Stockton, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

WILLIAM DAL PORTO & SONS, INC., Respondent , and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 81-CE-6-F 81-CE-9-F 81-CE-13-F 81-CE-16-F 81-CE-18-F 11 ALRB No. 13 (9 ALRB No. 4)

SUPPLEMENTAL DECISION AND ORDER

Pursuant to the remand order of the Court of Appeal *of* the State of California, Third Appellate District, in William Pal Porto & Sons, Inc. v. Agricultural Labor Relations Bd. (1984) 163 Cal.App.3d 541, we herein reconsider our award of makewhole relief in William Pal Porto & Sons, Inc. (1983) 9 ALRB No. 4.

In 9 ALRB No. 4, the Agricultural Labor Relations Board (Board) found inter alia that Respondent had failed to bargain in good faith with the Charging Party, the certified representative of its employees, in violation of Labor Code Section 1153(e) and (a). On appeal, the court held that there was substantial evidence on the record to support this Board's finding of bad faith bargaining in connection with the unilateral wage change and the issue of union security (dues checkoff). However, it did not find sufficient evidence to infer a lack of good faith from Respondent's bargaining position on the issue

of successorship. The court indicated that although it was affirming two of three contested findings of bad faith bargaining, it could not assume the Board would impose the same remedial order for two violations as for three. It therefore remanded the case to the Board for reconsideration of the award of "makewhole" relief and reformulation of a new remedial order. In all other respects, the Board's final Decision and Order was affirmed.

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

After a careful re-evaluation of the evidence in 9 ALRB No. 4, we conclude that the Board's award of makewhole relief remains warranted under the court's narrower finding of bad faith bargaining by Respondent.

As the court stated, Dal Porto's conduct regarding the union security issue created an inference that it was merely "going through the motions," and lacked the intent to reach an agreement.

> First, Dal Porto consistently refused to assume the expense of dues collection without ever ascertaining, or asking the union to ascertain, the amount of expense involved. Dal Porto in effect answered "no" before it knew just what the question was. (William Dal Porto & Sons, Inc. v. Agricultural labor Relations Bd., supra, 163 Cal.App.3d at 552.)

Further, the court held that the Board was justified

[1/]The signatures of Board Members in all Board Decisions appear with the signature of the Chairperson first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

in inferring a lack of good faith

> from Dal Porto's continued objection to the "cost" of dues collection after the UFW agreed to reduce its wage request by an offsetting amount. Instead of ascertaining the actual cost of the dues collection and the necessary adjustment in the wage request, Dal Porto merely persisted in rejecting the union's offers. Thus, the dispute went beyond the employer's mere insistence in good faith that the union bear the cost and the union's good faith insistence that the employer bear the cost. Rather, the ALO was entitled to view Dal Porto's continued objection to dues collection following the UFWs reducing its wage proposal as evidence of lack of intent to reach any agreement at all.
> (William Dal Porto & Sons, Inc. v. Agricultural Labor Relations Bd., supra, 163 Cal.App.3d at 553.)

The court also concluded that Dal Porto's unilateral wage change supported a finding of surface bargaining. Dal Porto never gave the UFW notice that it would grant a wage increase, but only told the union it wanted to grant an increase

> with the union's consent and that the employer was waiting for the union's response....The net result is that the union is stuck with the unannounced wage increase which it reasonably assumed was the subject of future bargaining.
> (William Dal Porto & Sons, Inc. v. Agricultural Labor Relations Bd., supra, 163 Cal.App.3d at 555.)

Moreover, the court held that the evidence showed that Dal Porto deceived the UFW about the granting of the wage increase,

> The wage increase was implemented May 21. The increase was not disclosed at the negotiating session of May 27. In fact, Dal Porto never disclosed the wage increase during negotiations; rather, the union found out about it on its own some six weeks after it had been granted....The record demonstrated Dal Porto was not honest about the implementation of the wage increase and that its deception torpedoed negotiations. Veracity of information is essential in the bargaining process. William Dal Porto & Sons, Inc. v. Agricultural Labor Relations Bd., supra, 163 Cal.App.3d at 555-556.)

It can thus be said that (1) Respondent's bargaining over the union security issue provides strong evidence of a lack

of intent to reach any agreement at all and (2) the manner in which it implemented a unilateral wage change crippled the bargaining process by demonstrating that Respondent would resort to deception in order to evade its bargaining obligations. We conclude that the unilateral change and the bargaining over union security, when taken together, result in a totality of circumstances[2/] indicating that Respondent was in fact seeking to frustrate negotiations and avoid signing a contract (see e.g., Montebello Rose co., Inc. & Mt. Arbor Nurseries (1977) 5 ALRB No. 6-4) and that Respondent should therefore make its employees whole for the loss of wages and benefits they may have incurred through Respondent's failure and refusal to bargain in good faith in violation of section 1153(e) and (a) of the Act.

We find that the order we issued in 9 ALRB No. 4 remains appropriate under the circumstances on remand from the Court of Appeals and a new order is hereby issued in identical form.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent William Dal Porto & Sons, Inc., 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

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[2/] The court's elimination of the successorship issue as evidence of bad faith bargaining is not, in our view, sufficiently detracting from the totality of circumstances to warrant any change in the conclusions we reached in 9 ALRB No. 4.

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) Unilaterally changing any of the wages or any other term or condition of employment of its agricultural workers, without first notifying and affording the UFW a reasonable opportunity to bargain with respect to such changes.

(c) Threatening employees with incarceration or any other reprisals because of their union activities.

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

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

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

(b) Upon request, meet and bargain in good faith with the UFW as the exclusive bargaining representative of its agricultural employees, regarding the unilateral increase Respondent made in the said employees' wage rates on or about May 27, 1981.

(d) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW, such amounts to be computed

in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, the period of said obligation to extend from April 1, 1981, the date of Respondent's first refusal to bargain with the UFW, until October 30, 1981, and continuing thereafter, until such time as Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(e) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terms of this Order.

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

(g) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(h) Provide a copy of the attached Notice to each agricultural employee it hires during the 12-month period following the date of issuance of this Order.

(i) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance

of this Order, to all agricultural employees employed by Respondent at any time during the period from April 1, 1981, until the date on which said Notice is mailed.

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on Company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice 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.

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

IT IS FURTHER ORDERED that the certification of the UFW as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended

for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: June 6, 1985

JOHN P. MCCARTHY, Member

JORGE CARRILLO, Member

CHAIRPERSON JAMES-MASSENGALE, Dissenting:

I respectfully dissent from the majority's conclusion that makewhole is an appropriate remedy in this case.

Procedurally, I am constrained to accept the underlying Board findings, as affirmed by the appellate court that Respondent bargained in bad faith with respect to the proposed dues checkoff provision and by the manner in which it granted a unilateral wage increase.[1/]

Accepting those findings as correct, I nevertheless do not believe makewhole is appropriate in this case because the evidence does not establish surface bargaining. It is well-established that "[a] lack of good faith . . . may be found only from 'conduct clearly showing an intent not to enter into a contract of any nature."' (Pease Co. v. NLRB) (6th Cir. 1981) 666 F. 2d 104/4, 1049 [109 LRRM 2092], cert. den. (1982) 456 U.S. 974 [110 LRRM 2320]; see

[1/]Based upon my review of the record and for the reasons set forth in the dissenting court opinion, I would not have found violations.

also NLRB v. Tomco Communications. Inc. (9th Cir. 1978) 567 F.2d 871 [97 LRRM 2660].) The evidence here is insufficient to satisfy that standard.

In interpreting the statute after which the Agricultural Labor Relations Act (Act) is patterned, the United States Supreme Court instructed that, "[T]he [National Labor Relations] Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of the collective bargaining agreements." (H. K. Porter Company, Inc. v. NLRB (1970) 397 U.S. 99, 106 [73 LRRM 2561]; NLRB v. American National Insurance Company (1952) 343 U.S. 395, 404 [30 LRRM 2147].)[2/] Indeed, the Act expressly provides that the statutory bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." (Labor Code section 1155.2(a).) Since there is no statutory obligation to include any particular provision in a collective bargaining agreement, Respondent's failure to accept the Union's dues checkoff proposal did not leave the Union with contract proposals which would have resulted in an agreement which was patently unacceptable. The Act contemplates that the contents of a collective bargaining agreement will be determined by perceptions of the relative economic positions of the parties. Thus, a collective bargaining agreement could have been concluded by either side on the basis of those proposals on which the parties had reached agreement and the acceptance by either side of the other side's proposals on issues where agreement had not been reached.

[2/] Labor Code section 1148 requires that we follow applicable National Labor Relations Act precedents.

Respondent's unwillingness to accept the Union's dues checkoff provision was based on economic and noneconomic factors. In addition to the cost factor, Respondent's owner did not want to impose additional burdens on his wife who served as Respondent's bookkeeper. In the context of this case, Respondent's failure to calculate the cost of adding the dues checkoff function to its accounting procedures was at worst a failure to comply with a ministerial duty and, in my view, did not evidence an intent not to reach a collective bargaining agreement of any nature.

Similarly, in my view, the wage increases granted by Respondent to its thinning employees does not evidence an intent not to conclude a collective bargaining agreement. The evidence establishes that Respondent's negotiator had received inaccurate information as to the precise time of the annual wage increases. Consequently, he indicated to the Union that wage increases would be made in May. After the fact, the negotiator learned that the increases were made in April. While the failure to notify the Union of the precise time and amount of an annual wage increase during contract negotiations may constitute a bargaining violation, the evidence does not demonstrate an intent on Respondent's part not to reach a collective bargaining agreement.[3/]

[3/] Nor does the evidence establish that the wage increase was granted or the inaccurate information was given to undermine the Union.

For the above reasons, I would not order a makewhole remedy in this case.

Dated: June 6, 1985

JYRL JAMES-MASSENGALE, Chairperson

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Fresno Office, the General Counsel of the Agricultural labor Relations Board (Board) issued a Complaint which alleged that we had violated the law. After a hearing at which each side had a chance to present its facts, the Board has found that we failed and refused to bargain in good faith with the United Farm Workers of America, AFL-CIO, (UFW) in violation of the law. The Board has told us to post and mail this Notice.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act (Act) is a law which gives you and all farm workers in California these rights:

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

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

WE WILL NOT make any change in your wages or working conditions without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed changes.

WE WILL NOT threaten employees with incarceration or like reprisals because of their union activities.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible. In addition, we will reimburse all workers who were employed at any time during the period from April 1, 1981, to the date we begin to bargain in good faith for a contract for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW.

Dated: WILLIAM DAL PORTO & SONS, INC.

By: ______________________________

(Representative) (Title)

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1685 "E" Street, Fresno, California 93706. The telephone number is (209) 445-5591.

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

William Dal Porto & Sons, Inc.

11 ALRB No. 13
(9 ALRB No. 4)
Case Nos. 81-CE-6-F
81-CE-9-F
81-CE-13-F
81-CE-16-F
81-CE-18-F

The Court of Appeal remanded this case to the Board after finding that one of the grounds on which the Board based its award of makewhole relief was erroneous. While the c6urt did not find sufficient evidence to infer a lack of good faith from Respondent's bargaining position on the issue of successorship, it did affirm the Board's findings of bad faith bargaining in connection with the unilateral wage change and employers bargaining position on the issue of union security. The remand was for the purpose of having the Board determine whether the award of makewhole relief was still appropriate under the circumstances.

The Board concluded that its award of makewhole relief remained warranted on the basis that (1) Respondent's bargaining over the union security issue provides strong evidence of a lack of intent to reach any agreement at all and (2) the manner in which it implemented a unilateral wage change crippled the bargaining process by demonstrating that Respondent would resort to deception in order to evade its bargaining obligations. These circumstances, when taken together, result in a totality of circumstances indicating that Respondent was in fact seeking to frustrate negotiations and avoid signing a contract. This conclusion was bolstered by the findings of the court concerning the unilateral wage change and the employer bargaining on the union security issue.

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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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