San Clemente, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN CLEMENTE RANCH, LTD., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 77-CE-ll-X, 77-CE-13-X, 77-CE-14-X, 77-CE-19-X, 77-CE-21-X, 77-CE-27-X, 77-CE-35-X, 77-CE-36-X, 77-CE-39-X, 78-CE-5-X, 78-CE-5-X 10 ALRB No. 21 (8 ALRB No. 11) (5 ALRB No. 54)

SUPPLEMENTAL DECISION AND ORDER

In accordance with the remand order of the Court of Appeal of the State of California for the Second Appellate District, Division One in San Clemente Ranch, Ltd, v. Agricultural Labor Relations Bd. (June 21, 1983) 2 Civ. No. 64874, we have reconsidered our remedial Order in Highland Ranch and San Clemente Ranch, Ltd. (1979) 5 ALRB No. 54 and have decided to reinstate our original remedial Order in this matter.[1/]

In Highland Ranch and San Clemente Ranch, Ltd., supra, 5 ALRB No. 54, we found San Clemente Ranch (San Clemente or Respondent) to be the legal successor to Highland Ranch. Respondent therefore inherited Highland's duty to meet and bargain with the United Farm Workers of America, AFL-CIO (UFW) as the certified exclusive collective bargaining representative of its agricultural

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[1/] Member Carrillo did not participate in the consideration of this decision.

employees.[2/] We therefore concluded that San Clemente's refusal to meet with, and its refusal to provide information to, the UFW, since on or about December 9, 1977, violated Labor Code section 1153(e) and (a). In our remedial Order, we directed San Clemente to make its agricultural employees whole for all economic losses they suffered as a result of its refusal to bargain.

Our findings and conclusions regarding San Clemente's successor status were affirmed by the California Supreme Court in San Clemente Ranch, Ltd, v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 874. However, the makewhole provision of our remedial Order was remanded to the Board for reconsideration in light of the Supreme Court's decision in J. R. Norton Company, Inc. v. Agricultural Labor Relations Bd. (1979) 29 Cal.3d 1.

In Highland Ranch and San Clemente Ranch, Ltd. (1982) 8 ALRB No. 11, we held that the Norton decision, limiting the Board's authority to automatically award the makewhole remedy, only applied to cases where the employer's refusal-to-bargain served the statutory purpose of preserving employee free choice. We decided that the issue of successorship did not involve free choice, and therefore that makewhole was an appropriate remedy for San Clemente's refusal-to-bargain.

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[2/] Following a representation election conducted among the agricultural employees of Highland Ranch on July 28, 1977, at which the UFW received a majority of the votes cast, post-election objections were filed by Highland. After reviewing those objections, the Board certified the UFW on November 29, 1977. While the objections were pending, Highland negotiated the sale of its business to San Clemente; the sale was consummated on November 29, the day the certification issued.

On review,[3/] the Court of Appeal affirmed the Board's conclusion that the Supreme Court's Norton decision only applied to cases where the employer was refusing to bargain to obtain judicial review of its election objections. The Court further concluded, however, that successorship was nonetheless a "unique and complex issue of law" involving a novel and crucial interpretation of relatively new legislation and litigation thereof "could reasonably be viewed as beneficial to the legislative goal of agricultural peace for both employers and employees." (San Clemente Ranch, Ltd. v. Agricultural Labor Relations Bd., supra, 2 Civ. No. 64874, slip opinion at 26.) The Court then extended the general principle of Norton by holding that automatic imposition of the makewhole remedy where an employer refused to bargain based on a successorship theory would be an abuse of discretion, absent a finding that the employer refused to bargain without a "reasonable good faith" belief in the validity of its own litigation posture. The case was therefore remanded to the Board to determine whether Respondent "acted in reasonable 'good faith' in undertaking this litigation." (Slip opinion at 26-27.)[4/]

[3/] Respondent's initial petition for review of 8 ALRB No. 11 was summarily denied by the Court of Appeal on October 19, 1982. However, Respondent's petition for hearing was granted by the California Supreme Court on December 8, 1982. The case was then transferred back to the Court of Appeal with directions to issue a writ of review. The writ was issued on December 21, 1982, and the Court of Appeal filed its written opinion on June 21, 1983.

[4/] At the Board's request, the California Supreme Court depublished the Court of Appeal's opinion but left its legal analysis and remand intact. We therefore consider ourselves bound by the doctrine of

[fn. cont. on p. 4]

We have reviewed the findings of fact in several related prior proceedings involving Respondent and, on the basis of those facts, as set forth below, we now find that Respondent did not act in reasonable good faith in undertaking this litigation.[5/] (See Highland Ranch and San Clemente Ranch, Ltd., supra, 5 ALRB No. 54, aff'd. (1981) 29 Cal.3d 874; and San Clemente Ranch, Ltd. (1982) 8 ALRB No. 29, review den. by 4th Dist.Ct.App., Div. 1 (Oct. 20, 1982); hg. den. by S.Ct. (Dec. 8, 1982).) We have considered the total lack of merit in Respondent's successorship defense theory and also Respondent's bad faith, evidenced by unlawful discrimination against former Highland Ranch employees. The Facts

Respondent took possession of Highland Ranch on November 29, 1977, the same day the UFW was certified as the exclusive representative of Highland's agricultural employees.[6/]

[fn. 4 cont.]

"law of the case" to follow the Court's conclusions of law and we find it unnecessary to decide whether to adopt, as a general standard, the Court's "unique and complex issue of law" standard or whether the Court's analysis conflicts with our decision in F & P Growers Association (1983) 9 ALRB No. 22. (See Estate of Baird (1924) 193 Cal. 225, 258.)

[5/] This finding covers Respondent's refusal-to-bargain from December 12, 1977, when it should have received the UFW's first request for bargaining, until September 10, 1981, when the Supreme Court upheld the Board's rejection of Respondent's defense. After the Supreme Court's decision issued, Respondent certainly had no basis for refusing to bargain. (See Waller Flowerseed Company (1980) 6 ALRB No. 51.) We leave it to the compliance phase of these proceedings to determine when Respondent began good faith bargaining with the UFW.

[6/] The UFW requested contract negotiations with Respondent on December 9, 1977, and again on February 17, 1978. Although Respondent provided the UFW with information regarding the sale of the business, Respondent never responded to the UFW's request for bargaining or the Union's general information request.

At that time, Highland's operations were at a seasonal hiatus with only one former Highland irrigator employed to water the already planted cabbage crop.

Respondent continued Highland's operations virtually intact, farming generally the same crops on the same leased land and using the same equipment and farming techniques used by Highland. As the need for employees increased, Respondent hired primarily former Highland employees. By the end of February 1978, Respondent had 49 employees, 46 of whom had previously worked for Highland. On March 14, 1978, Respondent began hiring through a labor contractor called Sun West. By March 25, 1978, Respondent had 150 employees, 42 of whom were supplied by Sun West and 70 of whom were former Highland employees.

In early April 1978, Sun West was directed by one of Respondent's supervisors to refuse to hire four former Highland employees, despite the availability of work and timely applications by the former Highland employees. Respondent's supervisor stated that the Highland workers were not wanted because they were "Chavistas" or UFW supporters. On April 14, despite the continued availability of work, Sun West laid off eight former Highland employees at Respondent's direction, again because the employees were "Chavistas." (San Clemente Ranch, Ltd., supra, 8 ALRB No. 29.)

Respondent's Legal Defenses

Throughout these proceedings, Respondent has based its refusal-to-bargain on two legal theories. First, Respondent has argued that Agricultural Labor Relations Act (ALRA or Act) section 1153(f) prohibits any employer, successor or not, from bargaining

with a union if that union has not been certified pursuant to a secret ballot election among that employer's employees. This argument was rejected by the California Supreme Court as "totally without merit." (San Clemente Ranch, Ltd, v. Agricultural Labor Relations Rd., supra, 29 Cal.3d 874, 885.) The Court found nothing in the Act, its legislative history, or common sense that would support such an interpretation and, on the contrary, held that:

> The ALRB was unquestionably correct in concluding that the ALRA contemplates that under appropriate circumstances an agricultural employer who purchases an ongoing agricultural business may be bound by the statutory obligations which the Act imposes upon its predecessor.
> (Emphasis added.) (29 Cal.3d at 885.)

Despite this total rejection of its position, Respondent continues to claim that its theory was raised in reasonable good faith. We cannot agree. Novelty alone does not cloak a litigation theory in reasonableness; the theory must have some basis in fact, law, or policy. (Cf. J. R. Norton Company, Inc. v. Agricultural Labor Relations Bd., supra, 29 Cal.3d 1, 39.)

Second, Respondent has argued that it is not a successor to Highland's bargaining obligation because the majority of its employees were not former Highland workers on the date that Respondent reached a full complement of employees. According to Respondent, "full complement" was not reached until March 25, 1978, when it first employed at least fifty percent of its peak employment

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level.[7/]

Respondent's theory is based on its interpretation of several United States Supreme Court decisions defining the concept of successorship. In Howard Johnson Co. v. Hotel Employees (1974) 417 U.S. 249, 263, the Court held that "a substantial continuity in the identity of the work force across the change of ownership" is a key factor in determining whether to impose an existing bargaining obligation on the purchaser of a business. Respondent also relies on language in NLRB v. Burns Security Services (1972) 406 U.S. 272, 295 which acknowledges the possibility of a cessation of operations at the point of the takeover and states that therefore continuity in the identity of the work force "may not be clear until the successor employer has hired his full complement of employees."

The California Supreme Court considered Respondent's application of federal precedents to the facts of its case and concluded that Respondent's theory was "untenable" and "totally

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[7/] The Board rejected Respondent's theory in Highland Ranch and San Clemente Ranch, Ltd., supra, 5 ALRB No. 54, holding that Respondent's "rigid, mechanical rule" was inappropriate in the agricultural setting, since high turnover and rapidly fluctuating work force size are typical. In the Board's view, the peculiar conditions of agriculture necessitated a flexible, case-by-case consideration of the significance of work force continuity and whether a "full complement" of employees were employed at any particular time, given the nature of the successor's agricultural operations. In Respondent's case, the Board noted that Respondent took over Highland's operations completely and without interruption in Highland's usual growing schedule. Therefore, Respondent may very well have had a full complement of workers on December 1, 1977, with only one irrigator employed since there was no other work to be done. Since Respondent employed primarily former Highland workers from December 1, 1977, until March 25, 1978, took over all of Highland's land and equipment, and continued to grow the same crops as Highland with the same farming techniques, the Board found that the employing entity and the bargaining unit had not changed and that Respondent' was a "successor" to Highland's bargaining obligation.

unsound." (San Clemente Ranch, Ltd, v. Agricultural Labor Relations Bd., supra, 29 Cal.3d 874, 887-8.) The Supreme Court found no support in any federal precedent for Respondent's strict, mechanical approach to successorship. On the contrary, the federal cases clearly require a cautious, case-by-case approach in which no single factor is conclusive. (Id. at p. 885.) The Supreme Court further rejected Respondent's assertion that "substantial continuity" means a strict majority of predecessor employees at the moment a "full complement" of employees has been hired. In the Supreme Court's view, federal authority indicated that "substantial continuity" is a flexible concept and a factor easily met in the instant case during the four months in which Respondent employed almost exclusively former Highland employees. (Id. at p. 888.)

Finally, the Supreme Court found Respondent's equation of "full complement" with peak employment to be completely without support in either the ALRA or federal case law. The Supreme Court reasoned that if Respondent's theory were applied to seasonal agricultural operations, the employees' opportunity to know with certainty whether the predecessor's bargaining obligation was binding on the successor could be unduly delayed. That uncertainty could also cause delay in the commencement of collective bargaining which could unfairly "weaken the position of a newly selected union." (Id. at p. 889.)

The Supreme Court not only rejected Respondent's theory in its entirety, it also found the ALRB's analysis "totally consistent" with federal authority and "completely justified" in its consideration of the peculiar conditions of agriculture.

(Id. at p. 887.) Given the total lack of merit in Respondent's successorship theory, we conclude that Respondent manufactured the only theory it could, given the facts of the case, in an effort to delay its bargaining obligation as long as possible.

Moreover, we find that even the implausible successorship defense on which Respondent relied reflected a situation created by Respondent's own discrimination against former Highland employees. In March 1978, Respondent, for the first time, began to hire new employees through labor contractor Sun West. In San Clemente Ranch, Ltd., supra, 8 ALRB No. 29, the credited testimony of a Sun West supervisor indicated that in early April 1978, within several weeks of the date Respondent claims is crucial, Respondent specifically directed Sun West to refuse to rehire and to lay off twelve former Highland employees because they were UFW supporters. Since Respondent here attempted, through illegal tactics, to create circumstances which could support its own claim of lack of successorship, we find that its refusal-to-bargain was an act of bad faith. (See Rivcom Corp. v. Agricultural Labor Relations Bd. (1983) 34 Cal.Sd 743, 772.)

Based on the foregoing analysis, we find that Respondent lacked a reasonable belief in the legal merit of its litigation theory and acted in bad faith by trying to create a defense through unlawful discrimination. No purpose of the ALRA would be served by insulating Respondent from responsibility for the losses suffered by its employees over the seven years since Respondent's initial refusal-to-bargain. We therefore conclude that the makewhole remedy

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is appropriate in this case and our original Order in 5 ALRB No. 54 is hereby reaffirmed and reinstated.

Dated: April 24, 1984

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

CASE SUMMARY

San Clemente Ranch, Ltd. (UFW)

10 ALRB No. 21
Case No. 77-CE-ll-X et al

COURT REMAND

The Second District Court of Appeal held that the makewhole remedy may not be automatically applied in cases where the employer's refusal to bargain is based on the reasonable, good faith assertion of a "complex and novel" issue of law. The Court of Appeal concluded that Respondent's refusal to bargain, based on a successor-ship theory, raised such a "complex and novel" legal issue. The Court thereafter remanded to the Board the question of Respondent's reasonable good faith.

BOARD DECISION

The Board found that Respondent did not hold a reasonable good faith belief in its own successorship theory, since the successorship rule proposed by Respondent was a rigid, mechanical formula, unsuited to the conditions of agriculture and contrary to all federal precedent. The Board further found Respondent in bad faith for attempt-to create its own claim of lack of successorship by illegally refusing to rehire and laying off pro-union predecessor employees.

Having found that Respondent lacked a reasonable good faith belief in its litigation theory, the Board concluded that the makewhole remedy was appropriate in this case.

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