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IN THE SUPREME COURT OF CALIFORNIA

TRI-FANUCCHI FARMS, Petitioner and Respondent, v. AGRICULTURAL LABOR RELATIONS BOARD, Respondent and Petitioner, and UNITED FARM WORKERS OF AMERICA, Real Party in Interest.	)	Case No. S_____ (Fifth District Court of Appeal; Case No. F069419)

PETITION FOR REVIEW

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DATED: June 22, 2015
#[1816]

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The Agricultural Labor Relations Board (the "ALRB" or the "Board") hereby petitions for review of a published decision of the Court of Appeal, Fifth Appellate District, filed May 14, 2015.

ISSUES PRESENTED

Labor Code section 1160.3 authorizes the Board, as an expert body, to make employees whole for loss of pay resulting from the unlawful refusal of an employer to bargain with a union certified under the Agricultural Labor Relations Act (the "ALRA" or the "Act"). Upon a finding that Tri-Fanucchi Farms ("Tri-Fanucchi") unlawfully refused to bargain with the United Farm Workers of America (the "UFW"), the Board determined that Tri-Fanucchi should make its employees whole for the violation. The Court of Appeal, Fifth Appellate District (the "Court of Appeal"), while agreeing that Tri-Fanucchi unlawfully refused to bargain, nevertheless substituted its judgment for the Board's, and reversed the Board's makewhole award.

The issues presented are:

(1) Whether the Court of Appeal exceeded its authority and failed to apply the applicable standard of review by failing to afford deference to the Board's determination that bargaining makewhole was appropriate and by conducting what amounted to a *de novo* determination of whether makewhole was appropriate;

(2) Whether the Court of Appeal's conclusion that Tri-Fanucchi's refusal to bargain with the certified representative of its employees furthered the policies and purposes of the ALRA was erroneous.

REASONS FOR GRANTING THE PETITION

This Court should grant review to settle an important question of law concerning the Board's remedial authority. As the agency established by the Legislature with primary and exclusive jurisdiction to prevent and remedy unfair labor practices ("ULPs") as defined by the ALRA and with subject matter expertise in California agricultural labor relations, the Board is entitled to deference in its choice of remedies to expunge the effects of ULPs. Here, as found by the Board and affirmed by the Court of Appeal, Tri-Fanucchi committed a ULP by refusing to bargain with its employees' certified representative without any legal justification for its conduct. Exercising the discretion vested in it by the Legislature over such matters, the Board determined that an award of bargaining makewhole pursuant to Labor Code section 1160.3 was appropriate because Tri-Fanucchi's refusal to bargain, predicated on an "abandonment" defense whose inapplicability under the ALRA had long been settled as a matter of Board law, did not further the policies and purposes of the ALRA. The reviewing Court, in error, reversed the Board's policy judgment.

The role of the courts in reviewing the Board's determinations concerning remedies for ULPs is a limited one. In view of the primary and exclusive jurisdiction vested by the Legislature in the Board, and the well-established principle that the formulation of remedies is peculiarly a matter for administrative competence, the Board's remedial orders are to be upheld "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." (*Karahadian Ranches v. ALRB* (1985) 38 Cal.3d 1, 16; *Virginia Electric & Power Co. v. NLRB* (1943) 319 U.S. 533, 540.) Under this standard, the Court of Appeal was not permitted to conduct its own analysis of the appropriateness of makewhole – that was the exclusive role of the Board. (*NLRB v. Seven-Up Bottling Co. of Miami, Inc.* (1953) 344 U.S. 344, 348. ("It is not for us to weigh these or countervailing considerations.").) Provided that the Board's remedy is a rational one, it must be upheld, even if the reviewing court would have ruled differently were it considering the matter *de novo*. (*Jasmine Vineyards, Inc. v. ALRB* (1980) 113 Cal.App.3d 968, 982; *Sure-Tan, Inc. v. NLRB* (1984) 467 U.S. 883, 898-899.)

In this case, the Court of Appeal failed to heed the clear and well-established precedent defining the limited scope of review of the Board's remedial decisions. The Court of Appeal did not analyze whether it had been established that the Board's determination of the appropriateness of makewhole represented an attempt to achieve ends other than those which

can be fairly said to effectuate the policies of the Act; rather, the Court of Appeal took it upon itself to conduct what amounted to a *de novo* determination of that issue. Thus, the Court of Appeal cast aside the Board's determination, acknowledging, as it must, the deference owed to the Board's remedial decision but, at the same time, dismissing the Board's policy judgment as "clearly wrong." The Court of Appeal then proceeded to determine for itself whether Tri-Fanucchi's conduct furthered the policies and purposes of the Act such that the remedy of makewhole would be appropriate.

Next, compounding its error, the Court of Appeal reasoned that the legal status of the abandonment defense could not be regarded as settled because there were no reported appellate decisions on the issue, notwithstanding that Board precedent rejecting that defense was well-established. As such, the Court of Appeal found, the Board's remedy of makewhole exceeded the Board's discretion in this case. The Court of Appeal's reasoning is contrary to California Supreme Court precedent holding that "a settled administrative construction of the statute . . . must be given great weight." (*Gibson v. Unemployment Insurance Appeals Board* (1973) 9 Cal.3d 494, 498 fn. 6.) Furthermore, the Court of Appeal's ruling threatens to eviscerate the legislatively-mandated role of the Board as the agency with primary and exclusive jurisdiction over ULPs, whose "findings within that field carry the authority of an expertness which courts do not

possess and therefore must respect" and whose decisions, particularly those dealing with appropriate remedies, are subject only to limited judicial review. (*Tex-Cal Land Management v. ALRB* (1979) 24 Cal.3d 335, 346.)

Even apart from the fact that the Court of Appeal exceeded its authority and failed to follow the appropriate deferential standard of review of the Board's remedial order, this Court should grant review because the Court of Appeal's determination that makewhole was not appropriate in this case was erroneous and would have significant harmful public policy impacts, which will be felt state-wide.

The Court of Appeal acknowledged that the Board's own decisions on abandonment have been very clear that the defense is not viable under the ALRA, and stated that the Board's precedent is "consistent with how California Courts have construed the ALRA." [Slip Op. 12.][1] The Court of Appeal further stated that the abandonment defense was "clearly analogous" to the "loss of majority" defense, which had been held to be "clearly inapplicable to the ALRA" in a prior appellate decision. [*Id.* at 12 & 14 (emphasis in original).] These conclusions cannot be reconciled with the Court of Appeal's ultimate conclusion that the legal status of the

[1] References to the May 14, 2015 opinion of the Court of Appeal will be indicated by "Slip Op." References to the certified record will be indicated by "CR." References to the Petitioner's Opening Brief to the Court of Appeal will be indicated by "Pet. Op. Br."

defense was sufficiently unsettled that the Board's makewhole award lay outside of its broad discretion. While the Court of Appeal cited the fact that the "abandonment" period was of a long duration, this particular factual permutation did not take the case beyond the generally applicable legal rule that, under the ALRA, unions remain certified until decertified through an election. While the Court of Appeal characterized the UFW's inactivity as "egregious," the statutory authority of the Board is to remedy ULPs, and it does not have plenary authority to police the relationships between employers and unions, or between unions and represented employees outside of the ULP context, and Tri-Fanucchi has never alleged nor contended that the UFW committed a ULP. Tri-Fanucchi, conversely, has been adjudicated to have committed a ULP, and the Board justifiably rejected the proposition that it should "punish" the UFW's prior inactivity by visiting the effects of Tri-Fanucchi's ULP upon the agricultural employees who had no control over Tri-Fanucchi's decision to litigate rather than bargain.

Additionally, the Court of Appeal did not take into account that this case represented the second time that Tri-Fanucchi argued abandonment before the Board and the Court of Appeal and its first attempt had resulted

in rejection of its abandonment defense and an award of makewhole.[2] (*Tri-Fanucchi Farms v. ALRB* (Nov. 21, 1987, F008776) ([nonpub. opn.])

The Court of Appeal cited the statutory policy of promoting stability in labor relations as justifying its determination that Tri-Fanucchi's refusal to bargain furthered the policies and purposes of the ALRA. However, the Court of Appeal disregarded the equally important statutory purposes of protecting employee free choice and eliminating employer interference in the designation of bargaining representatives, both of which polices were directly undermined by Tri-Fanucchi's attempt to terminate its bargaining relationship with the UFW outside of the election procedures of the ALRA. Furthermore, the Court of Appeal's ruling does not foster stability in agricultural labor relations, but undermines it. Under the Court of Appeal's ruling, employers will be encouraged to commit ULPs and litigate representation issues in the courts of appeal rather than bargain in good faith. Thus, the Court of Appeal's ruling undermines the role of the Board, encourages increased litigation in the already crowded dockets of the courts of appeal, and encourages the commission of ULPs, all of which undermine the statutory policy of promoting stability in agricultural labor relations.

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[2] The Court of Appeal took judicial notice of its prior unpublished opinion. [Slip. Op. 5 fn. 2.] The Board does not argue that the Court of Appeal's unreported 1987 decision should have been treated as having precedential value. However, it is clearly among the "facts and circumstances" bearing on whether an award of makewhole was appropriate.

For the foregoing reasons, and as will be explained further below, this case presents an important question of law that requires resolution by this Court. Accordingly, the Board respectfully requests that this Court accept review.

BACKGROUND

I. THE PARTIES' BARGAINING HISTORY AND TRI-FANUCCHI'S REFUSAL TO BARGAIN

The UFW was certified as the bargaining representative of Tri-Fanucchi's agricultural employees in 1977 after a secret-ballot election. [Slip Op. 4.] After the certification, Tri-Fanucchi initially refused to bargain, claiming that it intended to engage in a "technical refusal to bargain" to challenge the validity of the election. (See *Joe G. Fanucchi & Sons/Tri-Fanucchi Farms* (1986) 12 ALRB No. 8 at p. 2.) However, after the UFW filed a ULP charge, Tri-Fanucchi agreed to bargain and negotiations occurred. (*Ibid.*)

Between May, 1979 and July 1984, there was a hiatus in bargaining. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra*, 12 ALRB No. 8 p. 2.) When the UFW requested to resume bargaining in 1984, Tri-Fanucchi refused, asserting that the UFW had abandoned the bargaining unit along with other defenses. [Slip Op. 4.] The Board rejected these defenses in a 1986 decision and awarded bargaining makewhole pursuant to Labor Code section 1160.3. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms*, *supra*, 12 ALRB No. 8 at pp. 9-10.) The Court of Appeal upheld the Board's

decision, including the makewhole award. (*Tri-Fanucchi Farms v. ALRB, supra*, (Nov. 21, 1987, F008776) ([nonpub. opn.])

After the Court of Appeal's decision, Tri-Fanucchi indicated its willingness to bargain with the UFW. [Slip Op. 5.] Tri-Fanucchi claims that the UFW did not have any contact with Tri-Fanucchi or Tri-Fanucchi's employees for some 24 years.[3] [*Ibid.*] In 2012, the UFW reasserted its bargaining rights, demanded to bargain, and requested information from Tri-Fanucchi. [*Ibid.*]

II. THE BOARD'S DECISION AND AWARD OF MAKEWHOLE

Charged with unlawfully refusing to bargain with the UFW, Tri-Fanucchi admitted the substance of the allegations. [Slip Op. 6.] It contended, however, that the UFW had lost its certification due to the UFW's prolonged period of inactivity, an argument known as an "abandonment defense." [*Ibid.*] This defense has, however, been rejected by the ALRB in multiple decisions reaching back decades, as Tri-Fanucchi was aware. [*Ibid*; CR 394-396.] In light of the Board's well-established precedent rejecting the abandonment defense, the Administrative Law Judge ("ALJ") found that Tri-Fanucchi had no valid excuse for refusing to

[3] Because the case was decided via a dispositive motion, the ALRB assumed that the facts alleged concerning this period of inactivity were true, and this Petition, likewise, assumes that they are true.

bargain with its employees' certified representative. [Slip Op. 6.] The ALJ further found that bargaining makewhole was appropriate. [*Id.* at 6-7.]

Tri-Fanucchi filed exceptions with the Board. [*Id.* at 7.] The Board's decision applied long-standing precedent in affirming the ALJ's rejection of Tri-Fanucchi's abandonment defense. [*Ibid.*; CR 394-396.] The Board then considered whether to award bargaining makewhole pursuant to Labor Code section 1160.3. [CR 403-407.] Under the standard announced by the Board in *F&P Growers Assoc.* (1983) 9 ALRB No. 22 and affirmed by a court of appeal in *F&P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667 (the "*F&P Growers* standard"), the Board considered whether Tri-Fanucchi's position furthered the polices and purposes of the Act, in light of the facts and circumstances. [CR 405.] Examining Tri-Fanucchi's legal justification for its refusal to bargain, the equitable arguments against makewhole presented by Tri-Fanucchi, and the facts and circumstances generally, the Board rendered its policy judgment that an award of makewhole was appropriate. [Slip Op. 7; CR 405-407.]

III. THE COURT OF APPEAL'S DECISION

The Court of Appeal upheld the Board's rejection of the abandonment defense and the Board's conclusion that Tri-Fanucchi's refusal to bargain violated the ALRA. [Slip Op. 4, 13-14.] Yet, it reversed the Board's determination that makewhole was appropriate. The Court of Appeal held that the ALRB was correct to apply the *F&P Growers* standard

but disagreed with the Board's application of that standard. [Slip Op. 19-20.] The Court of Appeal found that the Board awarded makewhole "solely" based upon its conclusion that Tri-Fanucchi's assertion of the abandonment defense did not further the policies and purposes of the ALRA, a conclusion that the Court of Appeal found to be "clearly wrong." [*Id.* at 20.] In contrast, the Court of Appeal found that, because there had been no appellate decision on the "specific issue" of abandonment, and it was "far from certain" how a court would rule on the matter, and because the issue of abandonment remained "unsettled and controversial," litigation of the issue served the beneficial purpose of "clarifying and/or confirming" the law and furthered the "broader purposes of the ALRA to promote greater stability in labor relations . . ." [*Id.* at 20-21.]

The Board did not petition for rehearing, and the Court of Appeal's decision became final on June 13, 2015.

LEGAL DISCUSSION

The ALRA is, in most respects, modeled upon its federal equivalent, the National Labor Relations Act ("NLRA"). Under the NLRA, the standard remedy for an employer's violation of the duty to bargain with a certified union is an order directing the employer to cease and desist from its unlawful conduct and take the affirmative action of bargaining in good faith with the union. (See e.g., *Convergence Communications, Inc.* (2003) 339 NLRB 408, 408.) However, in

enacting the ALRA, the Legislature chose to afford the Board an additional tool to remedy the effects of employer refusals to bargain: the bargaining makewhole remedy. As the Board has observed, the adoption of the makewhole remedy was motivated by the perceived inadequacy of NLRB's remedies for refusals to bargain. (*Adam Dairy* (1978) 4 ALRB No. 24 at pp. 4-5.) In particular, employers were able, by refusing to bargain, to weaken the certified union and accrue cost savings, which were effectively borne by employees who were denied the benefits of collective bargaining. (*Ibid.*) Thus, Labor Code 1160.3, entrusting remedial relief to the Board, provides that the remedies available to the Board include "making employees whole, *when the board deems such relief appropriate*, for the loss of pay resulting from the employer's refusal to bargain." (Emphasis added.)

The makewhole remedy is not punitive in nature. Rather, it is "a compensatory remedy that reimburses employees for the losses they incur as a result of delays in the collective bargaining process." (*George Arakelian Farms, Inc. v. ALRB*, (1989) 49 Cal.3d 1279, 1286 fn. 3.) It is established that makewhole is not to be awarded automatically in every case where an employer refuses to bargain in violation of the Act. (*J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, 9.) Rather, the ALRA vests in the Board the discretion to award makewhole "when the board deems such relief appropriate." (Lab. Code, § 1160.3.) As discussed above, in determining whether makewhole is appropriate, the Board makes a policy judgment, weighing the public interest in the

employer's position against the harm caused by the refusal to bargain and only where the employer's positon furthers the policies and purposes of the Act does the Board place the risk of the decision to litigate rather than bargain on the employees rather than the employer. (*F&P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667, 682.)

I. THE COURT EXCEEDED ITS AUTHORITY AND FAILED TO APPLY THE APPLICABLE STANDARD OF REVIEW

This Court's review is necessary because, in reviewing the Board's makewhole award, the Court of Appeal went beyond its limited role of applying the deferential standard of review that requires that the Board-ordered remedy be upheld unless it was "a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." (*Karahadian Ranches v. ALRB, supra*, 38 Cal.3d 1, 16; *Virginia Electric & Power Co. v. NLRB* (1943) 319 U.S. 533, 540.) Instead, the Court of Appeal substituted its own judgment for that of the Board and reversed the Board because it reached a different conclusion as to whether makewhole was "appropriate," a policy judgment vested by the Legislature in the Board and not the courts. (*NLRB v. Seven-Up Bottling Co. of Miami, Inc., supra* 344 U.S. 344, 346; *Sandrini Bros. v. ALRB* (1984) 156 Cal.App.3d 878, 885.)

Where the Legislature vests in an administrative agency the responsibility to administer a statute, the courts' role of review, while important, is a limited one. These principles have been addressed in multiple decisions of the United

States Supreme Court in the context of the NLRA. In *San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 242-243, the United States Supreme Court emphasized the central role of the NLRB in administration of labor policy, "armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." The Court stressed that, "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . ." (*Ibid.*) The role of the NLRB and the limited nature of judicial review of its decisions was also was addressed in *Phelps Dodge Corp. v. NLRB* (1941) 313 U.S. 177. The Court stated that Congress met the challenge of applying the broadly phrased mandates of the NLRA "by leaving the adaptation of means to end to the empiric process of administration." (*Id.* at p. 194.) The Court continued that

> The exercise of the process was committed to the Board, subject to limited judicial review. 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 danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.
>
> (*Ibid.*)[4]

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[4] See also *Franks Bros. Co. v. NLRB* (1944) 321 U.S. 702, 704 ("One of the chief responsibilities of the [NLRB] is to direct such action as will dissipate

(Footnote continued....)

Accordingly, a remedial order of the National Labor Relations Board ("NLRB") "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." (*Virginia Electric & Power Co. v. NLRB, supra*, 319 U.S. 533, 540.)

In *ABF Freight System, Inc. v. NLRB* (1994) 510 U.S. 317, the United States Supreme Court considered the language of the NLRA, which grants the NLRB the remedial authority to direct violators to "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . ." (29 U.S.C. § 160(c).) In the course of upholding the NLRB's decision to order a reinstatement remedy for an employee who had perjured himself, the Supreme Court stated that "[w]hen Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute'" and that, "[b]ecause this case involves that kind of express delegation, the [NLRB's] views merit the greatest deference." (*ABF Freight System, Inc. v. NLRB, supra*, 510 U.S. 317, 324 (bracketed material supplied).)

(Footnote continued)
the unwholesome effects of violations of the Act. [Citation.] And, [i]t is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged.") (bracketed material supplied; internal punctuation omitted).)

Likewise, in *NLRB v. Seven-Up Bottling Co. of Miami, Inc., supra*, 344 U.S. 344, the United States Supreme Court, reviewing an NLRB decision concerning the calculation of backpay, held that the NLRA "charges the Board with the task of devising remedies to effectuate the policies of the Act." (*Id.* at p. 346.) While those remedies "must be functions of the purposes to be accomplished," the remedial power is "a broad discretionary one" and "is for the Board to wield, not the courts." (*Ibid.*) Indeed, after discussing the considerations that went into the NLRB's remedial decision, the Supreme Court stated that "[i]t is not for us to weigh these or countervailing considerations. Nor should we require the Board to make a quantitative appraisal of the relevant factors . . ." (*Id.* at 348.) In another case, the United States Supreme Court found that a federal court of appeals that modified an NLRB remedial order, replacing it with a remedy that the court of appeals found more "reasonable," "overstep[ped] the limits of its own reviewing authority" in light of the NLRB's "primary responsibility and broad discretion to devise remedies that effectuate the policies of the [NLRA]" and the command that reviewing courts not "substitute their judgment for that of the Board in determining how best to undo the effects of unfair labor practices . . ." (*Sure-Tan, Inc. v. NLRB, supra,* 467 U.S. 883, 898-899 (bracketed material supplied).) (And see *NLRB v. Virginia Electric & Power Co.* (1941) 314 U.S. 469, 476 ("we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act.").)

Thus, it is clear that, under the federal law on which the ALRA was modeled, the agency vested with the discretion to devise remedies to expunge the effects of violations of the statute is to be given "the greatest deference" and its determinations regarding appropriate remedies are to be given "controlling weight" except where such remedies are "manifestly contrary to the statute." (*ABF Freight System, Inc. v. NLRB, supra*, 510 U.S. 317, 324.) This precedent of judicial deference to the NLRB's policy judgments applies for the same reasons to the ALRB's remedial orders, as this Court has repeatedly recognized. (Lab. Code, § 1148; *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551, 557.)

Accordingly, following federal law, California precedent recognizes that, as a general matter, the discretion to formulate remedies to expunge the effects of ULPs is vested in the Board, and not the courts. (*Sandrini Bros. v. ALRB, supra*, 156 Cal.App.3d 878, 885 ("the power to fashion and order backpay and other remedies is vested in the expert regulatory agency alone, not in the courts of the state.") In fact, this Court has recognized that not only has "the Legislature plainly intended to arm the ALRB with the full range of broad remedial powers traditionally exercised by the NLRB," insofar as the ALRA's remedial language differs from that of the NLRA, "the drafters of the ALRA intended to broaden, not diminish, the ALRB's remedial authority." (*Highland Ranch v. ALRB* (1981) 29 Cal.3d 848, 865.)

Consistent with the principle that the remedial authority delegated by the Legislature is for the Board to wield, a highly deferential standard of review

applies to challenges to the Board's remedial orders. In *Karahadian Ranches v. ALRB, supra*, 38 Cal.3d 1, 16, this Court stated that [i]n general, the board's remedial orders "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." (See also *Nish Noroian Farms v. ALRB* (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."); *Butte View Farms v. ALRB* (1979) 95 Cal.App.3d 961, 968 ("In framing a remedy, the Board has wide discretion, subject to limited judicial scrutiny" and the reviewing court "can reverse only if . . . the method chosen was so irrational as to amount to an abuse of discretion.").)

In this case, there is no question that the Board applied the correct legal standard to the issue of whether makewhole was appropriate – the Court of Appeal noted that the Board "explicitly followed the standard that was approved in F&P Growers." However, the Court of Appeal failed to apply the applicable standard of review to the Board's application of that standard. The Court of Appeal never considered whether the Board's remedy represented an attempt to achieve "ends other than those which can be fairly said to effectuate the policies of the Act." Rather, it is clear that the Court of Appeal simply disagreed with the Board's application of the *F&P Growers* standard and took it upon itself to

decide *de novo* whether Tri-Fanucchi's refusal to bargain furthered the policies and purposes of the ALRA.

The Board concluded that, in light of settled Board law rejecting the abandonment defense, and the fact that, contrary to Tri-Fanucchi's arguments, there were no delays or dilatory conduct by the UFW or General Counsel that would justify a contrary conclusion, and upon a review of the facts and circumstances of the case, an award of makewhole was appropriate. The Court of Appeal reached a different conclusion. However, as the California and federal case law cited above makes clear, the fact that the Court of Appeal disagreed with the results of the Board's exercise of the discretion vested in the Board by the Legislature is not a sufficient ground for the reviewing court to override the Board's choice of remedy. Therefore, the Court of Appeal stepped beyond its proper role, thereby "sliding . . . from the narrow confines of law into the more spacious domains of policy." (*Carian v. ALRB* (1984) 36 Cal.3d 654, 674.)

The Court of Appeal's ruling turns on the question of whether the abandonment defense was settled as a matter of law such that Board's remedial judgment can be upheld. The Court of Appeal acknowledged that the matter was settled as a matter of ALRB precedent.[5] It further implicitly accepted that a

[5] The Court acknowledged, for example, that "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." [Slip Op. 20.]

party's refusal to bargain based upon a defense that has been established as invalid does not, as a general matter, further the policies and purposes of the ALRA. However, the Court of Appeal ruled, in essence, that, regardless of the settled Board law on the matter, the issue could not be considered settled until there was a reported court of appeal decision on that "specific issue."[6] However, this Court and the Fifth Appellate District itself have held that agency decisions construing a statute may not only be considered settled, but such a settled administrative construction is to be given great weight. (*Gibson v. Unemployment Insurance Appeals Board* (1973) 9 Cal.3d 494, 498 fn. 6 (recognizing that, although the meaning of a statute is a question of law properly presented to the court, an agency's decisions that "represent a settled administrative construction of the statute . . . must be given great weight."); *Rabago v. Unemployment Insurance Appeals Board* (1978) 84 Cal.App.3d 200, 207 fn. 5 ("The Board's decisions representing a settled administrative construction of the law must be given great weight . . .") Rather than giving the Board's settled precedent on abandonment "great weight" as this Court instructed, the Court of Appeal treated that precedent as having *no* weight,

[6] That the appellate decision in question, in the Court of Appeal's view, must be a reported one is demonstrated by the fact that the Court of Appeal did not regard its own prior unreported decision rejecting a prior attempt by Tri-Fanucchi to assert abandonment as having settled the issue.

holding, in essence, that the status of the abandonment defense could only become settled through a reported judicial decision.

Not only does the Court of Appeal's decision fail to afford settled administrative precedent the weight to which it is entitled, the Court's conclusion that the Board could not rely upon its own established precedent to award makewhole until and unless the matter of abandonment was "settled" through a reported judicial decision threatens to eviscerate the Board's statutory mandate to serve as the expert agency with primary responsibility to formulate remedies for the effects of ULPs. As stated above, this Court has recognized the ALRB, from its inception, 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 v. ALRB, supra*, 24 Cal.3d 335, 346.) The Board has primary and exclusive jurisdiction over ULPs. (Lab. Code, § 1160.9; *Rivcom Corp. v. ALRB* (1983) 34 Cal.3d 743, 771 fn. 25 ("where a dispute concerns activities arguably protected or prohibited by the labor relations statute, the Board, not the courts, has primary jurisdiction."); *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60 (recognizing ALRB's "exclusive jurisdiction" over ULPs).) Yet, the Court of Appeal's decision is based upon the premise that the Board itself cannot develop a body of settled law in its area of expertise and rely upon that same law as settled. That

premise is contrary to well-established precedent that has been long recognized by this Court.

The Court of Appeal also erred in finding that the Board's determination that makewhole was appropriate was based solely upon its assessment of status of the abandonment defense. The Court of Appeal is wrong on this point. The Board expressly stated that it had considered the facts and circumstances and the equities of the parties' positions in arriving at its conclusion. In particular, Tri-Fanucchi had argued that the ALJ had failed to take into account alleged delays and/or dilatory tactics on the part of the UFW and the General Counsel. The Board considered the particular facts alleged by Tri-Fanucchi and found that, even assuming their truth, they would not be sufficient to justify a conclusion that makewhole was not appropriate in this case. However, the Board explicitly acknowledged that, had the facts and circumstances been different, its conclusion might have been different as well. Specifically, the Board noted that "delays in processing a case may become sufficiently extreme to justify modifying the amount of makewhole that would otherwise be owed." [CR 406.] Thus, the Board did not rely exclusively on the fact that Tri-Fanucchi's asserted defense was invalid as a matter of settled Board law, it considered Tri-Fanucchi's legal justification for refusing to bargain, along with the equitable considerations argued by Tri-Fanucchi, and the facts and circumstances generally in arriving at its conclusion. As stated above, the Legislature vested the Board with the discretion to weigh these considerations to effectuate agricultural labor policy

and, under the applicable standard of review, the Court of Appeal should not have reversed the Board's determination simply because it would have weighed those considerations differently than did the Board.

II. THE COURT'S CONCLUSION THAT TRI-FANUCCHI'S REFUSAL TO BARGAIN FURTHERED THE POLICIES AND PURPOSES OF THE ACT WAS INCORRECT AND WILL UNDERMINE PUBLIC POLICY

As discussed above, this Court should grant review of the Court of Appeal's decision because the Court of Appeal failed to apply the proper standard of review to the Board's makewhole order. However, this Court should also grant review because, even had it been proper for the Court of Appeal to decide *de novo* whether an award of makewhole was appropriate, the Court of Appeal's analysis of that issue was incorrect and will have negative public policy effects of state-wide impact.

The Court of Appeal's conclusion that the status of the abandonment defense was "unsettled" and "controversial" such that Tri-Fanucchi's refusal to bargain was "reasonable" cannot be reconciled with its conclusion that the Board's rejection of the abandonment defense was consistent with existing law. In its opinion, the Court of Appeal included an extended excerpt from the Board's decision, which stated that the Board's prior decisions "have been very clear" that the inactivity or absence of a union, "even for an extended period of time," does not represent a defense to the duty to bargain. The Court of Appeal stated that "[t]he Board's position . . . on the abandonment issue . . . *is consistent*

with how California Courts have construed the ALRA." [Slip Op. 12. (Emphasis added.)] The Court of Appeal cited the long-recognized principle that, under the ALRA, "an employer's duty to bargain with the originally certified union *continues* until that union is replaced or decertified by a subsequent election. [*Ibid.* (citing *Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1, 23-24) (emphasis in original).] The Court further cited *F&P Growers v. ALRB*, noting that that case held that "the loss of majority support defense was "clearly *inapplicable* to the ALRA . . ." [Slip Op. 14 (citing *F&P Growers v. ALRB, supra*, 168 Cal.App.3d 667, 674-676) (emphasis in original).] Tri-Fanucchi conceded in its opening brief to the Court of Appeal that the abandonment defense is a mere subspecies of the loss of majority / good faith doubt defense that the Court of Appeal recognized as having been previously held inapplicable to the ALRA. [Pet. Op. Br. p. 15 ("abandonment is a narrow theory within the broader area of good faith doubt . . .").] Furthermore, the Court of Appeal stated that Tri-Fanucchi's abandonment defense "is clearly analogous to the loss of majority defense" that was asserted and rejected in *F&P Growers* and, in light of the "similar nature" of Tri-Fanucchi's claims, "we believe that the same reasoning applies and the same result should follow." [Slip Op. 14-15.]

The Court of Appeal's entirely correct conclusions above simply cannot be squared with its ultimate conclusion that that the state of the law on abandonment was so "unsettled" that the Board could not find that the advancement of that defense did not further the policies and purposes of the

ALRA – particularly in light of the highly deferential standard of review that should have been applied. To the contrary, as the Court of Appeal itself recognized, not only was it well-established that, under the ALRA, unions remain "certified until decertified," the broader "loss of majority" defense had already been rejected by the Board with judicial approval. The court stated that the question of how an appellate court would rule when confronted with the "novel situation of such *long-term* union absence or *egregious* inactivity" was "far from certain." [Slip Op. 20 (emphasis in original).] This statement turns existing law on its head. The Board's decisions, along with appellate decisions such as *Monebello Rose* and *F&P Growers* established generally applicable rules of law, to wit: that unions remain certified until decertified, that employers are not to be participants in deciding representation issues, and that there is no "loss of majority" defense or (under Board law) "abandonment" defense to the duty to bargain. Had the Court of Appeal recognized an abandonment defense for cases of "long term" or "egregious" inactivity it would have represented an unprecedented divergence from these generally applicable rules of law. In short, assuming that Tri-Fanucchi's claim involved a longer period of abandonment than had been addressed in prior decisions, the presentation of that fact pattern did not render the generally applicable rules of law "unsettled" or uncertain. There was nothing in the existing precedent that suggested that there was a time limitation on the "certified until decertified" rule. Rather, the common-sense

approach is to assume that the general rule of law encompasses fact patterns falling within it until and unless an exception is recognized.[7]

Furthermore, the Court of Appeal's reference to "egregious" inactivity by a union appears to reflect a misapprehension of the limits of Board authority under the ALRA. The ALRA sets forth certain forms of conduct that are designated ULPs and which the Board is empowered to remedy (not punish).[8] (Lab. Code, § 1153 et seq.) In particular, the Board is empowered to hear claims that an employer or a union has failed to bargain in good faith. (Lab. Code, § 1153 subd. (e) & 1154 subd. (c).) However, the Board does not have plenary authority to police the relationships between employers and unions or between unions and the employees they represent. Even within the context of conduct defined as ULPs, the Board's remedial authority must be invoked by the filing of a ULP charge. In this regard, the essential fact is that, at no time during the alleged 24-year period of inactivity did Tri-Fanucchi or any other person file a charge with the ALRB alleging that the UFW was refusing to bargain or otherwise violating the ALRA. Nor did Tri-Fanucchi's employees file a petition seeking to decertify the UFW, either during the inactivity period or, critically, in

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[7] Furthermore, the year before Tri-Fanucchi refused to bargain, the Board issued its decision in *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5, in which it rejected an abandonment claim that involved an alleged period of inactivity of approximately 13 years.

[8] It is well-established that the ALRB's authority to command affirmative action is remedial, not punitive, in nature. (*Sunnyside Nurseries, Inc. v. ALRB* (1979) 93 Cal.App.3d 922, 940.)

the period after September 2012 when the UFW resumed actively representing the bargaining unit. Accordingly, the fact that Tri-Fanucchi now, years later, characterizes the UFW's conduct as "extreme dereliction," did not make it "reasonable" for Tri-Fanucchi to assert a discredited abandonment defense. The ALRA does not authorize the Board to police union behavior or punish "dereliction" except to the extent that such behavior constitutes a ULP, and Tri-Fanucchi never asserted that the UFW's conduct constituted a ULP.

As discussed above, the applicable legal standard required the Board to consider the facts and circumstances in determining whether makewhole was appropriate. Among the facts and circumstances presented, the Board knew this was not the first time that Tri-Fanucchi had refused to bargain based on an abandonment theory. In 1986, the Board found that Tri-Fanucchi unlawfully refused to bargain, rejecting its abandonment defense. [Slip Op. 5.] Significantly, Tri-Fanucchi sought judicial review in that case, and the Court of Appeal upheld the Board's decision. The Court of Appeal stated that "Union inactivity alone does not mandate a finding of abandonment" and because Tri-Fanucchi only challenged the UFW's status after the UFW had requested to bargain, no abandonment defense was possible. [*Tri-Fanucchi Farms v. ALRB* (Nov. 21, 1987, F008776) ([nonpub. opn.] p. 9.]

Notably, Tri-Fanucchi's present claim involves the very same factual scenario – a claim of abandonment asserted only after the union resumed its representational role. Under the rules of court, the Board was not permitted to

cite the Court of Appeal's 1987 decision as precedent (and does not do so here). (Cal. Rules of Court, Rule 8.115.) However, the Board was not precluded from taking into account that this was Tri-Fanucchi's 'second bite at the apple' of abandonment, nor was the Court of Appeal. In *George Arakelian Farms, Inc. v. ALRB, supra*, 49 Cal.3d 1279, 1294-1295, this Court noted that forcing employees aggrieved by ULPs to suffer the consequences of "repetitive litigation tactics" would be "inconsistent with the purposes of the [ALRA]."

Tri-Fanucchi's unlawful refusal to bargain deprived (and continues to deprive) Tri-Fanucchi's employees of the benefits of collective bargaining. They have, to that extent, suffered harm.[9] It was entirely reasonable and consistent with the purposes of the ALRA for the Board to reject the proposition that it should "punish" the UFW's "dereliction" by imposing the burdens of Tri-Fanucchi's unlawful refusal to bargain on the bargaining unit employees who not only constituted the class to be protected by the ALRA, but who bore no fault in the matter. Tri-Fanucchi, for example, stated in its brief to the Court of Appeal that it was well aware when it made the calculation as to whether to refuse to bargain with the UFW that its refusal to bargain could result in a makewhole award against it. [Pet. Op. Br. p. 26.] Tri-Fanucchi's employees, on the other hand, had no say in the matter, except to the extent that they had the option to

[9] The amount of that harm will be determined in compliance proceedings, assuming this Court reinstitutes the Board's makewhole order.

decertify the UFW, which they chose not to do. Yet, Tri-Fanucchi and the Court of Appeal would impose the burden of Tri-Fanucchi's choice on those employees. The Board's decision to reject this result was manifestly reasonable and consistent with the Act.

In determining that Tri-Fanucchi's abandonment-based refusal to bargain furthered the policies and purposes of the ALRA, the Court of Appeal relied solely on the policy of the ALRA to promote "greater stability in labor relations." This purpose is undoubtedly an important one. (*Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 223.) However, there are other equally important purposes that the Act seeks to further. Among the most important of these are the purposes explicitly stated in Labor Code section 1140.2 to "encourage and protect the right of agricultural employees to . . . designation of representatives of their own choosing" and "be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives." These interlocking purposes were directly implicated by Tri-Fanucchi's effort to unilaterally terminate its bargaining relationship with the UFW without affording bargaining unit employees an opportunity to express their own choice in a secret ballot election – indeed, although those employees had declined to seek such an election. Requiring Tri-Fanucchi to make its employees whole for the losses caused by its unlawful attempt to unilaterally remove their representative unquestionably furthered these statutory purposes. Yet, the Court of Appeal, although it cited these purposes in affirming the Board's rejection of the

abandonment defense, did not even mention them in reversing the Board's makewhole award.

Furthermore, the Court of Appeal's decision does not further the statutory purpose of promoting stability in labor relations, but undermines it. As discussed above, the Court of Appeal's conclusion that the Board could not treat the legal status of the abandonment defense as settled law until and unless an appellate court issued a reported decision on that specific issue, upends the Board's role as the agency with primary and exclusive jurisdiction to administer the ALRA and decide ULPs. Critically, it signals to employers (and unions) throughout the state that regardless of how many decisions the Board issues on a point of law, they may consider that point of law unsettled as long as a court of appeal has not issued its own opinion on the matter in a reported decision. Furthermore, under the Court of Appeal's rationale, where a point of law on a bargaining issue has not been "settled" by an appellate decision, employers may refuse to bargain or otherwise comply with the Board's orders secure in the knowledge that they may assert the lack of an appellate decision on the "specific issue" as a bar to an award of makewhole. Thus, the Court of Appeal's decision undermines stability in labor relations by undercutting the force of Board decisions and strongly signaling employers to choose litigation over collective bargaining.

By treating Board decisions as something in the nature of advisory or tentative opinions pending ultimate resolution by the judiciary, the Court of Appeal's decision will place additional burdens on the courts of appeal and this

Court. If the law is to be considered "unsettled" in the absence of a court of appeal decision, the courts will be increasingly asked to "settle" the law with reported decisions on particular issues, for the Court of Appeal's decision states that, even where, as here, a defense to bargaining is inconsistent with the general rules of law set forth by the Board and the Courts, a party may not be awarded makewhole where there is no court of appeal decision on the "specific issue" raised. In creating the ALRB as an agency with primary and exclusive jurisdiction over ULPs and with subject matter expertise, the Legislature intended to relieve the courts of these kinds of disputes in order to eliminate delay and thereby effectuate stability and peace in the fields. (*George Arakelian Farms, Inc. v. ALRB, supra*, 49 Cal.3d 1279, 1295 (Noting the legislative intent in enacting the ALRA to "avoid undue litigious delay" and rejecting a "procedural system that encourages successive reviews by appellate courts of questions that were previously decided.") Thus, in *United Farm Workers of America v. Superior Court* (1977) 72 Cal.App.3d 268, the court of appeal rejected the proposition that superior courts have jurisdiction to issue declaratory relief concerning the bargaining rights of agricultural employers or employees in light of the Board's "exclusive primary jurisdiction" over ULPs. The court held:

> If every time an incident or condition precedent were involved in an alleged unfair labor practice and any party could first obtain declaratory relief in the superior court instead of from the Board, 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.

While the courts of appeal, undoubtedly have an important, if limited, role in reviewing the Board's decisions and determining the law, the Court of Appeal's ruling that the Board's ability to award makewhole was conditioned upon a court of appeal "settling" the status of the abandonment defense in a reported appellate decision similarly threatens to thwart the legislative intent, impair the work of the Board, and bring more litigation to the already overcrowded dockets of the courts.

The Court of Appeal focused on stability fostered by clarifying applicable rules of law (although, as noted, the rule of law on abandonment created by the Board's precedent was abundantly clear). However, the Court of Appeal's decision disregards other, arguably more fundamental, aspects of the stability sought by the Legislature in enacting the ALRA. In *Ruline Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247, 253-254, it was recognized that "the collective bargaining process is the preferred method for attempting to bring peace and stability to California's agricultural fields" and that the Act's election provisions are the "central feature" in the promotion of this policy. Relatedly, in in *Sandrini Bros. v. ALRB, supra*, 156 Cal.App.3d 878, 884, the court emphasized the importance of the "public policy goal of enhancing overall stability by discouraging unfair labor practices."

The Court of Appeal's decision undermines both of these public policy goals. Rather than bargain with the UFW and allow its employees to remove the UFW (if that was their desire) through the election process, Tri-Fanucchi sought to unilaterally terminate its bargaining obligation outside of the Act's election procedures, directly undermining this "central feature" promoting labor relations stability. Furthermore, by encouraging employers to commit ULPs and litigate certification disputes rather than bargain, the Court of Appeal's decision undermines the "public policy goal of enhancing overall stability by discouraging unfair labor practices." (*Sandrini Bros. v. ALRB, supra*, 156 Cal.App.3d 878, 884.)

In sum, while the Court of Appeal cited the public policy goal of fostering labor relations stability as justification for its decision to override the Board's makewhole determination and permit Tri-Fanucchi to commit an unfair labor practice without making its employees whole for economic harm caused thereby, its conclusion was simply incorrect that Tri-Fanucchi's conduct of challenging a well-established Board precedent furthered this goal, and the policies and purposes of the ALRA generally. The Board's award of makewhole furthered the statutory policies of preserving employee free choice and eliminating employer interference in the selection of bargaining representatives. The Court of Appeal's opinion does not further stability in labor relations but undermines the role of the Board, and encourages employers to choose litigation over bargaining, thereby encouraging the commission of ULPs. For these reasons, the

Court of Appeal's conclusion was erroneous and should be reversed. However, more fundamentally, as discussed above, the weighing of these policy considerations was a role assigned by the Legislature to the Board, and not to the judiciary.

CONCLUSION

For the foregoing reasons, the Agricultural Labor Relations Board respectfully requests that the Court grant review.

DATED: June 22, 2015

Respectfully submitted,

J. ANTONIO BARBOSA
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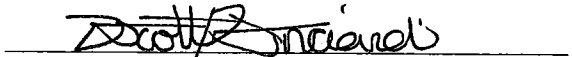

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CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court 8.504(d)(1), the undersigned hereby certifies that the Agricultural Labor Relations Board's Petition for Review contains 8,261 words according to the word count function included in Microsoft Word software with which the brief was written.

DATED: June 22, 2015

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Board

Tri-Fanucchi Farms v. Agricultural Labor Relations Board

Petition for Review

Exhibit A

CERTIFIED FOR PUBLICATION

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) **OPINION**

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.

-ooOoo-

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 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.

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

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 responded 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,

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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.

subdivisions (a) and (e) of the ALRA,[3] 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.

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

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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 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)).

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 exists 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.

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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.

(§§ 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 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

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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.)

[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.)

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 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*, at pp. 672–677.) In resolving that issue,

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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."

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 ... *making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain*, 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 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

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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.)

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 *egregious* 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

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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).)

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 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.

F069419

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Tri-Fanucchi Farms v. ALRB
S_____

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1325 J Street, Suite 1900-B, Sacramento, California 95814.

On June 22, 2015, I served the within **PETITION FOR REVIEW** on parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

Via U.S. Mail

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Executed on **June 22, 2015**, at Sacramento, California. I certify (or declare), under penalty of perjury that the foregoing is true and correct.

Sonia Louie