Hollister, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GRANT HARLAN FARMS,	)	
Respondent,	)	Case Nos. 80-CE-288-SAL 82-CE-5-SAL
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	9 ALRB No. 1
Charging Party.	)	

DECISION AND ORDER

On July 19, 1982, Administrative Law Officer (ALO) William H. Steiner issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions and a supporting brief.

Pursuant to provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the ALO as modified herein.

On September 30, 1980, Board agents conducted a representation election among Respondent's agricultural employees. The United Farm Workers of America AFL-CIO (UFW) received a majority of the votes cast, winning the election by a 32 to 9 vote. Respondent

[1/] All section references herein are to the California Labor Code unless otherwise noted.

timely filed a post-election objection which was dismissed by the Executive Secretary of the Board. The Board subsequently denied Respondent's request for review of that dismissal.

Findings of Fact

On July 1, 1981, the Board certified the UFW as the exclusive collective bargaining representative of all Respondent's agricultural employees in California. On September 15, 1981, the UFW sent, by certified mail, a letter to Respondent requesting that Respondent commence collective bargaining negotiations. On October 26, 1981, the UFW sent another request by certified mail. On December 2, 1981, the UFW personally served a request to bargain upon Grant Harlan, sole proprietor of Grant Harlan Farms.

On January 14, 1982, Respondent, through its attorney Howard D. Silver, sent the UFW a letter stating that it was refusing to bargain in order to obtain judicial review of the Board's certification of the UFW. Respondent admits that it refused to meet and bargain but contends that the Board improperly certified the UFW and that its refusal to bargain therefore did not constitute a violation of Labor Code section 1153(e) and (a).

Conclusions of Law

This Board has adopted the NLRB's proscription against relitigation of previously resolved representation issues in subsequent related unfair labor practice proceedings, absent a showing of newly discovered or previously unavailable evidence, or other extraordinary circumstances. (Ron Nunn Farms (1980) 6 ALRB No. 41.) As Respondent has not presented newly discovered or previously unavailable evidence and has claimed no extraordinary

circumstances, we shall not reconsider the representational issues in this proceeding. Accordingly, we conclude that Respondent violated section 1153(e) and (a) by its failure and refusal to meet and bargain collectively in good faith with the UFW.

Remedy

We now turn to a consideration of whether makewhole should be awarded to the employees in the bargaining unit in order to remedy Respondent's unlawful refusal to bargain. When an employer refuses to bargain with a labor organization in order to gain judicial review of a Board certification, we consider the appropriateness of the makewhole remedy on a case-by-case basis. (J. R. Norton Company v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1.) We shall impose the makewhole remedy unless the employer's litigation posture was reasonable at the time of its refusal to bargain and the employer seeks judicial review of the Board's certification in good faith. (J. R. Norton Company (1980) 6 ALRB No. 26.)

In its post-election objection, Respondent asserted that the requirements of section 1156.3(a)(1) were not met because during the payroll period preceding the filing of the petition, i.e., the eligibility period, it employed fewer than 50 percent of the workers it employed during its peak period for the year. Respondent supplied payroll data for its peak payroll period in 1979 for comparison and argued that, by either the body count method or the employee averaging method, the peak requirement was not met, assuming no days in the eligibility period were disregarded as unrepresentative. The Executive Secretary dismissed Respondent's

objection, finding that the peak requirement was met utilizing the employee averaging method and disregarding as unrepresentative the days on which few or no employees worked. The Executive Secretary, in his dismissal order noted,

> There is no evidence that the Employer provided the Regional Director with any information other than the payroll records for its 1979 peak payroll period. The Employer failed to submit any evidence that the days during which few or no employees worked in either the payroll period immediately preceding the filing of the Petition or the peak payroll period in 1979 were representative and would have been included in the peak calculations. California Lettuce Co. (Mar. 29, 1979 5 ALRB No. 24.)

The Board denied Respondent's request for review of the Executive Secretary's dismissal of the objection. For the reasons set forth below, we find that Respondent's refusal to bargain based upon its rejected post-election objection, does not constitute a reasonable litigation posture, and we therefore conclude that makewhole relief is an appropriate remedy in this case.[2/]

[2/] Our dissenting colleague, Member McCarthy, argues that Respondent's litigation posture was reasonable because, using the Scattini formula (Luis A. Scattini & Sons (1976) 2 ALRB No. 43) the peak requirement was not met. We respectfully disagree with his analysis. Our duty is to inquire into whether Respondent's litigation posture was reasonable, not to determine whether there was a reasonable litigation posture which Respondent might have adopted. Respondent never argued that Scattini was applicable or that the two employee groups should be averaged separately. Respondent's proposed formulas, in fact, rejected a separate-averaging approach. Respondent's sole objection was that days on which few or no employees worked should not be disregarded as unrepresentative. Our dissenting colleague did not directly address whether that litigation posture by Respondent was reasonable. Instead, he concedes that the principle of eliminating unrepresentative days is well established. (See his dissenting opinion in California Lettuce (1979) 5 ALRB No. 24.) Although we may differ with Member McCarthy's interpretation of Scattini, we need find only whether Respondent's litigation posture was unreasonable. We so find.

At all times material herein, Respondent utilized two groups of employees, a labor contractor's crew and a farm crew. During the eligibility period, the labor contractor employed 35 employees on each of three days but no employees on the remaining four days in that week. According to Respondent's position and proposed formula, the average number of employees per day for that crew would be 15 ($\frac{105}{7}$), not 35 ($\frac{105}{3}$), the figure which results if the four days when no employees worked are disregarded as unrepresentative.

In Mario Saikhon, Inc. (1976) 2 ALRB No. 2, we set forth the employee averaging method of determining peak. Respondent does not and did not challenge the validity of that method, which has come to be known as the Saikhon formula. In many election cases since, Regional Directors, in applying the Saikhon formula, have disregarded as unrepresentative Sundays and other days when few or no employees worked. We have affirmed that procedure on many occasions. (Ranch No. 1, Inc. (1976) 2 ALRB No. 37, p. 2, fn. 4; High & Mighty Farms (1977) 3 ALRB No. 88; California Lettuce Co. (1979) 5 ALRB No. 24.) Our California Lettuce Co. decision was divided on the issue of whether that employer had provided sufficient proof that the days disregarded by the Regional Director were, in fact, representative. However, all five Board members agreed that it was proper to exclude from the computation as unrepresentative the days on which little or no work was performed due to factors other than the amount of work available.

In the instant matter, Respondent has presented no arguments or evidence as to why the days when few or no employees

worked should be considered as representative and included in the computation. We find that Respondent's position, which simply challenges the concept of excluding unrepresentative days, is an unreasonable litigation posture.

Given the insubstantial nature of Respondent's post-election objection, we find that Respondent could not have entertained a reasonable belief that the election was conducted in a manner which did not fully protect employees' rights or that misconduct occurred which tended to affect the outcome of the election. Accordingly, we conclude that Respondent did not act reasonably or in good faith in seeking judicial review of the Board's certification, and we shall therefore order the makewhole remedy in this case.[3/]

The Refusal to Bargain

The duty to bargain commences upon the receipt of a bargaining request. It is uncontradicted that the UFW sent to Harlan, by certified mail, two requests to bargain and that the Post Office left a "pink slip" at Respondent's address on each occasion. As no one claimed the letters during a specified time period, the letters were returned to the UFW. Mr. and Mrs. Harlan

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[3/] As noted by the Executive Secretary, Respondent presented no evidence showing that any of the days excluded by the Regional Director and the Executive Secretary were representative. California Lettuce Co., supra, which specifically stated that it is the employer's burden to present such evidence, issued one and one half years prior to the election at Respondent's ranch. We consider that if Respondent believed in good faith that its objection had merit, it would have provided supporting information. Moreover, we find that its delay of 44 days between the personal service on Harlan of a request to bargain and its refusal is evidence of bad faith. (Holtville Farms (1981) 7 ALRB No. 15.)

testified that they neither received nor were aware of any such letters or pink slips.

The ALO discredited the testimony of the Harlans and, relying upon Evidence Code section 641, found that Respondent's duty to bargain began September 16, 1981, the day after the first certified letter was mailed rather than December 2, 1981, when Harlan was personally served with a request to bargain. Respondent has taken exception to that finding. We find merit in Respondent's exception. Although an employer cannot legitimately claim that a union's bargaining request has not been made when it has refused to accept any communication from the union,[4/] we find there is insufficient evidence to establish that Respondent knew of the attempted delivery. Evidence Code section 641 states that a properly addressed and mailed letter is presumed received. Said presumption does not apply to certified letters which require a signature upon receipt. Moreover, the letters were in fact returned, undelivered, to the UFW. The only basis upon which the Harlans could have known of the requests to bargain was by the pink slips left in their mailboxes. Such pink slips in general, and these pink slips in particular, did not indicate the identity or address of the sender. They indicated only the sender's zip code which was that of the UFW's office in Hollister. Thus, even if we affirmed the ALO's finding that the Harlans had knowledge of the slips, that alone would not establish that they knew the letters

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[4/] NLRB v. Columbian Enameling and Stamping Co., Inc. (1938) 306 U.S. 292; City Electric Company & I.B.E.W., Local 278 (1967) 164 NLRB No. 116 [65 LRRM 1264]; Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

were from the UFW, or were requests to bargain, or that they failed to claim the letters for that reason. As the Harlans live in Hollister, it is likely that they receive business and personal correspondence from individuals and entities other than the UFW in that area. Consequently, we find that Respondent's duty to bargain arose on December 2, 1981, the day the bargaining request was personally delivered to Harlan, and we shall award makewhole for a period commencing on that date.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Grant Harlan Ranch, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in section 1155.2(a) of the Agricultural Labor Relations Act (Act), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of its agricultural employees.

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

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective-bargaining representative of its agricultural employees and, if an

agreement is reached, embody the terms thereof in a signed contract.

(b) Make whole all agricultural employees employed by Respondent at any time during the period commencing on December 2, 1981, the date of Respondent's first refusal to bargain with the UFW, and continuing thereafter until the date on which Respondent commences good-faith collective bargaining with the UFW which leads to a contract or a bona fide impasse, for all losses of pay and other economic losses they have suffered as a result of Respondent's aforesaid refusal to bargain, the makewhole awards to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all records in its possession relevant and necessary to a determination, by the Regional Director, of the makewhole period and the amounts due employees under the terms of this Order.

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

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice

which has been altered, defaced, covered, or removed.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from December 2, 1981, until the date on which the said Notice is mailed.

(f) Provide a copy of the attached Notice in the appropriate language, to each agricultural employee hired by Respondent during the 12-month period following the date of issuance of this Order.

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

(i) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year commencing on the date on which Respondent commences to bargain in good faith with the UFW.

Dated: January 25, 1983

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

MEMBER McCARTHY, Dissenting:

The majority concludes that Respondent's technical refusal to bargain with the certified representative of its employees was not premised on a reasonable litigation posture and therefore makewhole relief is warranted. I respectfully dissent.

A representation election was conducted despite Respondent's objection that the petition was not timely filed in accordance with Labor Code section 1156.4. Respondent thereafter timely filed a post-election objection, contending that the petition for certification did not meet the threshold statutory requirement of Labor Code section 1156.3(a)(1). After an administrative investigation, the Executive Secretary of the Board dismissed the objection for failure to set forth a prima facie case. (J. R. Norton Co. (1979) 26 Cal.3d 1.) The Executive Secretary apparently assumed that the Regional Director, in computing the peak measurement, properly excluded certain days on which the labor contractor's crew had not worked, on the theory

that those days were not representative work days. However, Respondent's regular farm crew employees worked on every day in the same work week, establishing that there was work to be done throughout that week. In denying Respondent's request for reconsideration of the dismissal of its election objection, the Executive Secretary ruled that Respondent had failed to meet its burden of establishing that the excluded days were representative and should have been factored into the peak calculation.

This is a prospective-peak case. Respondent maintained that it was at less than 50 percent of its peak agricultural employment for the current calendar year during the eligibility period, i.e., the payroll period immediately preceding the filing of the certification petition. We have held that in prospective-peak cases, the appropriate test is whether the Regional Director's peak determination was reasonable at the time made in light of data submitted to him or her by the employer. (Charles Malovich (May 9, 1979) 5 ALRB No. 33.) In support of its post-election objection, based on its previous preelection peak objection, Respondent attached a declaration asserting that it had informed the Board agent in charge of the election that its payroll, for the payroll period just preceding the filing of the petition on September 22, 1980, represented less than 50 percent of its anticipated peak employment for the 1980 calendar year. In support of that assertion, Respondent presented the Board agent with copies of its payroll records for the week ending October 3, 1979, its peak employment period for the previous year. Labor Code section 1156.4 applies to prospective peak determinations and

requires that the Regional Director not rely solely on the peak agricultural employment for the prior season but shall estimate future peak employment on the basis of all relevant data, including acreage and crop statistics applied uniformly throughout the State.

Reproduced below is a comparison chart of the relevant payroll periods submitted by Respondent in support of its post-election objection and represents the payroll data made available to the Board agent prior to the election.

ELIGIBILITY PERIOD (1980)

Date	Sun. 9/14	Mon. 1/15	Tue. 1/16	Wed. 1/17	Thur. 9/18	Fri. 9/19	Sat. 9/20	Total # Different Employees
Labor Contractor	0	0	0	35	35	35	0	35
Harlan Farm's Crew	2	5	13	11	15	16	3	20

PEAK PERIOD (1979)

Date	Sun. 9/27	Mon. 9/28	Tue. 9/29	Wed. 9/30	Thur. 10/1	Fri. 10/2	Sat. 10/3	Total # Different Employees
Labor Contractor	67	71	72	0	42	92	83	165
Harlan Farm's Crew	30	20	8	18	24	21	22	33

Since no hearing was held, the manner in which the Regional Director determined that the requirements of Labor Code sections 1156.4 and 1156.3(a)(1) had been satisfied is not before

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the Board.[1/] Thus, we are precluded from evaluating the Regional Director's determination in light of the Malovich standard.

In any event, an examination of the raw figures supplied by Respondent, in light of Board-approved computational formulas, clearly reveals that the petition for certification was not timely filed. Peak is obtainable in the present case only by excluding certain days from the prepetition payroll period for the labor contractor's crew and then averaging the remaining employee days for that crew, separately from the crew of steady employees and, in addition, excluding different days for the latter crew.

In Luis A. Scattini & Sons (March 3, 1976) 2 ALRB No. 43, the Board authorized Regional Directors to separately average crews only in those instances where the employer utilizes different payroll periods for two or more crews, i.e., when the payroll periods begin and/or end on different dates. (Affd. Kamimoto Farms (Dec. 21, 1981) 7 ALRB No. 45.) In Ranch No. I, Inc. (Feb. 23, 1976) 2 ALRB No. 37, we developed the concept of nonrepresentative

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[1/] Indeed, without benefit of a full report from the Regional Director, or facts developed at a hearing, neither this Board, nor Respondent for that matter, has any basis on which to assume that the Regional Director computed peak in a particular manner. It is entirely possible, for example, that the Regional Director merely erred in his computations or, on the other hand, that he found that the Respondent had materially altered its farming operations, resulting in a substantially smaller work force in the remaining payroll periods of the relevant calendar year. In a recent Federal Register notice announcing its revision of procedural rules, the National Labor Relations Board (NLRB) made clear that ex parte investigations by Regional Directors are not to be used to resolve "substantial and material factual issues" in representation proceedings. The Board noted that such questions on review are not whether conduct sufficient to set aside the election in fact occurred, but only whether the objecting party has established that it could produce, at a hearing, evidence which, if credited, would warrant setting aside the election.

days in order to exclude from peak computations those otherwise normal work days on which relatively few or no employees worked because there was no work to be done. See California Lettuce Co. (March 29, 1979) 5 ALRB No. 24, wherein the Board held that nonrepresentative days are those days when "little or no work is performed due to factors external to the amount of work available such as holidays, inclement weather, etc."

The Scattini rule is unavailing where, as here, Respondent maintains the same payroll period for all of its employees. Thus, there is no precedent which would authorize the separate averaging of the two crews. Moreover, there is no precedent which would warrant the manner in which the Ranch No. I nonrepresentative days concept has been applied by the Executive Secretary. An average of nine employees per day from Respondent's regular farm crew worked on each of the seven days in the pre-petition payroll period, thereby establishing that there was work to be done on each day of that week. Respondent had additional work that week, but only to the extent that it was necessary to call in thirty-five contract workers for a three-day period. In contrast, Respondent utilized between forty-two and ninety-two contract workers on each of six days during the preceding year's peak-employment period while the steady crew, averaging twenty employees per day, worked all seven days of the same payroll period.

In High & Mighty Farms (May 30, 1980) 6 ALRB No. 31, we held that the appropriateness of ordering the makewhole remedy in technical refusal-to-bargain cases will turn on whether a

respondent litigated in a "reasonable, good faith belief" that the election was conducted in a manner which did not fully protect employee rights or that misconduct occurred which tended to affect the outcome of the election. We declined to order makewhole in that case because the Regional Director developed a peak-computation formula that had not theretofore been reviewed or adopted by the Board. Similarly, in the instant case, only by utilizing a method of measurement which deviates substantially from established practice could 50 percent of peak be achieved.

In light of the circumstances here, given the inapplicability of the Malovich test, I am compelled to find that High & Mighty is dispositive of the issue of whether Respondent's challenge to the underlying representation matter was based on a reasonable litigation posture. I would find that Respondent technically refused to bargain with the certified representative of its employees because of a reasonable, good-faith belief that the petition was untimely filed because Respondent was at less than 50 percent of its annual peak employment during the eligibility period, and therefore the Regional Director erred in conducting the election. Accordingly, I dissent from the makewhole provisions of the majority's remedial Order.

If I were convinced that Respondent's post-election objection was based on an unreasonable litigation posture, I would have agreed with my colleagues and found that a makewhole award is appropriate and, furthermore, would have measured the

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makewhole period from the date on which the UFW's first request to bargain was submitted to Respondent.

Dated: January 25, 1983

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

A representation election was conducted by the Agricultural Labor Relations Board (Board) among our employees on September 30, 1980. The majority of the voters chose the United Farm Workers of America, AFL-CIO (UFW), to be their union representative. The Board found that the election was proper and officially certified the UFW as the exclusive collective bargaining representative of our agricultural employees on July 1, 1981. When the UFW asked us to begin to negotiate a contract, we refused to bargain so that we could ask the court to review the election. The Board has found that we have violated the Agricultural Labor Relations Act by refusing to bargain collectively with the UFW. The Board has told us to post and publish this Notice and to take certain additional actions. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL, on request, meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

WE WILL reimburse each of the employees employed by us on or after December 2, 1981, during the period when we were refusing to bargain with the UFW, for any money which they may have lost as a result of our refusal to bargain, plus interest.

Dated: GRANT HARLAN FARMS

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boranda Road, Salinas, California, 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Grant Harlan Farms
(UFW)

Case Nos. 80-CE-288-SAL
82-CE-5-SAL
9 ALRB No. 1

ALO DECISION

The UFW was certified at Respondent's ranch on July 1, 1981. The UFW sent requests to bargain to Grant Harlan, sole owner and operator, by certified mail on September 15, 1981 and October 26, 1981. These letters were returned to the sender, unclaimed. On December 2, 1981, a third request to bargain was personally delivered to Harlan by the UFW. On January 14, 1982, Respondent notified the UFW that it would refuse to bargain in order to test the certification.

The ALO found that Respondent's litigation posture, challenging the peak determination, was not reasonable and that the delay in its refusal indicated bad faith. He therefore awarded makewhole. The ALO credited the General Counsel's witnesses and found that Harlan intentionally and knowingly refused to accept the certified letters. Thus, he recommended that makewhole commence on September 15, 1981.

BOARD DECISION

The Board found that Respondent failed to meet and bargain collectively in violation of Labor Code section 1153(e). The Board found that Respondent's litigation posture, challenging in the abstract the concept of excluding unrepresentative days in peak calculations, was unreasonable on the basis that Respondent presented no arguments or evidence as to why certain days should not have been excluded and that the Saikhon formula was well established. The Board further found that the 44 day delay by Respondent was evidence of bad faith.

The Board did not adopt the ALO's recommendation that makewhole commence September 15, 1981. Instead, they found there was insufficient evidence to establish that Respondent was aware of the existence of the certified letters and that they were requests to bargain from the UFW. Consequently, the Board ordered makewhole to commence on December 2, 1981, the day Harlan was personally served with a request to bargain.

DISSENT

Member McCarthy dissented, arguing that had the average employee days for the farm crew and the labor contractor crew been computed together pursuant to the formula in Luis A. Scattini & Sons (1976) 2 ALRB No. 43, the peak requirement would not have been met and the election should not have been held. Consequently, McCarthy would have found that the Regional Director erred in conducting the election and would not have awarded makewhole.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Agricultural Labor Relations Board
JUL 12 1982
RECEIVED
Exec. Secretary

In the Matter of: GRANT HARLAN FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 80-CE-288-SAL 82-CE-5-SAL DECISION

Appearances:

For the General Counsel: JOSE B. MARTINEZ, Attorney
ALRB General Counsel
112 Boronda Road
Salinas, California 93907

For the Respondent GRANT HARLAN FARMS: HOWARD SILVER, Attorney
Dressler, Quesenbery, Laws, and Barsamian
116 Martinelli Street, Suite 8
Watsonville, California 95-76

For the Charging Party/ Intervenor: NED DUNPHY, Attorney
United Farm Workers of America
P.O. Box 30
Keene, California 93531

WILLIAM H. STEINER, Administrative Law Officer:

STATEMENT OF THE CASE

This case was heard before this Hearing Officer in Salinas, California on April 20, 1982. The Complaints issued on November 2, 1981 and February 16, 1982. The Charges and

Complaints were each duly served upon Respondent.

On September 30, 1980 a representation election was conducted among agricultural employees of Respondent. The vote count was: United Farm Workers of America, AFL-CIO ("UFW") - 32; No Union - 9; Challenged Ballots - 4. Respondent filed objections to the election challenging the peak determination made by the Salinas Regional Director of the Board. The objections were dismissed by the Executive Secretary, and the Board upheld the Executive Secretary's dismissal, upholding the election as valid, and certified the UFW as the collective bargaining representative of Respondent's employees on July 1, 1981. General Counsel submits that two written requests to bargain, sent by certified mail to Respondent on September 15, 1981 and October 26, 1981, were sufficient to trigger Respondent's duty to bargain. Respondent maintains (and General Counsel agrees) that there was no actual notice until December 2, 1981, the date a letter requesting bargaining was personally delivered to respondent at his home by a union representative. Respondent admits reading this letter.[1] General Counsel's position is that Respondent simply left the Post Office's notice of attempted delivery of the September and October letters in his mailbox and has since unlawfully refused in bad faith to engage in bargaining. On January 14, 1982

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[1]The tomato season ran from late August through October and the pepper season from the end of August into December (Respondent's Post Hearing Brief, p. 1).

Respondent, through its attorney, sent a letter to the UFW refusing to commence negotiations (GC Exh. 22). The letter, in part, states:

> "So far as negotiations are concerned, the company has decided not to negotiate at this time, in order to test the propriety of its certification through the Administration and Judicial process."

General Counsel also maintains that Respondent's delay in responding, from December 2, 1981 to January 14, 1982, is evidence of its bad faith.

On February 16, 1982 the Board issued its complaint alleging violations of Labor Code §§1153(a) and (e), based upon the charge filed by the UFW on January 20, 1982, served upon Respondent on January 20, 1982. Earlier, on November 2, 1982, the Board issued a related complaint based upon the UFW's charge that four employees of Respondent were terminated because of their support of the UFW in the September, 1980 election. This complaint, Case No. 80-CE-288-SAL, was ordered consolidated with the instant action, Case No. 82-CE-5-SAL, on March 4, 1982. However, the termination case was settled prior to the hearing. The UFW intervened in each case.

All parties were given a full opportunity to participate in the hearing, and after the close of the hearing the General Counsel and Respondent filed post-hearing briefs.

Upon the entire record, including this Hearing Officer's observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, this Hearing Officer makes the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent is a sole proprietorship, owned and operated by Grant Harlan, and has been in existence for approximately eight years in San Benito County, California. Respondent, at all relevant times herein, was engaged in the farming of tomatoes and bell peppers, and was an agricultural employer within the meaning of Labor Code §1140(c).

The UFW, as conceded by all parties herein, at all relevant times was and is a labor organization, and was officially certified as the collective bargaining representative of Respondent's agricultural employees on July 1, 1981.

II. The Alleged Unfair Labor Practices

As noted in John F. Adam, Jr. and Richard E. Adam, dba Adam Farms, 6 ALRB 40 (1980) at p. 3,

> "Because Board certifications are not subject to direct judicial review, a person wishing to challenge the validity of the certification must first refuse to bargain, in violation of Labor Code Section 1153(e). The Board order in the unfair labor practice decision, and the underlying representation decision, are then subject to judicial review pursuant to Labor Code Section 1160.8."

This case admittedly is a "technical refusal to bargain" case (GC Exh. 22). The issues for determination by this Hearing Officer are: (1) At what point in time Respondent's

duty to bargain began, and (2) Whether a preponderance of the evidence supports a finding that Respondent's refusal to bargain was in bad faith.[2,3] See J.R. Norton Company, 6 ALRB No. 26 (1980). All relevant evidence is now in the record (RT I:115-119).

A. The Issue of When Respondent's Duty to Bargain Began

Respondent takes the position that there was no duty to bargain until it received actual notice of the union's desire to commence bargaining. General Counsel maintains that the duty began at the time Respondent first avoided receipt of the September 15, 1981 letter requesting that bargaining begin whether or not the letter was opened and read.[4]

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[2]Respondent's counsel erroneously states in his Post-Hearing Brief at pp. 3-4 that "General Counsel is attempting to prove bad faith by Respondent solely by the fact that there was no response to the Union's September and October letters." In fact, General Counsel relies on three factors: (1) Respondent's objection to the election based on peak employment; (2) Respondent's conduct with regard to accepting delivery of certified mail from the UFW, and (3) Respondent's delay in responding to the UFW's request to bargain. (General Counsel's Post-Hearing Brief, p. 2)

[3]The Board recently noted in D'Arrigo Brothers Company, 8 ALRB No. 45 (1982) at p. 4: "National Labor Relations Board (NLRB) precedent clearly holds that an employer has a continuing duty to bargain with a certified bargaining representative during the period of time when it is seeking judicial review of the NLRB's certification." See also Adam Farms, supra at p. 3.

[4]"[S]ince the Respondent is charged with refusing communications from the union, City Electric, supra, as of September, 1981, the Respondent's time in responding must be considered from that initial September 16, 1981 request by the UFW." (General Counsel's Post-Hearing Brief, p. 12)

The testimony of the union's secretary and the Postmaster established that the September 15, 1981 and October 26, 1981 letters were written, signed and delivered to the Post Office for mailing certified, return receipt requested, to the residence address of Respondent (RT I:115, 122). It was also established that the December 2, 1981 letter was personally delivered to Respondent at this address (RT I:154). Finally, it was established that the postal letter carrier attempted to deliver these letters, and when noone answered the door, he left at least one and possibly two notices for each letter (Post Office Forms 3849-A and 3849-B) in Respondent's mailbox indicating to Respondent that there was an attempted delivery of a certified letter (RT I:63-67; 73; 88). In spite of the above facts, both Mr. and Mrs. Harlan deny having any knowledge of the September or October letters.

The above facts require the consideration of two complimentary rules regarding the mechanics of initiating bargaining. The first rule is that there must be a clear and unequivocal demand to bargain. NLRB v. Quick Shop Markets, Inc., 416 F.2d 601 (7th Cir. 1969); Morris, The Developing Labor Law (1971), pp. 259-260. Secondly, an employer may not rely upon his own avoidance of receiving a demand to bargain as a defense to an unfair labor practice charge. As noted in City Electric Co., 164 NLRB 844 (1967),

> "Clearly, Respondent can hardly claim that no bargaining demand was made where it 'refused to receive communications' from the union. NLRB v. Columbian Enameling & Stamping Co., Inc., 306 U.S. 292, 297. Its letter of demand having been rejected, the union was under no further obligation to communicate a demand."

A presumption that a letter has been received may arise from circumstantial evidence similar to the evidence presented here.[5] For example, in Birmingham Ornamental Iron Company, 240 NLRB 898, 901 (1979), the Board recognized such a presumption under the following circumstances:

> "[T]he credible evidence reveals that a duly authorized union agent prepared, typed, and mailed certified letters to Respondent requesting bargaining. It is noted inter alia, that on the face of the aforenoted letters the Union listed the identical post office box number that appears in the underlying charges...and that Respondent in its answer admits service thereof. Further, the complaints...and other formal documents list the same post office box number for Respondent. In these circumstances I find that the General Counsel established a presumption of receipt which was not overcome by virtue of Respondent's failure to deny such receipt."

Footnote 15 of the above decision at p. 901 cites S. Frederick K. Sansone dba S. Frederick Sansone Co., 127 NLRB 1301 (1960), wherein the Board noted that Respondent's unequivocal denial of receipt of the letter requesting bargaining created an issue of fact which was resolved in favor of Respondent. In the present case, this Hearing Officer finds that the circumstances surrounding the attempted delivery of the September and October 1981 letters, and the inconsistencies in the testimony of Mr. and Mrs. Harlan, require that General Counsel's version of the facts be credited. Respondent has failed to provide a credible explanation, and General Counsel's version is supported by a preponderance of the evidence. NLRB v. Quick Shop Markets, Inc., supra at pp. 605-606, cited

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[5] See Evidence Code §§641, 664; Code of Civil Procedure §1020.

by Respondent, is distinguishable. In this case there were additional circumstances which justified the employer's actions, including the fact that the addressee of the union's demand letter, Company President Tinsley, was out of town when the attempted delivery of the certified letter was made, and the letter was not accepted for him pursuant to a company policy.

For the above reasons this Hearing Officer finds that Respondent's duty to bargain commenced on or about September 16, 1981.

B. The Issue of Whether Respondent's Refusal to Bargain Has Been in Bad Faith, Thereby Warranting the Make-Whole Remedy

In J.R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, the Supreme Court provided the following standard for determining when to apply the make-whole remedy:

> "... the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. 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 hindsight 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. As discussed above, judicial review in this context is fundamental in providing for checks on administrative agencies as a protection against arbitrary exercises of their discretion. On the other hand, our holding does not mean that the Board is deprived of its make-whole power by every colorable claim of a violation of the laboratory conditions of a representation election: it must appear that the employer reasonably and in good faith believed the violation would have affected the outcome of the election. 26 Cal.3d at 39.

In J.R. Norton Co. (May 30, 1980) 6 ALRB No. 26, review den. by Ct. App., 4th Dist., Div. 1, Jan. 8, 1981, the Board interpreted the Supreme Court's decision to mean that the employer's litigation posture must be both reasonable and in good faith, and further observed,

> "... that an employer may act in good faith, while not having a reasonable basis for his position. An employer may also offer a reasonable basis, while not acting in good faith as shown by the totality of the circumstances." 6 ALRB No. 26 at p. 3.

In Holtville Farms, Inc. (July 8, 1981) 7 ALRB No. 15 at p. 6, fn. 4, the Board noted that in its decisions subsequent to the Supreme Court's Norton decision, the Board,

> "... decided to consider 'reasonableness' before 'good faith' for reasons of administrative economy, since reasonableness can generally be decided on the record of the representation case. Good faith, on the contrary, requires examination of a set of facts which may be completely outside the record of the representation case and may require another hearing."

Furthermore, the Board has chosen,

> "... to review technical refusal-to-bargain cases for reasonableness and then to consider the good-faith issue only in cases where the

> employer's election objections are found to be reasonable." 7 ALRB No. 15 at pp. 8-9.

In view of the above authorities, three aspects of Respondent's conduct must be examined, and a decision made regarding good faith based upon the "totality of the circumstances". The three aspects of Respondent's conduct are: (1) the reasonableness and good faith of its election objections regarding peak employment; (2) the legitimacy of Respondent's conduct with regard to accepting delivery of the union's written requests to bargain, and (3) the legitimacy of Respondent's delay in responding to the union's request to bargain. The second question already has been answered but is not in itself determinative of the good faith issue.

<u>The Reasonableness of Respondent's Election Objections Regarding Peak Employment</u>

Respondent's Petition to Set Aside Election (GC Exh. 1) and the Board's Order Dismissing Employer's Election Objection (GC Exh. 2) contain the essential facts relating to this issue. Respondent contended that peak employment was 198 employees, and that the 55 eligible voters on the day of the election, September 30, 1981, did not constitute at least 50% of Harlan Farms' peak employment as required by Labor Code Section 1156.3(a). The Board, however, computed peak employment to be 91 (see method of calculation in GC

Exh. 2), and this Hearing Officer finds no error in the Board's computation.[6] Furthermore, the bona fide character of Respondent's objection is placed in question by reason of the Board's following observation, contained in its Order:

> "There is no evidence that the Employer provided the Regional Director with any information other than the payroll records for its 1979 peak payroll period. The Employer failed to submit any evidence that the days during which few or no employees worked in either the payroll period immediately preceding the filing of the Petition or the peak payroll period in 1979 were representative and should have been included in the peak calculations." Order Dismissing Employer's Election Objection (GC Exh. 2), pp. 2-3.

The above evidence and the Board's denial of Respondent's request for review on May 18, 1981 (GC Exh. 4) lead this Hearing Officer to conclude that Respondent's election objection was not reasonable. Having so found, it is not necessary to consider the good faith issue. Holtville Farms, Inc., supra at pp. 8-9.

The Legitimacy of Respondent's Delay in Responding to the Union's Request to Bargain

The question here is whether Respondent's delay in responding from December 2, 1981 to January 14, 1982 was so unreasonable as to reflect bad faith. Mr. Harlan, in response to a leading question, testified that he had difficulty speaking with his attorney because his attorney was "out of town over the holidays." (RT I:120) When

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[6]Respondent admitted that the tomato season ran from "late August through October" and the pepper season from "the end of August into December." (Respondent's Post-Hearing Brief, p. 1)

asked to be more specific, he replied, "Christmas, New Years, the few weeks there." (RT I:120) There was no further evidence on the subject of Mr. Harlan's inability to discuss with an attorney his decision regarding the December 2, 1981 request to bargain. In view of the large amount of time that passed from the July 1, 1981 certification of the union, and the probability that Respondent received the union's September and October 1981 letters requesting bargaining, this Hearing Officer finds that Respondent unreasonably delayed responding to the union's request to bargain, and that this reflects Respondent's bad faith in these transactions.

CONCLUSION

Respondent's conduct points to an attitude of opposition to the purposes of the Act, and this Hearing Officer finds that a preponderance of the evidence supports a finding that Respondent challenged the election results and delayed bargaining in bad faith.

THE REMEDY

Having found that Respondent challenged the election results and delayed bargaining in bad faith, in violation of of §§1153(a) and (e) of the Act, this Hearing Officer recommends that it cease and desist from like violations

and take certain affirmative actions designed to effectuate the policies of the Act.

Upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to §1160.3 of the Act, this Hearing Officer hereby issues the following recommended:

ORDER

By authority of Labor Code §1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Grant Harlan Farms, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code §1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of its agricultural employees.

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed to them by Labor Code §1152.

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, meet and bargain in good faith with the UFW regarding past unilateral changes in terms and conditions of employment.

(c) Make whole its agricultural employees for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant and necessary to a determination of the amounts due its employees under the terms of this order.

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

(f) Post copies of the attached Notice at conspicuous locations on its premises for 60 days, the time(s) and place(s) of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may become altered, defaced, covered or removed.

(g) Provide a copy of the attached Notice to each employee hired by Respondent during the 12-month period following the date of issuance of this Order.

(h) Mail copies of the attached Notice in all appropriate lanaguages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the payroll period immediately preceding

September 30, 1980, and to all employees employed by Respondent at any time from September 16, 1981 until the date of issuance of this Order.

(i) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such time(s) and place(s) as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(j) Notify the Regional Director in wirting, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this order.

ORDER EXTENDING CERTIFICATION

It is further ordered that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective

bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year starting on the date on which Respondent commences to bargain in good faith with said Union.

Dated: July 14, 1982

WILLIAM H. STEINER
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to bargain about a contract with the United Farm Workers of America, AFL-CIO (UFW). The Board has ordered us to post this Notice and to take other action. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives you and all California farm workers these rights:

1. To organize yourselves;
2. To form, join, or help any union;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT refuse to bargain with the UFW, as exclusive collective bargaining representative of our employees, over a contract.

WE WILL, on request, meet and bargain with the UFW about a contract and about past unilateral changes in terms and conditions of employment.

WE WILL reimburse each of the agricultural employees employed by us at any time after September 16, 1981, for all losses of pay and other economic losses which he or she has suffered because of our refusal to bargain with the UFW.

Dated: GRANT HARLAN FARMS

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3160. This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE