where the agricultural employees in the above bargaining unit work at mutually arranged times in order to read the Notice to them and to answer questions employees may have about their rights under the Act outside the presence of supervisory personnel.
 - (d) Compensate employees for the time spent during the Notice reading and the following question and answer period at the employees' regular hourly rates, or each employee's average hourly rate based on their piece-rate production during the prior pay period.
 - (e) Post copies of the Notice, in all appropriate languages, in conspicuous places on its property, for sixty (60) days, the period(s) and place(s) to be

determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

- (f) Provide access during the notice-posting period to ALRB agents to ensure compliance with the notice-posting requirements of this Order.
- (g) Provide a signed copy of the Notice to each person they hired for work as an agricultural employee during the 12-month period following the issuance of the ALRB's Order in this case.
- (h) Notify the Regional Director in writing within thirty (30) days after the date of issuance of this Order of the steps Gerawan Farming, Inc. have taken to comply with the terms and, on request, also notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order until notified that full compliance has been achieved.

DATED: September 27, 2018

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Isadore Hall III, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing in which all parties had an opportunity to present evidence, the Agricultural Labor Relations Board (the "ALRB") found that we violated the Agricultural Labor Relations Act ("Act") by directly dealing with our agricultural employees while they were represented by the United Farm Workers of America ("UFW"), by unlawfully assisting with the circulation of a petition to decertify the UFW, and by granting a wage increase to a portion of our workforce prior to a representation election as alleged in a complaint issued by the ALRB's General Counsel.

The ALRB has told us to post, publish, and abide by the terms of this Notice. The Act is a law that gives you and all other farm workers in California the following 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 ALRB;
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 interfere with, restrain, or coerce you in the exercise of any of the rights set out above.

DATED: _____ **GERAWAN FARMING, INC.**

By: _____
(Representative) (Title)

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 (ALRB). One ALRB office is located at 1642 W. Walnut Avenue, Visalia, CA 93477, telephone number (559) 627-0995.

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

GERAWAN FARMING, INC.

Silvia Lopez
(Petitioner)
United Farm Workers of America
(Certified Bargaining Representative)

Case No. 2013-RD-003-VIS
(39 ALRB No. 20)
(42 ALRB No. 1)
2013-CE-041-VIS, et al.

44 ALRB No. 10

Background

On October 25, 2013, Silvia Lopez (Petitioner) filed a petition to decertify the United Farm Workers of America (UFW) as the bargaining representative of the agricultural employees of Gerawan Farming, Inc. (Gerawan). The Agricultural Labor Relations Board (Board) ordered that an election be held and the ballots cast in the election be impounded. The election was held on November 5, 2013.

Following a hearing on election objections and related unfair labor practice (ULP) allegations, an administrative law judge (ALJ) determined that Gerawan committed multiple unfair labor practices and engaged in other objectionable conduct by providing unlawful assistance to the efforts to decertify the UFW. Due to the pervasive nature of the misconduct found, the ALJ recommended dismissing the decertification petition and setting aside the election. On April 15, 2016, the Board issued a decision upholding the ALJ's order dismissing the decertification petition and setting aside the election. (*Gerawan Farming, Inc.* (2016) 42 ALRB No. 1.)

On May 30, 2018, the California Court of Appeal for the Fifth Appellate District issued an opinion reversing certain portions of the Board's unfair labor practice findings in *Gerawan Farming, Inc.*, *supra*, 42 ALRB No. 1, and vacating the Board's order dismissing the decertification petition and setting aside the election. (*Gerawan Farming, Inc. v. ALRB* (2018) 23 Cal.App.5th 1129.) The appellate court remanded the matter to the Board to open and count the ballots cast in the election and to reconsider the Board decision in light of its opinion.

On September 18, the ballots were opened and counted with the following tally: 197 for the Certified Bargaining Representative (UFW); 1,098 for the "No Union" choice, 660 unresolved challenged ballots; and 18 void ballots.

Board Decision

Under the appellate court's findings in this matter, Gerawan committed several unlawful acts prior to the November 5, 2013 election. First, Gerawan engaged in direct dealing with its employees by unilaterally implementing two wage increases in March 2013 and distributing flyers to its employees advising that Gerawan had made the decision to grant the wage

increases on its own and that it hoped the union would not delay or obstruct the increases. Next, Gerawan provided unlawful assistance to the circulation of the decertification petition: (1) when a crew boss gathered his crew together on one occasion in October 2013 during worktime and allowed the collection of signatures on the petition, and (2) by disparately enforcing its attendance policy and allowing Petitioner Lopez and her daughter extended absences from work to gather signatures for the showing of interest for almost two-and-a-half months. Finally, Gerawan unilaterally implemented a temporary wage increase to grape packing employees on October 25, 2013.

The Board evaluated the record on remand, and found that the unlawful and/or objectionable conduct committed by Gerawan did not interfere with the employees' free choice to such an extent that it affected the outcome of the election. Therefore, the Board certified that a majority of the valid ballots were cast for "No Union" in the representation election, and that the UFW lost its prior status as the exclusive representative of the employees for the purpose of collective bargaining.

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.