

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD<sup>1</sup>  
REGION 32

DIAMOND WALNUT GROWERS, INC.

Employer

and

Case 32-RC-3553

CANNERY WORKERS, PROCESSORS,  
WAREHOUSEMEN AND HELPERS, LOCAL 601,  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, AFL-CIO

Petitioner

**SEVENTH SUPPLEMENTAL DECISION AND NOTICE OF HEARING**

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the challenged ballots and Employer's objections in the second rerun election to be conducted and hereby overrules certain challenged ballots as specified below, and Objections Nos. 1, 2, 3, 6, 7, 9, 11, 12, 15 and 16. With regard to the remaining objections, a hearing on Objections Nos. 4, 5, 8, 10, 13, 14, 17, 18, and 19 will be held. If the opening and counting of the aforementioned overruled challenged ballots does not result in the remaining challenged ballots being non-determinative, those latter ballots will also be set for hearing.

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<sup>1</sup> Hereinafter the Board.

## The Election

Pursuant to a Decision and Direction of Election that issued on July 10, 1992, the initial representation election in this case was conducted on October 14, 1992. After failing to receive a majority of votes in that election, the Petitioner filed objections, resulting in the direction of a second election that was conducted during the following season on October 8, 1993.<sup>2</sup> Thereafter, again failing to obtain a majority of votes in the rerun election, the Petitioner filed election objections and an unfair labor practice charge, which ultimately resulted in the Board issuing a Decision, Order and Direction of Third Election on January 20, 1995. Upon a petition for review, the United States Court of Appeals for the District of Columbia Circuit affirmed the Board's Order in part and denied enforcement in part, and remanded the case to the Board for further processing. On August 7, 1998, the Board issued a Supplemental Decision and Direction of Third Election. The Petitioner subsequently filed additional unfair labor practice charges that blocked further processing of the Petition. The Board, following a hearing before an administrative law judge that closed on March 21, 2001, on November 28, 2003, issued a decision that required that the Employer remedy certain unfair labor practices. Upon completion of the compliance period, those cases closed on March 17, 2004. Because, as noted above, of the seasonal nature of the Employer's operations, the second rerun election was conducted on October 14 and 15, 2004,<sup>3</sup> in the following appropriate bargaining unit:

All full-time and regular part-time, and seasonal maintenance, production and warehouse employees employed by the Employer at its facility located at 1050 South Diamond Street, Stockton, California; **excluding** executive employees, administrative employees, professional employees, office and clerical employees, company inspectors, landscaping other than routine gardening to be performed by the bargaining unit gardener employee, guards and supervisors as defined in the Act.

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<sup>2</sup> The peak of the season is normally in the fall of each year.

<sup>3</sup> All dates hereinafter are 2004 unless indicated otherwise.

The Tally of Ballots served on the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters.....	1064
Number of void ballots .....	9
Number of votes cast for Petitioner.....	311
Number of votes against participating labor organizations...	262
Number of valid votes counted.....	573
Number of challenged ballots.....	76
Valid votes counted plus challenged ballots.....	649

Subsequent to the election, on November 2, the undersigned approved a Stipulation on Challenged Ballots concerning the challenges made by the Petitioner and the Board agent conducting the election. Pursuant to that Stipulation, the parties waived the issuance of a Regional Director’s Report on Challenges, the filing of exceptions thereto, and a hearing on those particular ballots and agreed to open and count the 24 ballots challenged by Petitioner and to sustain the 11 challenges to the ballots made by the Board agent. Accordingly, on November 3, the ballots of Fred Arrollo, Earl Avara, Alejandro Barajas, Donna Castellon, Silvino Da Silva, Ricardo Paz De Rocha, Rafael Duenas, Jose Esparza, Ronald Howard, Joann Jenkins, Laverne Jones, James Kennedy, Elser Lam, Brian Penno, Gurpreet Sandhu, Rajwinder Sandhu, Rodolfo Sandoval, Vincent Serna, Joseph Surratt, Pedro Tagalicud Jr., Alvin Threet, Pedro Valles, Pa Vans, and Chris Young were opened and counted. Additionally, the ballots of Calvo Bacilisa, Elias Cruz, Piedad Esquivel, Gurbax Kaur, Kulwinder Kaur, Carmen Lopez, Maria de Jesus Ochoa, Juan C. Reyes, Angel Ruis, Maria Torres, and Deydalina Montufar were sustained and not counted. A Revised Tally of Ballots issued which showed the following:

Approximate number of eligible voters.....	1064
Number of void ballots .....	9

Number of votes cast for Petitioner.....	311
Number of votes against participating labor organizations...	286
Number of valid votes counted.....	597
Number of challenged ballots.....	41
Valid votes counted plus challenged ballots.....	638

Thus, the remaining challenged ballots are sufficient in number to affect the results of the election. The Employer filed timely objections to the election, a copy of which was served on Petitioner by the Region.

### **The Challenged Ballots**

Of the remaining 41 challenged ballots, the Employer challenged 24 employees solely on the basis that those employees had been on strike for more than 12 months at the time the second rerun election was conducted. Those 24 challenged voters are Frances Atilano, Amparo Cabebe, Vickie Chow, Amrik Singh Dhaliwal, Narinder Dhillon, Sara Esqueda, Jackie Fanucchi, Pascual Garcia, Sharon Grimm, Anton Hinrichsen, Manuel Joaquin, Joseph Thomas, Leal Esperanza, Yick Ma, Richard Mack, Anita Orello, Bernadine Page, Lucio Reyes, Delores Smith, Enriqueta Vargas, Mike Vasquez, Cipriano Villareal, Josefina Villareal, and Wai Wan. The names of the aforementioned employees were included both on the original *Excelsior* list in the first election, and the list of striking employees submitted by the Employer. Aside from the Employer’s assertion that these employees were ineligible because they had been on strike for more than 12 months, there was neither evidence nor the contention by any party to the election that those employees had abandoned their jobs, or were otherwise ineligible to vote at the time of the third election. The Board has held that the 12-month economic striker eligibility period for a first election would be extended to preserve the original eligibility of replaced economic strikers in any subsequent rerun election. *Diamond Walnut Growers, Inc.*, 326 NLRB 28, 31 (1998) citing *Jeld-Wen of Everett, Inc.*, 285 NLRB 118, 119 (1987). Accordingly, I find that those employees

challenged solely on the ground that they had been on strike for more than 12 months at the time of the third election are eligible, and thus, overrule the challenges to their ballots. As it appears likely that this resolution of the challenged ballots of the above strikers will likely result in the remaining challenged ballots no longer being determinative of the results of the election, those ballots shall be opened and counted and a revised Tally of Ballots issued. As stated above, in the unlikely event that the remaining 17 challenged ballots are still sufficient to affect the results of the election, a hearing on those ballots<sup>4</sup> shall be held along with the hearing on objections.

### **The Objections**

#### Objections Nos. 1, 2, 3, 6, 7, 9, 11 and 15

1. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees and/or members of their families were by threats of economic, physical, and other retaliation if they did not join, support, or select the Petitioner as their collective bargaining representative.
2. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by threatening loss of employment if they did not support the Petitioner in the election.
3. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by creating an atmosphere of fear and coercion.
6. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by informing employees that they would be discharged or otherwise disciplined if the Petitioner did not prevail in the election.
7. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by misrepresenting facts which were critical and material to the election and to which the Petitioner had exclusive knowledge.

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<sup>4</sup> Ten of the remaining challenged ballots were challenged because a party questioned the Board agent's interpretation of the intent of a voter; the other seven were those of strikers whom the Employer challenged on the additional ground that they had either been terminated or had retired.

9. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by telling or implying to employees that either the Petitioner or someone else would contact the Immigration and Naturalization Service (INS) concerning the legality of the employees' employment in the United States if the employees did not support the Petitioner in the election or if the Petitioner did not prevail in the election.

11. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by telling or implying to employees that appearing at the polls to vote would require an employee to present identification which the Board agents could use to determine whether or not the employee was legally in the United States.

15. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by telling employees and/or implying to them that seasonal employees would be made regular, full-time employees if the Petitioner prevailed in the election.

As the objecting party, the Employer has the sole burden of providing evidence in support of its objections. *City Wide Insulation of Madison, Inc.*, 338 NLRB No. 108, slip op at p. 3 (Feb. 27, 2003). To satisfy this burden, the Employer may specifically identify witnesses who would provide direct rather than hearsay testimony to support its objections, specifying which witnesses would address which objections. *Id.*, *Heartland of Martinsburg*, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983). In the alternative, the Employer may provide specific affidavit testimony and other specific evidence in support of its objections. *City Wide Insulation of Madison, supra*. This evidence or description of evidence must be provided to the Regional Office "within 7 days of the day the objections are required to be filed or within such additional time as may have, upon a timely request, been allowed by the Regional Director." *Id.* (quoting from NLRB Casehandling Manual (Part Two) Section 11392.6). Although the Employer submitted a timely statement supporting certain of its objections, it did

not present any evidence, description of evidence, names of witnesses or affidavit testimony in support of Objections Nos. 1, 2, 3, 6, 7, 9, 11 and 15. Accordingly, Objections Nos. 1, 2, 3, 6, 7, 9, 11 and 15 are overruled.

Objection No. 16

16. By the above and other acts and conduct, the Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees.

As this is a “catch-all” objection and does not assert any independent objectionable conduct for which the Employer has presented any supporting evidence, it is overruled.

Objection No. 12

12. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by telling employees or implying to them that the Petitioner did not represent bargaining-unit employees from 1991-2004.

According to the Employer, Union officials told approximately ten employees that the Petitioner did not legally represent them during the period 1991 through the date of the election because no union dues were being taken out of their paychecks. Even assuming that Union agents made such statements, the Board has long held that it will not probe into the truth or falsity of the parties’ campaign statements. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). Moreover, it is not readily apparent, and the Employer proffered no explanation, of why such statements would have any impact on employee free choice in the election.

Accordingly, Objection No. 12 is overruled.

Objection Nos. 4, 5, 8, 10, 13, 14, 17, 18 and 19

4. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by making promises to them concerning matters which the Petitioner was capable of following through on and/or by making promises to

employees which caused the employees to believe falsely that they would automatically receive economic and other rewards if the petitioner prevailed in the election.

5. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by interrogating employees regarding their voting intentions and sympathies in the election.

8. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by possessing, maintaining, and/or checking off a list of eligible employees when the employees appeared at the Employer's facilities to vote.

10. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by entering the DFA Room at the Employer's facility where the voting was taking place during a time that voting was taking place.

13. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees when an election observer for the Petitioner campaigned with or otherwise spoke to voting employees in the DFA Room before the employees entered a voting booth while the election was taking place.

14. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by telling employees or implying to them that the Petitioner would provide them and/or their families with "Green Cards" or would otherwise insure that the employees would be made legal to work in the United States if the Petitioner prevailed in the election.

17. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by contacting, electioneering with, or otherwise speaking to employees during the polling period.

18. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees when an agent of the Petitioner placed himself in a position where eligible employees had to pass him in order to enter the polling area both before and during the polling period.

19. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by electioneering with or otherwise speaking to employees who were waiting in line to vote.

These objections raise material issues of fact and law that can best be resolved by a hearing.

### **Notice of Hearing**

**IT IS HEREBY ORDERED** that a hearing on Objections Nos. 4, 5, 8, 10, 13, 14, 17, 18, and 19, and the remaining 17 challenged ballots if they are still sufficient to affect the outcome of the election following the opening and counting of the ballots of the 24 striking employees, be held before a duly designated Administrative Law Judge of the Board.

**IT IS FURTHER REQUESTED** that the Administrative Law Judge designated for the purpose of conducting the hearing prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within fourteen (14) days from the issuance of said report, any party may file with the Board an original and one (1) copy of exceptions to such report, with supporting brief, if desired. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, on the other party to the proceeding and with the undersigned. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

**PLEASE TAKE NOTICE** that on , at 9:00 a.m., PDST, at the Oakland Regional Office, 1301 Clay Street, Suite 300N, Oakland, California, a hearing pursuant to Section 102.69 of the Board's Rules and Regulations will be conducted before an Administrative Law Judge of

the National Labor Relations Board upon the aforesaid challenged ballots and objections, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony and to examine and cross-examine witnesses with respect to said matters.

DATED AT Oakland, California, this 19th day of November, 2004.<sup>5</sup>

/s/ Alan B. Reichard  
Alan B. Reichard, Regional Director  
National Labor Relations Board  
Region 32  
1301 Clay Street, Suite 300N  
Oakland, CA 94612-5211

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<sup>5</sup> Under the provisions of Section 102.69 of the Board's Rules and Regulations, a Request for Review of this Supplemental Decision may be filed with the National Labor Relations Board, 1099 14th Street, NW, Washington, DC, 20570-0001. Pursuant to Section 102.69(g), affidavits and other documents which a party has submitted timely to the Regional Director in support of objections and/or challenged ballots are not part of the record unless included in the Supplemental Decision or appended to the Request for Review or opposition thereto which a party submits to the Board. The Request for Review must be received by the Board in Washington, DC by December 3, 2004.