St. Helena, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

C. MONDAVI & SONS, d/b/a CHARLES KRUG WINERY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 77-CE-21-S 10 ALRB No. 19 (6 ALRB No. 30) (4 ALRB No. 52)

SUPPLEMENTAL DECISION AND ORDER

On October 5, 1983, Administrative Law Judge (ALJ) Thomas M. Sobel issued the attached Supplemental Decision. Thereafter, Respondent C. Mondavi and Sons, General Counsel and Charging Party, the United Farm Workers of America, AFL-CIO, all filed timely exceptions to the ALJ's Supplemental Decision with supporting briefs.

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

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the ALJ except as modified herein and to remand to the ALJ for consideration of the proposed backpay specifications in light of J. R. Norton (1984) 10 ALRB No. 12.

In accordance with our Decision in High & Mighty Farms

(1982) 8 ALRB No. 100, we hereby modify our previously issued Order in this matter to reflect that effective with the date of the issuance of this Supplemental Decision, interest shall be awarded herein pursuant to our Decision in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

We otherwise adopt the ALJ's Decision and remand for the ALJ to exercise his discretion whether or not to reopen the record and order recalculation of the fringe benefit portion of the make-whole award in accordance with our Decision in J. R. Norton, supra.

ORDER

This matter is hereby remanded to the ALJ for proceedings consistent with the above Decision and J. R. Norton (1984.) 10 ALRB No. 12. Further, the interest to be paid on the award in this proceeding, if any, shall henceforth be assessed in accordance with Lu-Ette, Inc. (1982) 8 ALRB No. 55.

Dated: April 18, 1984

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

CASE SUMMARY

C. MONDAVI & SONS,
dba CHARLES KRUG WINERY
(UFW)

10 ALRB No. 19
(6 ALRB No. 30)
(4 ALRB No. 52)
Case No. 77-CE-21-S

ALJ DECISION

The ALJ determined that Respondent would not receive credit in the computation of makewhole specifications for administrative costs imposed by an entity engaged by Respondent to administer fringe benefits to its employees. Respondent also was not credited for the amount of union dues that would have been assessed against employees had Respondent signed a contract with the United Farm Workers of America, AFL-CIO. The ALJ remanded to the General Counsel for recomputation of the backpay specifications to more accurately mirror the dates of the wage increases awarded under the comparable contracts.

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the ALJ and remanded the case to the ALJ to determine whether to reopen the record and recompute the makewhole fringe benefit supplements in accordance with J. R. Norton (1984) 10 ALRB No. 12. In accordance with its Decision in High & Mighty Farms (1982) 8 ALRB No. 100, the Board directed that any interest assessed against Respondent be calculated henceforth in accordance with the rule set forth in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: C. MONDAVI & SONS dba CHARLES KRUG WINERY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 77-CE-21-S (6 ALRB No. 30) (4 ALRB No. 52)

Appearances:

Randolph C. Roeder
Littler, Mendelson, Fastiff & Tichy
650 California Street, 20th Floor
San Francisco, California 94108
for the Respondent

Clare M. McGinnis
United Farm Workers
P. O. Box 30
Keene, California 93531
for the Charging Party

James W. Sullivan
Agricultural Labor Relations Board
112 Boronda Road
Salinas, California 93907
for the General Counsel

Before: Thomas M. Sobel
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

THOMAS SOBEL, Administrative Law Judge:

This case was heard by me in Napa, California on April 12, 1982. On May 30, 1980, the Board issued its Decision and Order requiring Respondent C. Mondavi and Sons to make its employees whole for its failure to bargain in good faith. Pursuant to the Board's Decision, the Regional Director issued a Notice of Hearing Without Backpay Specification followed by a Backpay Specification and then a First and Second Amended Backpay Specification. Respondent filed answers to the specifications.

Although there is no dispute about the duration of the make-whole period, which runs from September 28, 1977 until May 16, 1980 (1:8), or about which contracts are comparable (Tr. Pre-Hearing Conference, p. 2), the parties do disagree about a range of other issues and Respondent raised a number of defenses according to which it either owes no make-whole, or the amount of make-whole it owes, according to General Counsel, must be reduced. Taken in their entirety, Respondent's defenses constituted a broadside against almost every aspect of the Regional Director's specification, including the intitial decision to seek make-whole, the techniques the Board has developed for computing it, and particular details of the specification itself. Pursuant to General Counsel's Motion, I struck a number of these defenses either at the Prehearing Conference or by written ruling after the Prehearing Conference. Among the defenses struck were Respondent's challenges to the

applicability of the Board's Adam Dairy formula;[1/] its challenges to the Board's Hickam formula;[2/] and its argument that Ceasar Chavez's and Boren Chertkov's assurances that no make-whole would be due estops the Board from presently seeking it.

Although General Counsel resisted Respondent's challenge to the Board's Adam Dairy formula, he mounted one of his own and proposed that the Adam Dairy approach be modified to take into, account what he asserts is more current information concerning the percentage of employee compensation represented by fringe benefits.

During the Prehearing Conference, and in my interim ruling, I indicated that I was bound to follow existing Board law and I was not free to replace recently reaffirmed Board make-whole priniciples with approaches that the Board has either already rejected (as Respondent urged me to do) or with a new make-whole formula (as General Counsel has urged me to do). Nevertheless, because make-whole is a novel remedy, and Board experience in applying it is limited, I permitted all parties to make offers of proof regarding their positions so that the Board can consider for itself whether it ought to permit proof of the matters raised by the parties.[3/]

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1. Adam Dairy (1978) 4 ALRB No. 24

2. Robert Hickam (1983) 9 ALRB No. 6

3. The record was left open for a number of items:

1. The parties agreed to supply information relating to FICA rates (1:90). General Counsel supplied this information by letter dated April 15, 1983. I have marked and received it as GCX 7.

(Footnote 3 continued----)

After the conclusion of the hearing, the Board invited oral agrument in a pending make-whole case, J.R. Norton 77-CE-166-E, on the continued applicability of its make-whole formula. Accordingly, some of the issues I ruled on above have once again become open questions before the Board. As a result, I will not make any calculations in this decision: if the Board does reconsider its Adam Dairy approach the thousands of calculations I would have performed in this decision under Adam Dairy's auspices would have been so much wasted effort.

At the hearing all parties were given full opportunity to participate and after close of the hearing all of them filed briefs in support of their positions. Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs filed by the parties, I make the following:

(Footnote 3 continued----)

2. Respondent wanted to put in data concerning Workers Compensation and Unemployment Insurance rates paid by California employers in support of its assault on the validity of the Board's Hickam formula. (I:113-114.) I agreed to take the information. (I:117.) It proffered these by letter dated April 22, 1983. In the same letter, Respondent included a supplemental offer of proof concerning fringe benefits paid under the comparable contracts. General Counsel objects to so much of Respondent's Supplemental Offer as concerns the fringe benefit rates paid under the Christian Brothers, Trefethan and Napa Valley Vineyards contracts. (See Motion to Strike Portion of Respondent's Supplemental Offer of Proof.)

I am granting General Counsel's Motion to Strike. The record was left open to the extent of permitting summaries similar to that marked as RX 4. (See I:106: 109.) I concur with General Counsel that the form of Respondent's offer of proof is defective. (Jefferson Evidence Benchbook, 2d Edition, Section 20.1, p. 466.)

FINDINGS OF FACTS

Jenny Diaz, the Field Examiner who prepared the make-whole specification, explained her technique. She testified that she first identified the comparable contracts for the purpose of deriving a make-whole wage. (I:31A.) For the period September 1977 -- May 1978 there were two UFW contracts with vineyards in the Napa Valley -- one at Napa Valley Vineyards, the other at Mont LaSalle (Christian Brothers). (I:31A.) After 1978, the UFW obtained contracts at two other vineyards in the area, Trefethan and St Reg is. (Ibid.)

Having identified the comparable contracts, Diaz then averaged the wages paid under them in order to obtain a basic make-whole wage.[4/] (I:32.) For the period September 28, 1977 through May 7, 1978, when the only contracts were those at Napa Valley Vineyards and Mont LaSalle, Diaz averaged the wage rates under those contracts; for subsequent years, she averaged the wages of the four contracts. (I:32.) Because the contracts incorporated wage changes at different times,[5/] Diaz sought to assimilate

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4. From her examination of Respondent's records Diaz concluded that there would be no increase in wages for piece rate work under a contract: "because there were so many factors involved...we went ahead and assume[ed] that if there have been a contract the workers would have gotten that particular rate that they received." (I:38.) Thus, piece rate employees receive only the value of fringe benefits as a make-whole differential.

5. Thus, a wage increase took effect at LaSalle on September 19th (I:61); at Napa Valley Vineyards on August 3rd (I:62); at St Regis, on June 1st. (Ibid.) The parties did not stipulate to the date the wage increase took place at Trefethan. However, G.C. 5C is the wage rate page from the Trefethan contract. It indicates that increases became effective on the anniversary date of the contract, which is May 21st. [(See RX 10.) The contracts came into evidence after the close of the hearing (see I:98) and are marked as RX 7 (St. Regis); RX 8 (Napa Valley Vineyards); RX 9 (Christian Brothers); RX 10 (Trefethan).]

these changes to the annual employment cycle at Mondavi by assuming each change was effective on May 8 of each year. (I:62.)[6/] General Counsel did not compute a new average wage each time one of the employers raised wages pursuant to contract. (I:33.)

One other detail of Diaz' technique requires explanation:[7/] in figuring the credit Respondent is entitled to for fringe benefits paid on behalf of it employees, Diaz discovered that Mondavi paid 6.2% of its gross payroll to the Wine Growers foundation for insurance, 2.5% for pensions; 6% for vacations and 2.8% for contract administration. (I:35.) Diaz ignored the cost of contract administration when giving Respondent a credit for fringe benefits. (I:36.)

Lee Henderson, General Manager of the California Growers Foundation, corroborated Diaz' testimony. (I:80.) She also described how the fund was administered. Information elicited during her testimony has caused General Counsel to seek an adjustment of his specification. Henderson testified that during the period in which Respondent participated in the plans provided by the Growers Foundation, the Foundation used part of its administrative fee to pay higher insurance premiums during the

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6. Although General Counsel makes a number of legal arguments in support of Diaz' approach, in cross-examination Diaz repeated that her primary motivation in treating all wage increases as effective on May 8 was to reduce the number of calculations. (I:63.)

7. At the hearing, Respondent also explored Diaz' practice in determining the wages of employees in ambiguous job classifications; inasmuch as Respondent does not make any issue of Diaz' practice in this regard in its brief, I shall not treat it here.

make-whole period. (I:91.) Thus, an additional premium of .434 percent of gross payroll was paid in 1979 and an additionaly premium of .093 percent of gross payroll was paid in 1980. (I:91.) General Counsel concedes that Respondent is entitled to an additional credit in these amounts. (Brief, p. 23.)

QUESTIONS PRESENTED

As may be obvious from the brief discussion above, the issues in this case are primarily legal. After my interim rulings, the remaining questions are:

(1) Whether the amount of union dues deducted from an employees' paycheck pursuant to the comparable contracts should be deducted from their make-whole award; and whether Respondent should receive a credit for the administrative fee paid to the Growers Foundation;

(2) Whether General Counsel's treating every wage increase as effective on May 8, 1978 is reasonable;

(3) Whether imposition of the Lu-Ette interest rate is appropriate.

(1)

Respondent contends that employees are not entitled to receive the amount of dues they would have paid to the union if they had been covered by the comparable contracts. General Counsel opposes such a deduction for a variety of reasons.

If I understand Respondent's argument correctly, it appears that Respondent is not seeking to reduce the basic make-whole

wage[8/] but to obtain a credit for the administrative fee it paid the Growers Foundation according to the following argument: since union benefit plans must have some administrative costs associated with them, Respondent is entitled to a credit in the amount of dues inasmuch as dues ordinarily represent the cost of administering the contract. I have no doubt that union benefit plans have administrative expenses and that these expenses are somehow paid for; but I cannot conclude from this general understanding of the economy of trusts that union dues, as opposed to some portion of the employer contributions to the plans themselves, either cover the costs or represent a fair measure of the costs of administration. Respondent's argument is based on no evidence at all.

Respondent makes a further argument in support of its effort to obtain a credit for these costs to the effect that the BLS statistics upon which the Board relied in Adam Dairy to compute the percentage of employee compensation applicable to fringe benefits must contain some amount for administration of fringe benefits.[9/]

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8. Any attempt to reduce the basic make-whole wage by a deduction for union dues would have to be rejected since in the absence of a contract, a union is not entitled to receive any dues. (TMY Farms (1983) 9 ALRB No. 29; Carter Lumber Co. (1977) 227 NLRB 703; Miami Coca Cola Bottling Co.(1965) 1515 NLRB 1701, 1710.)

9. Respondent's Brief, pp. 25-26: "There are too many unknown factors pertaining to the specific breakdown of the 22 percent figure contained in the BLS study. For example, the study shows that 3.5 percent of the total economic compensation paid by non-farm employers nationwide in 1974 was paid for private retirement plans. It is unknown if the employers surveyed in that study paid any portion of that amount to third parties to assist in the administration of such plans or whether the entire amount was paid directly to a bank or an insurance company to fund and administer the retirement plan. If the latter ocurred, it is

(Footnote continued----)

General Counsel, points out, however, that the BLS study relied upon by the Board to compute the Adam Dairy fringe benefit rate did attempt to exclude administrative costs from the calculation of fringe benefits. Thus, the survey utilized by the Bureau of Labor Statistics instructs participants to exclude their administrative costs from their calculation of benefits, see RX5 p. 62 Instructions Lines 16-21. Although it is possible that the information actually elicited by a questionnaire is different from the information it called for, I cannot simply assume that it is. Accordingly, I shall not credit Respondent with the costs of administration except to the extent that the Foundation used part of its fees to pay non-mandatory fringe benefits in 1979 and 1980.[10/]

(2)

As noted previously, General Counsel proposes to treat each wage increase as effective in the first week of May, when Mondavi raised its wages. Respondent opposes this since most of the raises occurred later, and it proposes to average the wages actually in

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(Footnote 9 continued----)

unknown what portion of the amount paid was attributable to administration compared to the amount paid by Respondent to the California Growers Foundation. It would simply be inequitable to start carving out positions of the amount paid by Respondent to the Growers Foundation, on the basis that those portions are attributable to administration, when there is no basis for reviewing comparable costs in the contributions paid by the employers surveyed in the BLS study."

10. I believe General Counsel is correct that, under Hickam, I cannot credit Respondent with the social security contributions made by the Grower's Foundation, since the credit for mandatory fringes is fixed at 6.3%.

effect in order to obtain a comparable wage.

In support of his approach General Counsel generally argues that, under Respondent's proposed averaging technique Mondavi rates during parts of the period are actually higher than those paid under comparable contracts, so that no make-whole is due. Such a result, according to General Counsel contravenes the principle applicable in make-whole proceedings that "loss of wages is presumed." However, the principle relied upon by General Counsel is only a presumption, which may be rebutted by proof, and the question really is, whether Respondent proved that it paid wages higher than those obtaining under the comparable contracts. If it did, since a make-whole award is remedial rather than punitive, no make-whole would be due, and there is no reason in principle that it ought to be.

General Counsel also argues that, had the parties bargained, it is unlikely that the raises would have come in steps. But we are not writing a contract between Respondent and the UFW: we are measuring "damages" by reference to the wages the employees would most likely have received. The reference point for that determination is what wages were actually received under the comparable contracts; to draw any further conclusion about what the specific terms of the Mondavi contract "would" or, as General Counsel would have it, "would not" have been appears to intrude too far into the bargaining process.[11/]

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11. General Counsel also argues that, if "actual" averaging is to be used, the averages contained in RX 1 and RX 2 are inaccurate in certain particulars. (See G.C. Brief, pp. 17-18.) After examining the various exhibits, I conclude that General Counsel's averages are more accurate than Respondent's RX 1.

(Footnote continued----)

(3)

In Bruce Church, 9 ALRB No. 19 Board imposed Lu-Ette interest only from the date of issuance of its order. My order, therefore, will bear interest at the rate of 7%.

CONCLUSION

General Counsel is ordered to prepare a new specification in compliance with this decision, except that this order is automatically stayed if either party files a request for review of the decision within the time periods provided by applicable regulations.[12/]

Dated: October 5, 1983

THOMAS M. SOBEL
Administrative Law Judge

(Footnote 11 continued----)

RX 1 does exclude the working foreman category and the June 1979 tractor driver raise at St. Regis. It also contains an understatement of the post-August 4, 1979 hand cutter wage at Napa Valley Vineyards and an understatement of the hourly wage for Mt. LaSalle tractor drivers for the period September 1978 until May 1979. It also fails to provide an hourly rate for frost protection, which General Counsel concedes was 1½ times the general hourly rate. (I:100; see also, GCX 5A & B, 5E.)

12. Pursuant to my direction, General Counsel prepared new make-whole worksheets which I anticipated using to perform ray own calculations. As I have noted, since the Board has apparently re-opened the question of its make-whole formula, I have decided to bifurcate the present proceedings and give the Board the opportunity to decide the foundational questions treated herein before any calculations need be performed. Accordingly, I will be transmitting the wage summaries back to General Counsel.