Fillmore, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

F & P GROWERS ASSOCIATION, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 82-CE-7-OX 9 ALRB No. 22

DECISION AND ORDER

On September 28, 1982, Administrative Law Judge (ALJ)[1/] William H. Steiner issued his attached Decision on the General Counsel's motion for summary judgment and motion to strike Respondent's amended answer in this proceeding. Thereafter F & P Growers Association (Respondent) filed timely exceptions to the ALJ's Decision and a supporting brief.

Pursuant to the provision of California Labor Code section 1146[2/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this proceeding to a three-member panel.

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[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

[2/] Unless otherwise specified, all code sections herein refer to the California Labor Code.

The Board has considered the record[3/] and the ALJ's Decision in light of Respondent's exceptions and Respondent's brief and has decided to affirm the ALJ's ruling, as modified herein and to adopt his recommendation to grant General Counsel's motion for summary judgment, both as to liability and as to imposition of the makewhole remedy for the period from April 15, 1982 forward.[4/] However, we deny General Counsel's motion to strike Respondent's first amended answer and we hereby remand the case to the ALJ for hearing on the propriety of imposing the makewhole remedy for the period between July 31, 1981, the date of Respondent's initial refusal to bargain, and April 15, 1982.

This case comes to the Board on the General Counsel's motion for summary judgment and motion to strike Respondent's amended answer to the complaint.[5/] We are called upon to determine whether the allegations in Respondent's first amended

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[3/] The record consists of the complaint and answers, General Counsel's motion to strike and for summary judgment, Respondent's opposition papers, including declarations by its attorney and manager and a proposed stipulation of facts, as well as supporting briefs, and a transcript of the Prehearing Conference.

[4/] By April 15, 1982, Respondent had had a reasonable period of time to obtain notice of the Board's March 25, 1982 decisions in Cattle Valley Farms and Nick J. Canata (1982) 8 ALRB No. 24 and Nish Noroian Farms (1982) 8 ALRB No. 25, and to have informed the Union of its willingness to negotiate. (See Waller Flowerseed Company (1980) 6 ALRB No. 51.)

[5/] Respondent's first amended answer states "as an affirmative defense that its refusal to bargain was predicated on a reasonably grounded doubt as to the Union's continuing majority status, asserted in good faith, based upon objective considerations and raised in a context free of employer unfair labor practice charges."

answer and/or the evidence it presented in its opposition to General Counsel's motions would, if true, raise a triable issue of fact which would constitute a defense: (1) to the allegations in the complaint that Respondent violated section 1153(e) and (a) of the Agricultural Labor Relations Act (ALRA or Act) by its admitted refusal to bargain with the UFW; and/or (2) to the imposition of the makewhole remedy.

Certain facts are not in dispute. Respondent admits that it notified the UFW by letter on July 31, 1981, after almost two years of contract negotiations, that it would thereafter refuse to bargain based on its belief that the Union no longer enjoyed the support of a majority of its agricultural employees.[6/] Also conceded are the following facts: (1) The UFW was certified by this Board as the exclusive collective bargaining representative of Respondent's agricultural employees on July 10, 1978 as the result of an election held on June 23, 1978; (2) Respondent and the UFW engaged in contract negotiations between May 17, 1979, and February 17, 1981; (3) no collective bargaining contract was ever concluded between the parties; (4) on July 16, 1981, the UFW asked Respondent to meet and resume negotiations; (5) unfair labor practice charges which the UFW

[6/] A declaration of Respondent's manager, Bill Winters, submitted in support of Respondent's opposition to General Counsel's motion for summary judgment, states that Winters received "reports" from new foremen and supervisors "that F & P employees are thoroughly disillusioned with United Farm Workers Union because of its failure to live up to the promise made to the workers at the time of the election, and because of its neglect of the affairs of the workers. On the basis of these reports, I have concluded that the Union is no longer supported by a majority of the employees."

filed against Respondent alleging surface bargaining before July 31, 1981 were dismissed by the Regional Director; and (6) there has been no decertification election or rival union election held among Respondent's agricultural employees. Respondent does not contest the validity or propriety of this Board's July 10, 1978 certification of the UFW.

Defense of Good Faith Belief in UFW's Lack of Majority Support

The ALJ found that the Board's "certified-until-decertified" rule announced in our decision in Nish Noroian Farms, supra, 8 ALRB No. 25,[7/] is applicable in this case and forecloses Respondent's defense, based on National Labor Relations Act (NLRA) precedent, of its good faith belief that the UFW no longer enjoyed majority employee support.

Respondent argues that the Nish Noroian rule is "non-germane" dicta which should not control because Nish Noroian Farms, having been cleared of wrongdoing in that case, had no standing to appeal the decision. Regardless of whether Nish Noroian Farms had standing to appeal, the certified-until-decertified rule was indeed germane to issues decided in Nish Noroian. In determining whether the filing of a decertification petition followed by a majority vote to reject the incumbent union affects the employer's duty to bargain with the union, the Board confronted from Nish Noroian the same argument as Respondent presents herein: that NLRA precedent

[7/] "Once a union has been certified it remains the exclusive collective-bargaining representative of the employees in the unit until it is decertified or a rival union is certified." (Nish Norian Farms, supra, 8 ALRB No. 25, at p. 14.)

permits an employer to withdraw recognition from, and to refuse to bargain with a union where the union has lost majority support, or where the employer has a good faith and reasonably grounded belief that the union no longer enjoys the support of a majority of the employees in the bargaining unit. (Dayton Motels (1974) 212 NLRB 553 [87 LRRM 1341]; Orion Corp. v. NLRB (7th Cir. 1975) 515 F.2d 81 [89 LRRM 2135].) In Nish Noroian the employer made unilateral changes in its employees' terms and conditions of employment, claiming the majority vote for no-union evidenced a loss of majority support for the union. In the instant case, Respondent flatly refused the Union's request to bargain on the grounds that alleged reports by foremen of its employees' disillusionment with the UFW caused Respondent to have a good faith belief that the Union no longer enjoyed the support of a majority of the unit employees. The rationale behind our decision in Nish Noroian to reject as a defense an employer's asserted good-faith belief in the union's loss of majority support applies a fortiori to the instant case, where no decertification or rival union election was sought by Respondent's employees.

Aside from the statutory issues and policy considerations cited in Nish Noroian, supra, 8 ALRB No. 25,

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pages 13-14,[8] our determination to reject the loss of majority defense is informed by our concern that applying NLRA precedent would be anomalous in an industry such as agriculture, where the radical employee changes necessitated by seasonal operations create inevitable fluctuations in the number or proportion of employees who support the union. Similarly, the seasonal nature of agricultural work and the consequent high rate of employee turnover all but eliminate the possibility of proving whether the Union actually enjoyed majority support at the time of the employer's refusal to bargain or at the time of its implementation of a unilateral change in working conditions, precisely what the NLRB's General Counsel is required to prove in order to rebut an employer's defense of good faith belief in the union's loss of majority support.

Accordingly, we shall adopt the ALJ's recommendation awarding summary judgment against Respondent on the liability

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[8] Majority support and/or a good faith belief of majority support do not control [under the ALRA]. Under our Act, the only means by which a union can be recognized is through winning a secret ballot election and being certified by the Board.

An employer under the ALRA does not have the same statutory rights regarding employee representation and elections as employers have under the NLRA. Under the ALRA, employers cannot petition for an election, nor can they decide to voluntarily recognize or bargain with an uncertified union. By these important differences the California legislature has indicated that agricultural employers are to exercise no discretion regarding whether to recognize a union; that determination is left exclusively to the election procedures of the Board. Likewise, whether or not recognition should be withdrawn or terminated must be left to the election process.
(Nish Noroian Farms, supra, 8 ALRB No. 25, pp. 13-14.)

issue.

The Makewhole Remedy

In J. R. Norton v. ALRB (1979) 26 Cal.3d 1, the Supreme Court, concerned with protecting judicial review of the conduct of elections and preventing arbitrary agency decisions certifying a union as exclusive bargaining agent, set forth a standard for imposition of the makewhole remedy in "technical" refusal to bargain cases.[9/] The Court stated:

> 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.
> (26 Cal.3d at p. 39.)

Where, as in the instant case, an employer refuses to bargain but neither the conduct of the election nor the agency's decision to certify the union is at issue, the "reasonableness" of the employer's litigation posture and the employer's "good faith" do not control our decision as to whether to impose makewhole.[10/] Cognizant, however, of our duty under

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[9/] We define a "technical refusal to bargain" as did the court in Montebello Rose Co. v. ALRB (1981) 119 Cal.App.3d 1, 38, at n. 18: "A 'technical' refusal to bargain occurs when the employer refuses to bargain in order to seek court review of the propriety of a certification election. Because the ALRA does not provide for immediate judicial review of a Board order certifying a union, to obtain such review the employer must first be found guilty of an unfair labor practice. (Norton, supra, 26 Cal.3d at pp. 10, 27)."

[10/] Our use of the J. R. Norton analysis in a hypothetical discussion of makewhole as it related to the respondent's unproven loss of majority support defense in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 91, is hereby reconsidered and rejected.

section 1160.3 to exercise discretion in the imposition of the makewhole remedy, we 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 Act, the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain. Makewhole, after all, is not a penalty; it merely puts 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.

Unlike surface bargaining, where a specific finding of bad faith is required to support the finding of a violation, an employer's outright refusal to bargain, like a unilateral change of working conditions, constitutes a per se violation of its duty to bargain in good faith. Unlike some unilateral changes, however, refusals to bargain are final and singularly destructive of the bargaining relationship. The employer, then, in resisting imposition of the makewhole remedy, bears a heavy burden to show that its refusal to bargain effectuates the policies and purposes of the Act.

In the instant case Respondent claims to have been protecting the "free choice" of its employees by refusing to bargain with the UFW. It asserts that its refusal to bargain was "predicated on a reasonably grounded doubt as to the Union's continuing majority status, asserted in good faith, based upon objective considerations and raised in a context free of employer

unfair labor practices." Although we have found such a defense to be unavailing under the ALRA, we shall consider in deciding whether to award makewhole whether Respondent's liability should be mitigated by the public interest in its position.

As we noted in Nish Noroian Farms, supra, 8 ALRB No. 25, our Act differs from the NLRA by providing no procedure by which an employer can petition to decertify a union. As the Court of Appeal stated in Montebello Rose Co. v. ALRB (1981) 119 Cal.App.3d 1, 28, two months before Respondent first refused to bargain with the UFW:

> 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.

Thus, except for post-election objection proceedings, agricultural employees have the exclusive responsibility for exercising and protecting their own free choice under the ALRA.

In Cattle Valley Farms and Nick J. Canata (March 25, 1982) 8 ALRB No. 24, the Board clarified the availability of the decertification procedure under the ALRA when no collective bargaining agreement is in effect. In Nish Noroian Farms, supra, 8 ALRB No. 25, issued the same day as Cattle Valley, the Board reiterated the Montebello Rose Court's pronouncement that once a union is certified, decertification pursuant to Board procedures constitutes the exclusive means of terminating an employer's

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duty to bargain.[11/]

Before issuance of the above-cited decisions, then, Respondent's asserted attempt to protect its employees' free choice rights by refusing to bargain with their previously chosen union -- assuming that objective considerations did support a good faith belief that the union had lost its majority support -- may have been in keeping with the policies and purposes of the Act since its employees' right to decertify was in question. Once Cattle Valley and Nish Noroian issued, however, there could be no public benefit derived from Respondent's refusal, as decertification by the employees is less disruptive and, as a matter of law, the exclusive approach and Respondent's employees did not seek to decertify.

The ALJ found that the differences between the NLRA and the ALRA, when considered with the Court's decision in Montebello Rose, supra, 119 Cal.App.3d 1, render Respondent's refusal to bargain unreasonable from its inception in July 1981, justifying imposition of the makewhole remedy from that date. Contrary to the ALJ, we find that, until this Board in Cattle Valley clarified the decertification procedure for employees not covered by a collective bargaining agreement and in Nish Noroian explained the exclusivity of the decertification procedure, the public interest in Respondent's asserted attempt

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[11/] In Lu-Ette Farms, supra, 8 ALRB No. 91, we noted that the employer's duty to bargain with the previously certified union could be terminated by the certified union ceasing to exist or disclaiming its status as representative as well as by a decertification election or by certification of a rival union.

to protect its employees' free choice rights may have outweighed the detriment caused its employees by its refusal to bargain so that the makewhole remedy would be inappropriate.

We shall therefore impose the makewhole remedy for the period commencing April 15, 1982, a reasonable period of time after the March 25, 1982 issuance of Cattle Valley and Nish Noroian. (See Waller Flowerseed Company, supra, 6 ALRB No. 51.) We shall remand this matter to the ALJ for hearing on the issue as to whether between July 31, 1981 and April 15, 1982 Respondent had a reasonable good faith belief that the Union had lost its majority support,[12/] and, if so, whether the public benefit in the pursuit of Respondent's refusal to bargain outweighed the harm that such refusal caused its employees.

REMAND ORDER

This case is hereby remanded to the Administrative Law Judge for hearing on whether the makewhole remedy should be imposed for the period from Respondent's initial refusal to bargain on July 31, 1981 until April 15, 1982. The Administrative Law Judge is hereby directed to confine the issues at hearing to the threshold question of whether Respondent's refusal to bargain between July 31, 1981 and April 15, 1982 was based on

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[12/] NLRA precedent should be applied on this threshold issue. To establish its defense, Respondent must show either that the Union had in fact lost its majority support at the time of the refusal to bargain, or that Respondent had a good faith belief, based upon objective considerations, that a majority of the unit employees no longer supported the Union. (Dayton Motels, supra, 212 NLRB 553.)

a reasonably held good faith belief that the UFW had lost its majority support, and, if so, whether the public benefit in the litigation of Respondent's refusal to bargain outweighed the harm that such refusal caused to Respondent's agricultural employees.

Dated: April 29, 1983

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

CASE SUMMARY

F & P Growers Association

9 ALRB No. 22
Case No. 82-CE-7-OX

ALJ DECISION

After oral argument at a prehearing conference, the ALJ recommended granting General Counsel's motion for summary judgment and motion to strike Respondent's answer. He rejected Respondent's defense that its conceded refusal to bargain on July 31, 1981, with the certified bargaining agent of its agricultural employees was justified by its good faith belief that the Union, whose 1979 certification Respondent had not contested, had lost the support of a majority of its employees. In finding the violation the ALJ cited the Board's certified-until-decertified rule in Nish Noroian Farms (1982) 8 ALRB No. 24. The ALJ based his finding that the makewhole remedy was appropriate on Respondent's unreasonableness in defending on the NLRA grounds of loss of majority support, given the differences in the NLRA and ALRA and the Court's discussion in Montebello Rose Co. v. ALRB (1981) 119 Cal.App.3d 1, relating to the nature of certification under the ALRA.

BOARD DECISION

The Board denied the motion to strike the amended answer but adopted the ALJ's recommendation to grant the General Counsel's motion for summary judgment as to liability for Respondent's refusal to bargain, citing additional considerations for rejecting the NLRB good faith belief in loss of majority support defense. As to imposition of the makewhole remedy, the Board divided the makewhole period into two parts: (1) the period from July 31, 1981, the date of Respondent's initial refusal to bargain, to the issuance of Cattle Valley and Nick J. Canata (1982) 8 ALRB No. 24 and Nish Noroian Farms (1982) 8 ALRB No. 25, and (2) the issuance of the above-cited cases forward. The Board rejected the ALJ's use of the test formulated in J. R. Norton v. ALRB (1979) 26 Cal.3d 1, and reiterated the limited applicability of that case to "technical" refusals to bargain. The Board then announced its intention to impose makewhole for non-technical refusals to bargain only on a finding of bad faith or a finding that the public interest in litigation of the employer's defense outweighs the harm to the employees occasioned by the refusal to bargain. Because the exclusivity of the decertification procedure and the availability of the procedure when no collective bargaining agreement is in effect was clarified on March 25, 1982 with the issuance of Cattle Valley and Nish Noroian, Respondent's continuing refusal to bargain after issuance of those decisions, in the face of its employees' failure to seek decertification or certification of a rival union, justifies the imposition of makewhole from April 15, 1982 forward, a

reasonable period of time for Respondent to have obtained notice of the decisions and inform the Union of its willingness to bargain.

In remanding the case to the ALJ for hearing on imposition of makewhole from July 31, 1981 to April 15, 1982, the Board directed that evidence be taken on whether Respondent, on July 31, 1981, had a good faith belief, based on objective conditions as required by NLRA precedent, that the Union had lost its majority support; and if so, whether the public interest in the litigation of Respondent's refusal to bargain outweighs the harm that such refusal caused to Respondent's agricultural employees.

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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
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In the Matter of: F & P GROWERS ASSOCIATION, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 82-CE-7-OX DECISION ON GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT

Appearances:

For the General Counsel: JUDY WEISSBERG, Attorney
528 South "A" Street
Oxnard, California 93030

For the Respondent
F & P GROWERS ASSOCIATION: LEON L. GORDON, Attorney
WILLIAM S. MARRS, Attorney
Gordon, Glade & Marrs
600 South Commonwealth Avenue
Los Angeles, California 90005

For the Charging Party/
Intervenor
UNITED FARM WORKERS OF
AMERICA, AFL-CIO: NED DUNPHY, Attorney
United Farm Workers of America,
AFL-CIO
P.O. Box 30
Keene, California 93531

WILLIAM H. STEINER, Administrative Law Officer:

STATEMENT OF THE CASE

This case was heard before me in Oxnard, California on September 7, 1982. The Complaint issued on April 9,

1982. The charge was duly served upon Respondent. The hearing of September 7, 1982 was a Prehearing Conference. At this conference this Hearing Officer granted Respondent's Motion to File First Amended Answer over General Counsel's objection that the amendment does not state a legal defense, based upon the arguments contained in General Counsel's Motion for Summary Judgment, also filed and served September 7, 1982. This Hearing Officer stated that granting Respondent's Motion to File First Amended Answer did not imply any judgment as to the legal or factual merits of the amendment. All parties agreed that General Counsel's Motion for Summary Judgment would be deemed to include a Motion to Strike the amendment contained in Respondent's First Amended Answer because the same legal issues are addressed by both. All parties agreed to a briefing schedule. Respondent's opposition brief and supporting declarations were filed on September 16, 1982. A telephone conference was held on September 20, 1982 between all parties to permit General Counsel and Charging Party/ Intervenor an opportunity to reply to Respondent's opposition papers. No new authorities were cited by any of the parties at the September 20, 1982 conference. All parties were given an opportunity to make final oral arguments on the motion at this conference, and both General Counsel and Respondent did so. Charging Party/

Intervenor deferred to General Counsel.

The principal question presented is whether Respondent refused to bargain in bad faith in violation of Labor Code section 1153(a) and (e) by reason of its letter to the United Farm Workers of America, AFL-CIO (hereinafter "UFW"), dated July 31, 1981, refusing to negotiate further because Respondent believed that "the union no longer represented a majority of the employees in the bargaining unit."[1] Secondly, if a bad faith refusal to bargain is found, the question is presented whether the make-whole remedy is warranted.

Respondent concedes certain facts(see Respondent's proposed Stipulation attached to Respondent's opposition brief): (1) The UFW was certified as the exclusive collective bargaining representative on July 10, 1978 following a representation election held on June 23, 1978; (2) Respondent and the UFW carried on contract negotiations between May 17, 1979 and February 17, 1981; (3) No collective bargaining contract was ever concluded between the parties; (4) On July 16, 1981 the UFW

1/ The Declaration of Bill J. Winters, Manager of Respondent, states at p. 6, "During the past two or three years I have had reports from my crew foreman and supervisors that F & P employees are thoroughly disillusioned with United Farm Workers union because of its failure to live up to the promises made to the workers at the time of the election, and because of its neglect of the affairs of the workers. On the basis of these reports I have concluded that the union is no longer supported by a majority of the employees."

requested that Respondent resume negotiations; (5) On July 31, 1981, in a letter to the UFW, Respondent declined to negotiate further on the ground that it believed the UFW no longer represented a majority of the employees in the bargaining unit; (6) On January 25, 1982 the UFW filed an unfair labor practice charge alleging that Respondent violated section 1153(e) of the Act by reason of its refusal to bargain after July 31, 1981, and alleging further that Respondent engaged in surface bargaining prior to July 31, 1981; (7) The Regional Director of the Agricultural Labor Relations Board (hereinafter "ALRB" or "Board") conducted an investigation of said charges and issued a complaint charging Respondent with a refusal to bargain from and after July 31, 1981. The Regional Director found there was no merit in the charge that the employer engaged in surface bargaining prior to July 31, 1981; (8) There has been no decertification election in the bargaining unit in question.

Furthermore, it is undisputed that Respondent made no attempt to decertify the UFW, no rival union election was sought, and Respondent's refusal to bargain was not based on any irregularities in the June 23, 1978 election.

Respondent's defense is stated in Paragraph 8 of its Answer:

> Respondent admits that it has refused to bargain collectively with the UFW

> because of a good faith doubt, based on objective evidence, that the UFW no longer represents a majority of its agricultural employees.

Respondent's First Amended Answer essentially restates the above allegation:

> Respondent alleges as an affirmative defense that its refusal to bargain was predicated on a reasonably grounded doubt as to the union's continuing majority status asserted in good faith, based upon objective considerations and raised in a context free of employer unfair labor practice charges.

At the Prehearing Conference Respondent's counsel stated his belief that Respondent's conduct may properly be characterized as a "technical refusal to bargain":

> MR. GORDON: Well, I think it's perfectly clear. I think that the significance of this term technical for refusal to bargain is some of the language in the J. R. Norton case. And the General Counsel is arguing that under that case, it's only in a certification matter that there can be a technical refusal to bargain. I don't think there should be any such distinction made.
>
> I think any -- I think you can characterize, as a technical refusal to bargain, any situation where the -- where a party is attempting to raise some legal issue and bring it before the Hearing Officer and before the Board.

Transcript of Prehearing Conference of September 7, 1982, p. 5, lns. 5-14.

Procedurally, Respondent does not question that this Hearing Officer may properly render a decision on

General Counsel's motion based upon the pleadings and declarations presently on file. See Teamsters Union Local 865 and UFW (July 28, 1977) 3 ALRB No. 60.

The following issues are raised by the pleadings, including the Motion for Summary Judgment and Respondent's Opposition and supporting declarations:

(1) Does Respondent's First Amended Answer allege any facts which, if true, could constitute a legal defense to the allegations of the complaint that Respondent violated Labor Code sections 1153(e) and (a) by its refusal to bargain?

(2) Has Respondent presented any evidence which raises a triable issue of fact as to the allegations of the complaint that Respondent violated Labor Code sections 1153(e) and (a) by its refusal to bargain?

(3) If Respondent's evidence fails to raise a triable issue of fact as to the alleged violations of sections 1153(e) and (a), is there a triable issue of fact as to whether Respondent's refusal to bargain warrants imposition of the make-whole remedy?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Jurisdiction

Respondent is and at all relevant times herein has been a harvesting association engaged in the harvesting of citrus fruit in Ventura County, California, and admits that it is and has been an agricultural employer within the meaning of Labor Code section 1140.4(c).

The UFW, as admitted by all parties herein, is and at all relevant times herein has been a labor organization

within the meaning of the Labor Code, and on July 10, 1978 was certified as the exclusive bargaining representative of the agricultural employees of Respondent.

II. Legal Standards for Evaluating a Motion for Summary Judgment

Section 20260 of the Regulations of the ALRB provides as follows:

> If there is a conflict in the evidence upon which an unfair labor practice is based, an evidentiary hearing shall be held. If there is no conflict in the evidence, the parties may, where appropriate, file with the Board a stipulated set of facts and briefs and request permission to make oral arguments concerning matters of law.

This regulation has been applied with reference to section 437(c) of the Code of Civil Procedure in proceedings before the Board. Teamsters Union Local 865 and UFW, supra at p. 15 (procedural requirements of section 437(c) not strictly followed). Section 437(c) provides in part,

> Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense thereto.

III. Does Respondent's First Amended Answer Allege Any Facts Which, If True, Could Constitute a Legal Defense to the Allegations of the Complaint that Respondent Violated Labor Code Sections 1153(e) and (a) By Its Refusal to Bargain?

Respondent's explanation for its refusal to bargain does not address either of the two basic prerequisites to an agricultural employer's duty to bargain: (1) The requirement that the union be the "currently certified labor organization" (Board Regulation section 1155.2(b)), and (2) The requirement that the union make 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. The rule under the Board is simply stated in Nish Norian Farms (March 25, 1982) 8 ALRB No. 25 at p. 14:

> Under the ALRA, the rule is as follows: After a union is certified, an employer has a duty to bargain upon request with that union.

In April, 1977 the Board decided in Kaplan's Fruit and Produce Co., Inc. (April 1, 1977) 3 ALRB No. 28, that the duty to bargain does not end after the certification year lapses. See Montebello Rose Co. v. Agricultural Labor Relations Bd. (1981) 119 Cal.App. 3d 1, 16.

Respondent argues that there is a third basic prerequisite to an agricultural employer's duty to bargain under the Act - the prerequisite recognized by the National Labor Relations Board (hereinafter "NLRB") that the employer not have a good faith belief, based on objective considerations, that the union has lost its majority status. Dayton Motels (1974) 212 NLRB 553

[87 LRRM 1341]; Orion Corp. v. NLRB (7th Cir. 1975) 515 F. 2d 81 [89 LRRM 2135]. Respondent contends that the Nish Norian decision, which rejects the NLRB rule, violates Labor Code section 1148, which provides that "applicable" precedents of the NLRB shall be followed by the Board. Nish Norian and its companion case, Cattle Valley Farms and Nick J. Canata (March 25, 1982) 8 ALRB No. 24, both rejected the NLRB rule. One reason for not following the rule is explained in Cattle Valley Farms, supra, pp. 6-7. The Board notes "the limited time period during which an election petition (representation, decertification, or rival union) can be filed under the ALRA." Further reasoning, relating to the ALRB's requirements and procedures for recognition, is given in Nish Norian, supra, pp. 12-13, in which the Board concludes,

> By these important differences the California legislature has indicated that agricultural employers are to exercise no discretion regarding whether to recognize a union; that is left exclusively to the election procedures of this Board.

Respondent's contention that the Nish Norian - Cattle Valley Farms statements on this issue are mere dicta is not persuasive, particularly in light of the fact that at least two later Board decisions have cited Nish Norian on this question. Lu-Ette Farms, Inc. (August 18, 1982) 8 ALRB No. 55, p. 5; Patterson Farms, Inc. (August 27, 1982) 8 ALRB No. 57, pp. 4, 7-8. Respondent's related arguments misinterpret the facts of Nish Norian and Cattle Valley Farms,

and overlook the duty of the Board to interpret statutory language in a manner consistent with the purpose of the statute. Steilberg v. Lackner (1977) 69 Cal. App. 3d 780, 785. Finally, Respondent's contention that the absence of a collective bargaining agreement relieves the employer of the obligation to seek decertification of a certified collective bargaining representative is contrary to the policy of the Act to facilitate rather than discourage collective bargaining agreements. Respondent's interpretation of the Act would reward an employer for thwarting a collective bargaining agreement.

Therefore, Respondent has not alleged facts which could constitute a legal defense to the allegations of the Complaint that Respondent violated Labor Code sections 1153(e) and (a) by its refusal to bargain.

IV. Has Respondent Presented Any Evidence Which Raises a Triable Issue of Fact as to the Allegations of the Complaint that Respondent Violated Labor Code Sections 1153(e) and (a) By Its Refusal to Bargain?

The foregoing analysis suggests that the only evidence relevant to the issue of Respondent's duty to bargain at the time in question would have to relate to either (1) The UFW's status as the currently certified labor organization or (2) The legal sufficiency of the union's request to bargain. The Board's holding that

"agricultural imployers are to exercise no discretion regarding whether to recognize a union" precludes this Hearing Officer from inquiring into evidentiary matters, as requested by Respondent, which would be irrelevant as a matter of law, at least as to the issue of its duty to bargain. Additional evidence may be admissible, as discussed below, on the issue of the application of the make-whole remedy. However, Respondent acknowledges that Nish Norian's "certified until decertified" rule, Nish Norian, supra at p. 15,

> . . . impliedly ruled out the defense that the Respondent has asserted in the instant case. The Board expressly ruled out the defense in Lu-Ette Farms, supra.
>
> The Board should reconsider Nish Norian, Cattle Valley, and Lu-Ette Farms, and eleminate the confusion created by the dicta in these cases.

Respondent's Opposition to Board and Union Motions for Summary Judgment and To Strike Answer, pp. 6-7. The Board apparently does not believe there is any confusion of the type perceived by Respondent, nor does this Hearing Officer. And whether the Board will reconsider the precedents which are unfavorable to Respondent is speculative, as is the likelihood that these precedents will be overruled in a manner which would favor Respondent under the present facts.

Thus, the two principal evidentiary matters presented

by Respondent, (1) It's belief that the UFW no longer had the support of a majority of Respondent's employees in the bargaining unit, and (2) The "confusion" perceived by Respondent in the state of the applicable law, do not raise any triable issues of fact on the issue of Respondent's duty to bargain on July 31, 1981. Furthermore, in the absence of any other evidence by Respondent justifying its conduct, this Hearing Officer finds Respondent's litigation posture unreasonable (it goes without saying that an employer does not bargain "in good faith" when it has refused to bargain). By analogy to the Norton, infra, and Holtville Farms, Inc. (July 8, 1981) 7 ALRB No. 15 standards for technical refusal-to-bargain cases, having found Respondent's position to be unreasonable, there is no need to inquire into the good faith vs. bad faith issue. 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 reasonable." Holtville Farms, Inc., supra at pp. 8-9.

V. Legal Standards for Application of the Make-Whole Remedy

The authority of the Board to make employees "whole" for the loss of pay resulting from the employer's refusal to bargain is contained in Labor Code section 1160.3. It provides that the Board, upon finding that an unfair labor practice has been committed, shall take certain remedial

measures,

> . . . including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain. . . .

In J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal. 3d 1, the Supreme Court rejected the automatic imposition of the make-whole remedy, and provided the following standard for determining when it should be applied:

> [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 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.

J. R. Norton Co., supra at p. 39.

The Board also has indicated that a proper evaluation of the propriety of a make-whole award requires "balancing the interests of the employer and its employees in light of the goals and policies of the Act." Superior Farming Company, Inc. (July 13, 1978) 4 ALRB No. 44, p. 3.

Norton discusses the make-whole remedy in the context of a "technical refusal to bargain" situation.[2] Respondent contends that the present facts constitute a "technical refusal to bargain" and that the totality of the circumstances must be examined before awarding the make-whole remedy. While the relevant authorities do not support Respondent's expanded definition of "technical refusal to bargain", this Hearing Officer concludes that a fair reading of section 1160.3 of the Act requires consideration of the totality of the circumstances whenever the make-whole remedy is requested. This, however, does not preclude the granting of a motion for summary judgment if the requirements of Board Regulation section 20260 are met and the ruling is consistent with Code of Civil Procedure section 437(c).

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[2] A "technical refusal to bargain occurs when "the employer refuses to bargain in order to seek court review of the propriety of a certification election. Because the ALRA does not provide for immediate judicial review of a Board order certifying a union, to obtain such review the employer must first be found guilty of an unfair labor practice (Norton, supra, 26 Cal. 3d at pp. 10, 27)." Montebello Rose Co., supra at p. 38, fn. 18.

VI. Is There a Triable Issue of Fact as to Whether Respondent's Refusal to Bargain Warrants the Make-Whole Remedy?

Whether an employer's good faith confusion about an unsettled rule or legal interpretation conceivably could be a circumstance which may, in an appropriate setting, render the make-whole remedy inappropriate is a question which need not be decided here. There is no evidence that any legal authorities were cited by Respondent to the UFW on or after July 31, 1981. Furthermore, the Act's procedures for union recognition and decertification, and the differences between the NLRA and the ALRA, were sufficiently clear from the statutes and such decisions as Montebello Rose Co., supra, that Respondent could not reasonably have misunderstood its duty to bargain under the circumstances presented. In May, 1981 the Court of Appeals' decision in Montebello Rose Co., supra at pp. 23-24, observed, citing Kaplan's Fruit & Produce Co., Inc., supra,

> [T]he 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 pursuant to the provisions of sections 1156.3 or 1156.7.

In a case similar to the present action the Board, imposing the make-whole remedy, held,

> It is well established that an employer refuses to recognize a certified union at its peril. See, e.g., Allstate Insurance Co., 234 NLRB No. 21 (1977). In cases such as this, the state of mind of the Respondent is not material. . . .

Superior Farming Company, Inc., supra at p. 4.

Respondent also seems to take the position that the make-whole remedy should not be imposed because Respondent held a reasonable belief that the union did not represent a majority of its employees. However, in view of the finding that Respondent could not reasonably assert the loss-of-majority status defense on the issue of liability, this Hearing Officer finds that Respondent's belief - reasonable or not - about the union's support is not a factor which may be raised by Respondent as a defense to the make-whole remedy. The fact that Respondent apparently engaged in good faith negotiations with the UFW within six months of its refusal to bargain, along with all of the other evidence summarized above, leads this Hearing Officer to conclude that there is no triable issue of fact as to the propriety of the make-whole remedy.

CONCLUSION

Respondent's Answer, including the Affirmative Defense, fails to allege any legal defense to the charges. This Hearing Officer therefore recommends granting General Counsel's Motion for Summary Judgment as to liability, as well as General Counsel's Motion to Strike Respondent's amendment to its Answer.

The totality of the circumstances under which Respondent has refused to bargain since July 31, 1981 indicates bad faith and an attitude of opposition to the

purposes of the Act by Respondent fully warranting imposition of the make-whole remedy commencing July 31, 1981. Because Respondent's evidence does not raise a triable issue of fact on the issue of the make-whole remedy, this Hearing Officer also recommends granting General Counsel's Motion for Summary Judgment as to the propriety of the make-whole remedy.

THE REMEDY

Having found that Respondent refused to bargain in bad faith, in violation of sections 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 section 1160.3

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of the Act, this Hearing Officer hereby issues the following recommended:

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, F & P Growers Association, 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 section 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 section 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 languages, 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 July 31, 1981, and to all employees employed by Respondent at any time from July 31, 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 writing, 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: September 29, 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 you 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 July 31, 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: F & P GROWERS ASSOCIATION

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 528 South "A" Street, Oxnard, California 93030. The telephone number is (805) 486-4475. 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

F & P GROWERS ASSOCIATION Case No. 82-CE-7-OX

(UFW)

ALO DECISION

The ALO granted General Counsel's motion for summary judgment both as to liability and the propriety of the make-whole remedy for Respondent's bad faith refusal to bargain in violation of Labor Code section 1153(a) and (e). The principal issue was whether Respondent refused to bargain in bad faith in violation of Labor Code section 1153(a) and (e) by reason of its letter to the UFW, dated July 31, 1981, refusing to negotiate further because Respondent believed that "the union no longer represented a majority of the employees in the bargaining unit." This assertion was based upon the observations of Respondent's manager: "During the past two or three years I have had reports from my crew foreman and supervisors that F & P employees are thoroughly disillusioned with the United Farm Workers union because of its failure to live up to the promises made to the workers at the time of the election, and because of its neglect of the affairs of the workers. On the basis of these reports I have concluded that the union is no longer supported by a majority of the employees."

Respondent had not challenged the June 23, 1978 election won by the UFW, and no decertification petition had been filed. Also, no rival union election was sought.

The ALO applied Nish Norian Farms (March 25, 1982) 8 ALRB No. 25, which was challenged by Respondent as a violation of Labor Code section 1148. Respondent also argued that Nish Norian's statements on the issue of the loss-of-majority status defense were merely dicta, a contention rejected by the ALO.

It was also decided that the propriety of the make-whole remedy required examination of the totality of the circumstances of Respondent's conduct, regardless of whether a technical refusal to bargain situation is presented. The ALO concluded that the make-whole remedy was proper under the circumstances, and that no triable issue of fact was raised either as to liability or remedy.