Guadalupe, California
Lompoc, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOHN ELMORE FARMS, KUDU, INC., and ROBERT WITT RANCH, Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 77-CE-4-SM 77-CE-4-1-SM 77-CE-5-SM 77-CE-5-1-SM 11 ALRB No. 22 (8 ALRB No. 20)

SUPPLEMENTAL DECISION AND MODIFIED ORDER

In accordance with the remand of the Court of Appeal, Fifth Appellate District, in Robert Witt Ranch v. Agricultural Labor Relations Bd. (1984) 5 Civ. 7142 (unpublished), we have reviewed and reconsidered our remedial Order and hereby make the following additional findings and conclusions, and reaffirm our original Order as modified herein.[1/]

In the underlying case, Robert Witt Ranch (Witt) contended that because he was an entity separate from and not a successor to Kudu, Inc. (Kudu) he had no duty to recognize and bargain with the certified union and that section 1153(f) of the Agricultural Labor Relations Act (Act or ALRA) prevented him from doing so. We rejected both defenses and found Witt (as well as Kudu and John Elmore Farms (Elmore)) in violation of section 1153(e) and (a)

[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.

of the Act and awarded makewhole "... until April 7, 1978, and thereafter until such time as Respondents commence good-faith bargaining with the UFW which leads to a contract or to a bona fide impasse."

The Court of Appeal, while otherwise upholding the Board's findings and conclusions that makewhole should be applied to April 7, 1978, observed that our award of makewhole for the period after April 7, 1978 was based solely upon Witt's refusal to recognize and bargain with the Union. The court noted that neither the Board nor the Administrative Law Officer (ALO)[2/] had made a finding that Witt's refusal to recognize and bargain after April 7, 1978, was either unreasonable or in bad faith, citing J.R. Norton Co., Inc. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1. The court suggested that the "right of employees to freely choose their own representatives through an election" may be an issue in this case,

> ... inasmuch as none of Witt's employees voted in the original ALRB election that was held among the employees of Elmore 16 months prior to the time Witt commenced farming and first started employing his work force. (Robert Witt Ranch v. ALRB, supra, slip opinion pp. 6-7.)

Because this Board's initial decision regarding the successorship doctrine, Highland Ranch/San Clemente Ranch, Ltd. (1979) 5 ALRB No. 54, was not upheld by the California Supreme Court until September 1981 (San Clemente Ranch Ltd, v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 874), the court suggested Witt's

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[2/] At the time of that Decision, our Administrative Law. Judges were referred to as Administrative Law Officers.

refusal to bargain may have been in good faith and reasonably based upon the National Labor Relations Board (NLRB) successorship standard enunciated in Pacific Hide and Fur Depot, Inc. v. NLRB (1977) 553 F.2d 609 [95 LRRM 24-67]. The court therefore remanded this case to us for re-determination of the appropriateness of makewhole after April 7, 1978.

In J.R. Norton, supra, the Supreme Court held that in technical refusal to bargain cases,[3/] makewhole is inappropriate only where the employer "reasonably and in good faith believed the violation would have affected the outcome of the election." (Id., at p. 39.) We have recognized, in this "two pronged" test, that:

> ... an employer may act in good faith, while not having a reasonable basis for his position. An employer may also offer a reasonable basis, while not acting in good faith as shown by the totality of the circumstances. (J.R. Norton Company (I960) 6 ALRB No. 26, p. 3.)

We have held that we would look first to the reasonableness of the employer's litigation posture and where such posture is found to have been reasonable, we would then review the good-faith prong of the test. (cf. Holtville Farms, Inc. (1981) 7 ALRB No. 15.) We note the instant case does not involve a technical refusal to bargain as set forth by the court in Norton, supra, since the integrity of the representation election is not at issue. In John Elmore Farms, et al. (1982) 8 ALRB No. 20, we concluded that Robert

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[3/] Because there is no judicial review of a certification decision (Nishikawa Farms, Inc. v. Mahony (1977) 66 Cal.App.3d 781, 788), a refusal to bargain is the only means to obtain judicial review where the employer entertains doubts as to the validity of the election certification, hence the term "technical refusal to bargain." (Boire v. Greyhound Corp. (1964) 376 U.S. 473 [84 S.Ct. 894].)

Witt was not a successor to Kudu, but its alter ego, that is, "merely a disguised continuance of the old employer." (Southport Petroleum Co. v. NLRB (1942) 315 U.S. 100, 106 [9 LRRM 411, 414].) Our finding was in no way dependent upon the factors considered in determining whether an entity is a true successor. Thus, the issues raised by Pacific Hide and Fur Depot, Inc. v. NLRB, supra, 553 F.2d 609 and our Decision in Highland Ranch/San Clemente, supra, 5 ALRB No. 54, were of no consequence in considering the obligations of an alter ego such as Witt.[4/]

In F & P Growers Association (1983) 9 ALRB No. 28,[5/] we stated:

> 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. Cognizant, however, of our duty under 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. (F&P, supra, pp. 7-8, fn. omitted.)

[4/] In this regard, we note that at no time before the Court of Appeal did Witt acknowledge this Board's determination that he was the alter ego of Kudu. Instead, Witt portrayed the issue as one involving the successorship of an arms length new employer, when, in fact and law, the Board had determined otherwise.

[5/] (Enforced, F&P Growers Assn. v. Agricultural Labor Relations Bd. (May 23,1985) 168 Cal.App.3d 667.)

As we further stated there, an employer's flat refusal to bargain constitutes a violation of the duty to bargain in good faith which is "singularly destructive of the bargaining relationship." (Id., at p. 8.) Therefore, an employer seeking to avoid imposition of the makewhole remedy bears a heavy burden to show that its refusal to bargain effectuates the purposes and policies of the Act. Consistent with the court's remand to examine the post-April 7, 1978 posture of Witt, we do so within the analytical framework of F & P Growers, supra.

Robert Witt testified at considerable length in the underlying proceeding in support of his contention that his agricultural operation was a discrete legal entity separate from that of Kudu. Evaluating that testimony,[6/] the ALO concluded, and this Board affirmed,[7/] that Witt was "... frequently evasive, prone to exaggeration, conveniently forgetful, sometimes cute, and at times totally unbelievable." (ALO Decision, p. 4.3.)

> ... Witt's overall demeanor in regard to and knowledge of his financial situation further buttresses the conclusion that he was not the independent operator that he claimed. As with his testimony about his counsel, Witt's extended testimony about his finances and his reliance on Elmore related money was, as previously noted, evasive and hostile. [Citation.] ... I am forced to conclude that either he was truthful and did not act independently enough to understand the financial workings of his company or that he was lieing [sic] and his testimony about the independence of his business is to be discredited. As noted in my section on the credibility of Robert Witt, because of

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[6/] (See John Elmore, et al. (1982) 8 ALRB No. 20, ALO Decision, pp. 43-57, 93.)

[7/] No exceptions were taken by Witt to these adverse credibility findings.

> the overall nature of his testimony, I am forced to totally discredit his assertion that 'I operate that ranch completely independently of John Elmore'. [Citations.] The financial structure of Robert Witt Ranch and Witt's own testimony support the opposite conclusion. (ALO Decision, p. 93.)

We find no public interest is served by the perpetration of such a sham before this Board. Indeed, independent from our F & P Growers analysis here, we also infer bad faith from the lack of credibility in Witt's explanations. On this basis, of course, no "public interest" analysis is necessary before awarding make-whole. (See Rivcom v. Agricultural Labor Relations Bd. (1983) 34. Cal.3d 74-3, 773 and fn. 26.) From either perspective, then, no purpose of the ALRA would be served by insulating Respondents from responsibility for the losses caused by Witt's unlawful refusal to recognize the Union after April 7, 1978.

We therefore reaffirm our original Order awarding make[8/] with the following modifications. Our original Order provided for makewhole during the discrete interval of March 8, 1977 to April 7, 1978, and, in addition, makewhole "thereafter until such time as Respondents commence good faith bargaining with the UFW which leads to a contract or to bona fide impasse." Consistent with Board precedent, we will modify that Order here so as to award makewhole commencing only six months preceding the filing of the

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[8/] While in our underlying Decision we noted the stipulation of the parties with respect to the liability of Kudu at the Lompoc operation, this stipulation in no way supersedes our Order that Elmore, Kudu, and Witt are jointly and severally liable for all makewhole herein. The Board will not apportion liability among the various ranches.

charge. (Desert Seed Co. (1983) 9 ALRB No. 72.)[9/] In addition our original Order neglected to include a provision requiring interest to be applied to the amounts owed in makewhole. We will, therefore, modify our original Order so as to conform to Board precedent.[10/]

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondents John Elmore Farms, Kudu, Inc., and Robert Witt Ranch, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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

[9/] The dissent's novel proposal to terminate makewhole upon mere recognition of the Union by Respondents ignores the full implication of our finding of bad faith by Respondents in their refusal to recognize the Union. Where a refusal to recognize the union stems from a good faith technical refusal to bargain, it may be appropriate to view surface bargaining subsequent to recognition as a distinct and separate violation. In such a situation, however, the issue of when to terminate makewhole would not arise because makewhole would not have been imposed in the first place. (See J.R. Norton Co., Inc. v. Agricultural Labor Relations Bd., supra, 26 Cal.3d 1.) Where -- as here -- the employer's justification for refusing to recognize is found to be a fraud and a sham, it would be irresponsible, impractical and wasteful for the Board categorically to decline to remedy any subsequent bargaining misconduct -- which is consistent with the employer's previous bad faith strategy -- on the minimal showing that the employer had agreed to sit down at the table with the union. The dissent erroneously characterizes our Order as "open-ended." (See Ruline Nursery Co. v. Agricultural Labor Relations Bd. (June 3, 1985) 169 Cal.App.3d 247, 264 (petn. for review pending).)

[10/] (Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55; McAnally Enterprises, Inc. (1985) 11 ALRB No. 2.)

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the 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 collectively in good faith with the UFW as the certified exclusive collective bargaining representative of their agricultural employees with respect to the said employees' rates of pay, wages, hours of employment, and other terms and conditions of employment and if agreement is reached, embody such agreement in a signed contract.

(b) Make whole their present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondents' refusal to bargain, as such losses have been defined in J.R. Norton Company, Inc. (1984.; 10 ALRB No. 42, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 for the period from June 21, 1977 to April 7, 1978, and thereafter until such time as Respondents recognize and commence good-faith bargaining with the UFW which results in a contract or a bona-fide impass in negotiation.

(c) Preserve and, upon request, make available to this Board or its agents, for examination, photocopying, and otherwise copying, all payroll records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the makewhole period and the amounts of makewhole and

interest due under the terms of this Order.

(d) 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.

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

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

(g) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of the Order, to all of the agricultural employees employed by Respondents at any time subsequent to June 21, 1977 until June 28, 1978, and thereafter until Respondents recognize the UFW and commence good faith bargaining with the UFW which leads to a contract or a bona fide impasse.

(h) Arrange for a representative of Respondents or a Board agent to 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 the 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 Respondents to all nonhourly wage employees in order to compensate them for time lost at this reading and the question-and-answer period.

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

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the collective bargaining representative of the agricultural employees of John Elmore Farms, Kudu, Inc., and Robert Witt Ranch be, and it hereby is, extended for one year from the date of issuance of this Order.

Dated: September 19, 1985

JEROME R. WALDIE, Member

JORGE CARRILLO, Member[11/]

PATRICK W. HENNING, Member

[11/] Member Carrillo would impose the standard mailing remedy for a violation of this kind: mailing to all employees of Respondents employed between the date the violation commenced and the date the Notices are mailed -- which must be within 30 days of issuance (or enforcement) of the Board's Order. Such a remedy is appropriate even if Respondents commenced good faith bargaining before court enforcement of the Board's Order because the effects of unfair labor practices often linger long after the practices are abandoned.

[fn. cont. on p. 11]

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[fn. 11 cont.]

Employees hired after an extended refusal to recognize a duly certified union inherit an undermined and weakened collective bargaining representative. Under the majority's bifurcated mailing Order, those employees would not receive the Notice unless they happened to be working for Respondents at the time of the reading or posting. In addition, by delaying, until after compliance proceedings, mailing to all but those workers who were employed prior to the unfair labor practices hearing, the bifurcated mailing remedy may effectively deny notice to workers who are entitled to make-whole. Therefore, although I join the majority in ordering an immediate mailing to Respondents' employees employed between June 21, 1977 and June 28, 1978, I would not delay the mailing to employees who worked for Respondents between June 28, 1978, and the issuance of the Board's Order.

CHAIRPERSON JAMES-MASSENGALE and MEMBER McCARTHY, Dissenting in part:

We dissent from the majority's opinion insofar as it concerns the duration of the makewhole period after April 7, 1978. We would terminate makewhole relief at such time as it may be shown that Respondents recognize and offer to bargain with the United Farm Workers of America, AFL-CIO (Union) concerning the entire bargaining unit.

As was stated in F & P Growers Association (1983) 9 ALRB No. 22, makewhole is not a penalty but a remedy intended to put the parties and the employees in the positions that they would have been if the employer had not unlawfully refused to bargain. We believe that the violation here was not one of surface bargaining but rather was a refusal to recognize and bargain with the Union as the certified bargaining representative of all of Respondents' agricultural employees. Terminating makewhole at the time Respondents recognize the Union and offer to bargain should encourage Respondents to do

so as quickly as possible. Such a purpose was implied by the Agricultural Labor Relations Board in its original Decision and Order in this proceeding wherein it sought to facilitate the compliance process by designating the makewhole remedy for bad faith bargaining in discrete periods of time in so far as possible.

The date on which Respondents recognize the Union and offer to bargain should be readily ascertainable. Open-ended makewhole orders which run until the parties have reached a bona fide impasse or a contract, in cases such as this, would only encourage further litigation and discourage reasonable efforts by unions to reach agreement, since the prospect of securing more favorable terms by virtue of an open-ended makewhole order overshadows the negotiation process.[1/] Here, any allegation of a failure of the duty to bargain in good faith, except a refusal to recognize and offer to bargain with the certified representative, should not be before the Board at the compliance stage bur should appropriately be the subject of new charges of unfair labor practices.

Dated: September 19, 1985

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

[1/] The mailing remedy contemplated by the majority involves a mailing at the time this Order issues and another following the compliance determination. Based upon the above reasoning, we would only require Respondents to mail notices to agricultural employees employed by Respondents from June 21, 1977, until such time as Respondents recognize the Union and offer to bargain.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Santa Maria Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, John Elmore Farms, Kudu, Inc., and Robert Witt Ranch, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we violated the law by refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW). The Board has ordered us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

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

WE WILL in the future meet and bargain in good faith, on request, with the UFW about a collective bargaining contract covering our agricultural employees.

WE WILL reimburse each of the employees employed by us at any time on or after June 21, 1977, until the date we began to bargain in good faith with the UFW for any loss of wages and economic benefits they have suffered as a result of our failure and refusal to bargain in good faith with the UFW.

Dated: JOHN ELMORE FARMS, KUDU, INC., and ROBERT WITT RANCH

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 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

John Elmore Farms
(UFW)

11 ALRB No. 22
(8 ALRB No. 20)
Case Nos. 77-CE-4-SM
77-CE-4-1-SM
77-CE-5-SM
77-CE-5-1-SM

The Court of Appeal, Fifth Appellate District, remanded to the Board its prior decision in John Elmore Farms, et al. (1982) 8 ALRB No. 20, to reconsider the imposition of makewhole for Robert Witt's refusal to recognize the Union after April 7, 1978. Affirming all other aspects of the Board's Decision, the court remanded because the Board had not found Witt to have been in bad faith after April 7, 1978, and the court referred to its previous (unpublished: decision in which it noted that the standards in awarding makewhole enunciated in J. R. Norton Company, Inc. v. Agricultural Labor Relations Bd. (1979) 25 Cal.3d 1 might well be appropriate here.

BOARD DECISION

On remand, the Board analyzed the concerns expressed by the court from the standards enunciated in F & P Growers Association (1983)9 ALRB Mo. 28, since the instant refusal to recognize the Union was not in challenge to the integrity of the election process. The Board concluded that no public interest was served by Witt's pots -- April 7, 1978, posture, since the Board in 8 ALRB No. 20 had affirmed the ALO' s complete discrediting of Witt's testimony and had concluded he was the alter-ego of Kudu, who had acknowledged a duty to recognize and bargain with the Union. The Board also noted that, not-withstanding the F S P analysis, it; inferred bad faith by Witt because of his discredited testimony, citing Rivcom. v. Agricultural Labor Relations Bd. (1983) 34 Cal.3d 743.

The Board therefore reaffirmed its original Order, but modified it to commence only six months prior to the filing of the charge, pursuant to Dessert Seed Co. (1963) 9 ALRB No. 73.

DISSENTING IN PART

Chairperson James-Massengale, joined by Member McCarthy, would toll the makewhole period at that point when Witt recognizes the Union and leave to additional filling of charges and ULP hearings any determination as to whether or when good faith bargaining commenced following recognition.

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