Pinedale, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

S & J RANCH, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 84-CE-168-D 12 ALRB No. 32

DECISION AND ORDER

This matter has been submitted to the Agricultural Labor Relations Board (ALRB or Board) pursuant to section 20260 of the Board's regulations. (Cal. Admin. Code, tit. 8, § 20100, et seq.) The United Farm Workers of America, AFL-CIO (UFW or Union), S & J Ranch, Inc. (S & J), and the General Counsel have filed a stipulation of facts and have waived an evidentiary hearing before an Administrative Law Judge. The case involves a "technical" refusal to bargain engaged in by the Respondent to obtain judicial review of the certification of the UFW as the exclusive bargaining representative of Respondent's employees issued by the Board in S & J Ranch, Inc. (1984) 10 ALRB No. 26.[1/]

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[1/] A certification is not a "final order" of the Board within meaning of 'Labor Code section 1160.8. It is therefore not sub to direct judicial review. Only by "technically" refusing to bargain may an employer obtain court review of the basis for Board's finding that an unfair labor practice (i.e., a refr bargain with the certified representative) has been commit (Nishikawa v. Mahony (1977) 66 Cal.App.3d. 781.)

On October 22, 1982, an election was held among Respondent's workers under the expedited strike election procedures of section 1156.3(a)[2/] (case no. 82-RC-7-P). The strikers were olive pickers nominally employed by Rio Del Mar, Inc. (RDM). S & J, the employer named in the petition, is a land management concern wholly owned by a Minnesota corporation which has been operating for more than twenty years. S & J contracts to provide cultivation, maintenance, and operations services for various crops on various farms owned by interrelated companies.[3/] In 1982, S & J engaged RDM to harvest olives on three such properties.

: The election resulted in 220 votes for the UFW, 60 votes for no union, and 115 unresolved challenged ballots, for a total of 395 votes. Respondent filed objections to the election which may be grouped into two basic categories: objections centering on the identity of the statutory employer of the olive pickers, and those concerned with the conduct of the election itself. While the objections in the former group were set for hearing before an Investigative Hearing Examiner (IHE), those in the latter were

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[2/] Section 1156.3 provides:

> If at the time the election petition is filed a majority of the employees in the bargaining unit are engaged in a strike, the board shall . . . attempt to hold a secret ballot election within 48 hours after the filing of such petition."

All section references herein are to the California Labor Code unless otherwise specified.

[3/] The corporation which owns S & J is also the general partner in three land-owning limited partnerships which, as client-owners, have engaged S & J.

dismissed by order of the Executive Secretary.[4/]

The IHE determined that S & J was the statutory employer of the olive harvesters. This finding was affirmed by the Board in S & J Ranch, Inc., supra, 10 ALRB No. 26, and the UFW was certified as the exclusive bargaining representative of S & J's agricultural employees. On June 9, 1984, Respondent filed a timely request for reconsideration. While contesting the statutory employer finding, S & J also argued that the certification should be amended. The certification in S & J Ranch Inc., supra, 10 ALRB No. 26, provided that the UFW was the exclusive representative of all S & J employees. However, prior to the election, the parties had agreed that the unit would be composed only of S & J employees in Madera County. The Notice and Direction of Election contains the same limitation. S & J has operations and employs workers in three areas which are not contiguous with its Madera operations: Fresno/Tulare, Kings, and Kern Counties. The workers in these areas did not receive notice of the election, were not named on the eligibility list, and did not vote or participate in the election.

Also on June 9, the Union requested that negotiations begin. In response, S & J formally notified the Union on June 27

[4/]The parties at the objections hearing stipulated that all of the issues set would turn on the question of whether the supplier of the harvest workers, RDM, could be considered a custom harvester or a labor contractor and concomitantly, whether RDM or S & J, as one who engaged a labor contractor, was the statutory employer of the harvest workers. These objections included allegations of improper inclusion of RDM employees in the unit, commingling of the ballots of S & J and RDM employees, conducting a 48-hour election when S & J employees were not on strike and conducting an election when S & J was not at 50 percent of peak.

of its pending request for reconsideration.[5/] On July 18, the Executive Secretary denied the Employer's request for reconsideration and suggested that " . . . any issues left unresolved regarding the appropriate unit may be raised pursuant to a petition for unit clarification."

On July 30, the UFW again requested bargaining. The following day Respondent informed the UFW that it was refusing to bargain in order to test the validity of the certification and asked the UFW for its cooperation in expediting anticipated unfair labor practice proceedings. On August 20, Respondent again asked the UFW's cooperation in this latter regard. In the week following, on August 28, the UFW filed charge number 84-CE-168-D, alleging that S & J was refusing to bargain. The Board's field examiner requested a statement of position from Respondent's attorneys on September 24. They replied two days later, stating that an expedited hearing was desirable should a complaint issue, and that the Employer was planning to file a unit clarification petition which, it suggested, should be consolidated with the ULP case. The Petition for Unit Clarification (case no. 84-UC-2-D) was filed on October 2.

In the months that followed, Respondent's representatives wrote to ALRB investigators, repeatedly expressing their desire to expedite the unfair labor practice investigation. On May 1, 1985, in case no. 84-UC-l-F,[6/] the Certification of

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[5/] A proof of service reflects that the request for reconsideration had been served on the UFW on June 9.

[6/] Case no. 84-UC-l-F and 84-UC-2-D were stipulated to be the same case.

Representative was amended to limit the bargaining unit to "all agricultural employees employed by the Employer in Madera County" as originally stipulated.

The complaint in the instant matter issued on April 19, 1985. On November 12, 1985, the parties agreed to a stipulated set of facts. After the submission of briefs, the matter was transferred to the Board on December 23.

Respondent has refused to meet and bargain with the certified bargaining representative in order to obtain judicial review of its elections objections. Respondent has thereby engaged in a per se violation of Labor Code sections 1153(e) and 1153(a). (Lab. Code § 1155.2; see also McFarland Rose Production, Co., et al. (1980) 6 ALRB No. 18; Masaji Eto Ranch, et al. (1980) 6 ALRB No. 20; Joe G. Fanucchi & Sons, et al. (1986) 12 ALRB No. 8; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].)

Thus, the issue presented by this case is whether to apply the makewhole remedy for Respondent's "technical" refusal to bargain[7/] pursuant to standards set forth in J. R. Norton Co., Inc. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1 [~~160 Cal.Rptr.~~ 710].[8/] Makewhole relief is appropriate when

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[7/] General Counsel's complaint did not seek makewhole relief. However, it is clear that it is the Board's prerogative, if not obligation, to determine the appropriateness of this remedy even in the absence of a request by the General Counsel. (Harry Carian Sales v. ALRB (1985) 39 Cal.3d 209; D. Papagni Fruit Co. (1985) 11 ALRB No. 38.)

[8/] Absent facts such as those we found compelling in T. Ito & Sons Farms (1985) 11 ALRB No. 36, this Board, like the National Labor Relations Board (NLRB), does not relitigate representation case issues presented in subsequent unfair labor practice

[fn. cont. on p. 6]

an employer, in deciding to contest the validity of a certification, adopts a litigation posture which is either unreasonable or not pursued in good faith. (J. R. Norton Co. (1980) 6 ALRB No. 26.) As no evidence was presented on the second, or "good faith" aspect of the Norton test, the appropriateness of awarding makewhole turns on the reasonableness of the employer's litigation posture.

As a threshold matter, Respondent's position regarding the scope of the bargaining unit was reasonable. The parties agreed prior to the election that balloting would take place solely among those workers employed by Respondent in Madera County. The Notice and Direction of Election reflects this agreement, and only those employees in Madera County were afforded the opportunity to participate in the election. The names of employees from areas other than Madera County were not included on the eligibility list.

The report of the Regional Director, issued pursuant to the unit clarification petition, states that the remainder of Respondent's operations were geographically noncontiguous with the Madera site(s), had no functional integration with the operation in Madera, were under separate supervision, and had no interchange

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[fn. 8 cont.]

proceedings where there was neither newly discovered or previously unavailable evidence nor a claim of extraordinary circumstances. (See generally, D. Papagni Fruit Co., supra, 11 ALRB No. 38, and cases cited therein on p. 6; Muranaka Farms (1986) 12 ALRB No. 9.) No such evidence or circumstances exist here. Thus, notwithstanding the conclusions reached below concerning the "reasonableness" of Respondent's litigation posture in challenging the certification previously issued by the Board, that certification will remain in force and effect.

of employees or equipment with the Madera operation. Finally, the Union did not oppose the limitation placed on the unit description sought by Respondent. Nonetheless, the Board Decision in S & J Ranch, Inc., supra, 10 ALRB No. 26 certified a unit which encompassed all of Respondent's employees.

The issue of the proper unit designation was raised by Respondent at its earliest possible opportunity in the request for reconsideration filed after S & J Ranch, supra, 10 ALRB No. 26 issued. In denying the request, the Executive Secretary suggested that a unit clarification proceeding might be the appropriate avenue for contesting the unit description.

As indicated by the chronology and correspondence following the issuance of S & J Ranch, supra, 10 ALRB No. 26, the issue of the scope of the bargaining unit was inextricably woven into the fabric of Respondent's overall "technical" refusal to bargain. Its initial request for reconsideration of the Decision raises the issue, and Respondent attempted to consolidate the unit clarification petition with the unfair labor practice proceedings herein. Further, Respondent's letter of March 18, 1985, to ALRB agents investigating the refusal to bargain charge, specifically states: " . . . one of the reasons S & J Ranch has been refusing to bargain in good faith is because of the unit clarification issue."

The NLRB rule is that resort to the unit clarification process does'hot absolve an employer of its duty to bargain when the issue is solely the placement in the unit of certain employees, and the basic appropriateness of the unit is not in

question.[9/] (May Department Stores (1970) 186 NLRB 86 [75 LRRM 1308], at fn. 5.) Here, the issue is closer to a question of the basic appropriateness of the unit since the Board certified a unit whose scope differed from the unit that was stipulated to by the parties and found appropriate by the Regional Director.

The unit certified by the Board consisted of all of S & J's employees, as required by section 1156.2 in the absence of a finding of two or more noncontiguous geographical areas.[10/] According to the Regional Director:

> The Kings County, Fresno-Tulare and Kern County Operations are, respectively 85, 65 and 140 miles from the Petitioner's Madera County operation. There are approximately 77 agricultural employees employed at these three (3) locations, with separate and distinct supervision. There is no evidence that these employees, either on a temporary or permanent basis, transfer to or interact with the employees at the Madera County operation.[11/]

[9/] ALRB precedent is in accord. In Paul W. Bertuccio dba Bertuccio Farms (1984) 10 ALRB No. 16, the ALJ, whose decision was affirmed by the Board, noted that the filing of a petition for unit clarification does not suspend the duty to bargain over the employees in question.

[10/] The Agricultural Labor Relations Act (Act) provides that the appropriate bargaining unit consists of all agricultural employees of an employer unless the employees work in two or more noncontiguous geographical areas, in which case the Board shall determine the appropriate unit or units (section 1156.2.)

[11/] See, Regional Director's Report [regarding Respondent's petition for unit clarification], at p. 8, which is made a part of the record in the instant case pursuant to the parties' stipulations.

While we hold that the Board's certification of a statewide unit did not suspend S & J's duty to bargain (in light of the fact that the Board affirmed the validity of the election), Respondent was understandably confused as to whether its obligation was to bargain on the basis of a statutory unit
certified by the Board or on the basis of the unit noticed for 127 election by the Regional Director.[12/]

Respondent never accepted the inclusion in the unit of workers employed in other than its Madera County operations. Evidence of its reasonableness In asserting this contention is clear from its agreement with the Union regarding the scope of the unit, an agreement which was not recognized in the Board's initial Decision. Further indications of the reasonableness of Respondent's stance are the acceptance by the Regional Director of Respondent's position in his unit clarification report and the ultimate affirmance by the Board of the Regional Director's conclusions.[13/] As Respondent maintained a litigation posture

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[12/]Al though Respondent here is not absolved of its duty to bargain, it is important to note that Respondent's posture differed significantly from that adopted by the employer in Bertuccio, supra, 10 ALRB No. 16. The employer there, in seeking to exclude certain labor contractor employees from the bargaining unit, maintained a position inconsistent with its initial acceptance of the inclusion of these employees and adopted a stance which was legally meritless and specifically found to have been interposed in bad faith as a means of avoiding its obligation to bargain.

[13/]Compare Houston Chronicle Publishing (1961) 130 NLRB 1243 [47 LRRM 1477] enforcement denied on other grounds (5th Cir. 1962) 300 P.2d 273 [49 LRRM 2782] where the NLRB found respondent could not reasonably contend that the unit certified by the Board was at variance with the unit stipulated to by the parties.

which was reasonable,[14/] at least until the unit clarification issue was resolved, no makewhole award should be imposed for the period up to and including the amendment of the certification on May 1, 1985.[15/]

We now turn to the question of whether Respondent's litigation posture with regard to other election objections was reasonable and therefore precludes a makewhole award for the period subsequent to the amendment of the certification. It has been our policy not to award makewhole in situations involving

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[14/] In arguing that it was not reasonable for the employer to refuse to bargain pending determination of the scope of its bargaining obligation, the dissent refuses to concede the reasonableness of the employer's litigation posture at the same time that it admits the employer was right. (See p. 30 where the dissent concedes S & J's objections were meritorious.) It must not be forgotten that the unit erroneously certified by the Board encompassed employees who never had the opportunity to vote.

[15/]As further evidence of the interrelationship between Respondent's refusal to bargain and its petition for unit clarification, Respondent's reply to the Union's initial request for negotiations cited the Company's then recently filed Request for Reconsideration. Respondent raised the unit description issue as an integral part of its Request.

In denying the Request for Reconsideration, the Executive Secretary, as previously noted, suggested that Respondent file a petition for unit clarification in order to obtain possible relief from the allegedly incorrect unit designation. Thus, by pursuing the suggestion of the Executive Secretary, Respondent was in effect foreclosed from raising the unit issue in the subsequent unfair labor practice proceedings. That this approach was of concern to Respondent is reflected by language in its petition for unit clarification that, "[B]y this petition..., S & J reserves all of its objections to the election.... [W]ithout waiving its objections S & J has submitted their Petition for Unit Clarification in order to expedite the processing of the technical refusal to bargain charge...."

It would be anomalous and indeed grossly unfair to impose makewhole liability during the period when Respondent, in good faith, was pursuing an avenue of review proposed by the Board itself, through the Executive Secretary.

"novel" legal theories or issues in close cases that raise important issues concerning whether an election was conducted in a way that protected the employees' right of free choice. (See, e.g., J. R. Norton v. Agricultural Labor Relations Bd., supra, 26 Cal.3d 1; Adamek and Dessert, Inc. (1985) 11 ALRB No. 8, affd. (1986) 78 Cal.App.3d 970.)

Respondent's refusal to bargain is grounded in election objections which fall into two broad categories: (1) the identity of the statutory employer and (2) the conduct of the election.

The Board acknowledged that the statutory employer issue was a close case. The Board determined that RDM, the supplier of harvesting employees, was not a "mere" labor contractor. Rather, the Board characterized RDM as a "labor contractor plus."[16/] The Board found it necessary to resort to a weighing of policy considerations in accordance with Rivcom Corp. v. Agricultural Labor Relations Bd., supra, 34 Cal.3d 743, to determine whether S •& J or RDM had the "substantial long-term interest in the ongoing agricultural operation."

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[16/] Section 1140.4(c) excludes farm labor contractors from the statutory definition of "agricultural employer," and deems the employer who engages a labor contractor the employer of the employees whom the contractor supplies. The Board early developed the "custom harvester" concept to describe an enterprise which not only supplied labor, "but something more as well." (Kotchevar Brothers (1976) 2 ALRB No. 45. Custom harvesters, as contrasted with "mere" labor contractors, are considered the agricultural employer of their employees. (See generally, Tony Lomanto (1982) 8 ALRB No. 44; Rivcom Corp. v. Agricultural Labor Relations Bd. (1983) 34 Cal.3d 743. In S & J Ranch, Inc., supra, 10 ALRB No. 26, the Board specifically noted that while not disagreeing with the IHE's ultimate conclusion on the issue, it questioned his finding that RDM was a "mere" labor contractor.

Since this issue created a close case, we find it was not unreasonable for Respondent to contest the UFW's certification. The fact that Respondent did not prevail on the issue is not determinative of whether its position was reasonable. (Norton, supra.)

Finally, even though the Executive Secretary dismissed various election objections regarding the conduct of the election, we find that Respondent's challenge thereto, which formed part of the basis for its refusal to bargain, was not unreasonable. Although the Board approved the dismissal of the objections, the California Supreme Court cautioned in Norton, supra, that the fact that the Board finds that Respondent has not established a prima facie case (and that reviewing courts subsequently affirm the Board's conclusions) does not necessarily justify the imposition of makewhole.

Respondent's challenge to the conduct of the election concerns extensive electioneering which occurred in the quarantine area[17/] near the polls. Declarations filed by Respondent aver

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[17/]The quarantine area, one mile square, was so large as to be virtually unmanageable. However, much of the conduct complained of occurred in close proximity to the voting booth.

The cases cited by our colleague in his concurrence/dissent regarding electioneering conduct (see p. 22) are factually distinguishable from the instant case. They involve conduct of shorter duration, less pervasiveness or greater remoteness from the polls than that which occurred here. The totality of the conduct here arguably created a disruptive atmosphere where voters were not left free from interference in the final moments before voting and were thus deprived of the opportunity to carefully reflect on the choices faced in the election immediately before casting their ballots.

that large groups of voters carried UFW flags into the quarantine area; voters wearing UFW emblems were walking through the voting area as close as 10 or 1.2 feet from the voting booth; authorization cards, ostensibly to be used as identification, were distributed to persons waiting in line to vote; and employees had to wait in line to vote for as long as several hours, thus prolonging their exposure to the improper electioneering. This Board has declined to apply the "laboratory
conditions" standard under which NLRB representation elections are scrutinized for objectionable conduct[18/] because it determined that conditions peculiar to agriculture make adherence to this doctrine unrealistic and that "some deviation from the ideal does occur in representation cases." (D'Arriqo Bros, of California (1977) 3 ALRB No. 37.) Instead, the ALRB has utilized the rule set forth in NLRB v. Aaron Bros. Corp. (hereafter Aaron Bros.) (9th Cir. 1977) 563 F.2d 409 [96 LRRM 3261]: ". . . where it is alleged that the acts or conduct of the voting unit employees, or other third parties, before or during the election, warrant setting aside the election," it must be determined whether these acts, or the failure of Board agents to control them, "created a situation so coercive or disruptive, or so aggravated, that a free expression of employee choice with respect to representation was impossible." (Pleasant Valley Vegetable Co-op. (1982) 8 ALRB

[18/](See General Shoe Corp. (1948) 77 NLRB 124 [21 LRRM 1337].)

No. 82 at p. 12.)[19/]

Although the Pleasant Valley case opted for the standard articulated in Aaron Bros, supra, 563 F.2d 409, rather than that stated in Boston Insulated Wire and Cable System v. NLRB (hereafter Boston Insulated Wire) (1982) 259 NLRB 1118 [109 LRRM 10811, affd. Boston Insulated Wire and Cable System v. NLRB (5th Cir. 1983) 703 F.2d 876 [113 LRRM 2243],[20/] the factors examined in Boston Insulated Wire, supra, in determining whether to set an election aside as a result of poll site electioneering are relevant to either standard. Those factors are:

> ... whether the conduct occurred within or near the polling place, ...the extent and nature of the alleged electioneering, ...whether it is conducted by a party . . . or by employees, ...and whether the electioneering is conducted within a designated 'no electioneering area[1] or contrary to the instructions of the Board agent.

In the instant case, the alleged electioneering occurred in close proximity to the polls, over an extended period of time and involved very visible acts in support of the UFW. While we adhere to our position that the conduct was not sufficient to warrant setting aside the election, we find that it was

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[19/]Also, like the national board, the ALRB considers misconduct by a party more destructive of an appropriate election atmosphere than conduct by a nonparty. (Takara International, Inc. (1977) 3 ALRB No. 24; see also NLRB v. Georgetown Dress Corp. (4th Cir. 1976) 537 F.2d 1239 [92 LRRM 3282]; NLRB v. Monroe Auto Equipment Co. (5th Cir. 1972) 470 F.2d 1329 [81 LRRM 2929].) In the instant case, individuals involved in the poll-site electioneering were not shown to be agents of the Union under the "apparent authority" doctrine enunciated in San Diego Nursery Co., Inc. (1979) 5 ALRB No. 43. Their conduct in reference to the election is therefore evaluated under the more lenient standard.

[20/](See Pleasant Valley Vegetable Co-op., supra, 8 ALRB No. 82, dis. opn. of Member McCarthy.)

not unreasonable for Respondent to refuse to bargain to test the Union's certification since under either Aaron Bros., supra, 563 F.2d 409 or Boston Insulated Wire, supra, 259 NLRB 1118 Respondent had arguable grounds for its litigation position.[21/]

We find that a "close case" resting on legal theories which have reasonable support in precedent is presented by both the statutory employer issue that was set for hearing and the electioneering objections that were dismissed by the Executive Secretary.[22/] We therefore conclude that makewhole relief is not appropriate in this case.[23/]

[21/]See also NLRB v. Carroll Contracting & Ready Mix (5th Cir. 1981) 636 F.2d 111 [106 LRRM 2491] where the NLRB set aside an election on the ground that two former employees wore "vote Teamsters" signs on their hats and had cards pinned on their shirts with an "X" marked in a "Yes" box and stationed themselves where employees lined up to vote.

[22/]The dissent misconstrues the majority's position regarding the election objections. The majority has not relitigated the objections. We have affirmed the certification and find only that S & J was not unreasonable in litigating to test the Board's previous decision.

[23/]The dissent incorrectly indicates that the majority is excusing Respondent's refusal to bargain. To the contrary, the majority has found that S & J had a duty to bargain and that it failed to meet that duty. We have determined only that the refusal to bargain was not based on unreasonable grounds and that makewhole is therefore not warranted.

The appropriateness of awarding makewhole is to be determined on a case-by-case basis. Our conclusion here in no way signals that we will "decline to award makewhole in virtually every technical refusal to bargain case" as charged by our fellow Board member in his concurrence/dissent. To the contrary, the Board majority has already awarded makewhole in a technical refusal to bargain case earlier this year. (See Joe G. Fanucchi & Sons/Tri-Fanucchi Farms (1986) 12 ALRB No. 8.)

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent S & J Ranch, 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 section 1155.2(a) of the Agricultural Labor Relations Act (Act), with the United Farm Workers of America, AFL-CIO (UFW) as the certified exclusive bargaining representative of its agricultural employees,

(b) 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 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 its 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) 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.

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(c) 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.

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

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order, to all of the agricultural employees employed by Respondent at any time from July 31, 1984, until the date of this Order, and thereafter until Respondent recognizes the UFW and enters into good faith negotiations with the UFW upon the Union's timely acceptance of Respondent's offer to bargain.

(f) Arrange for a representative of Respondent 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 Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and question-and-answer period.

(g) Notify the Regional Director, in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has 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 S J Ranch, Inc. is hereby extended for one year from the date of issuance of this Order.

Dated: December 30, 1986

JYRL JAMES-MASSENGALE, Chairperson [23/]

JOHN P. McCARTHY, Member

GREGORY L. GONOT, Member

[23/] 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.

MEMBER CARRILLO, Concurring and Dissenting:

I agree with the majority's determination that S & J Ranch, Inc. violated sections 1153(e) and (a) of the Agricultural Labor Relations Act (Act or ALRA) by refusing to bargain with the United Farm Workers of America, AFL-CIO (UFW or Union). However, I disagree with the majority's decision that S & J's workers should not be made whole for the economic losses they sustained as a result of Respondent's unlawful refusal to bargain. For the reasons set out below, I would award makewhole for the period from May 1, 1985 -- the date on which the Agricultural Labor Relations Board (Board) amended the certification -- until such time as S & J begins to bargain in good faith and thereafter bargains to contract or impasse.

Like my dissenting colleague, I disagree with the majority's conclusion that Respondent's objections to the scope of the bargaining unit in the Board's Certification of Representative were "inextricably woven into the fabric of Respondent's overall

`technical' refusal to bargain." (S & J Ranch, Inc. at p. 7 .) There was no real dispute between Respondent and the Union as to the scope of the bargaining unit; indeed/ the Union stipulated to a unit composed of the Madera County employees of S & J at the preelection conference and never opposed either S & J's request for reconsideration or its unit clarification petition. Respondent's challenge to the election did not, then, turn on its question as to the scope of the bargaining unit in the certification, which was in any event resolved in response to S & J's unit clarification petition. Moreover, S & J refused to bargain even after the Board amended the certification.

I am, however, reluctant to award makewhole prior to the Board's amendment of the certification. The certification issued in S & J Ranch, Inc. (1984) 10 ALRB No. 26 covered "all agricultural employees of S & J Ranch in the State of California." Pursuant to that certification, S & J was required to bargain over the terms and conditions of employment as to all of the Company's employees, rather than just its Madera County work force, despite the fact that the election had been directed only in the smaller unit pursuant to the stipulation of the parties. In light of the discrepancy between the Regional Director's notice and direction of election and the ultimate certification issued by the Board, it is difficult to characterize Respondent's challenge to the scope of the Board's certification as unreasonable. That Respondent had legitimate questions as to the scope of the certification is shown by the Board's subsequent amendment of the certification. Thus, even though I do not believe that S & J would have bargained with

the UFW even in the absence of a question as to the scope of the certification, I would decline to award makewhole for the period June l, 1984 through May 1, 1985.

An award of makewhole for S & J's refusal to bargain after the Board's amendment of the certification is clearly indicated. The Company's litigation posture was simply not reasonable, and the majority's contrary conclusion runs counter to established Board precedent.

To the extent that my dissenting colleague suggests that it is per se unreasonable for a litigant to continue to press election objections which the Executive Secretary and the Board have summarily dismissed, I disagree. However, in this instance Respondent has consistently failed to present even a colorable argument that the Executive Secretary erred in summarily dismissing the bulk of Respondent's objections to the conduct of the election. The majority fails to explain how, in the circumstances herein, Respondent's continued litigation of objections which did not even state a prima facie case of misconduct tending to affect the outcome of the election can be termed reasonable.

Although the majority points to three objections as evidence of the reasonableness of S & J's litigation posture, those three dismissed objections do not even involve conduct which would have tended to affect the outcome of the election. Thus, even assuming that large groups of voters did carry flags into the one mile square quarantine area or that voters wore UFW emblems while in the voting area, such conduct would not constitute

grounds for setting aside the election. (See e.g., George A. Lucas S Sons (1982) 8 ALRB No. 61, ALJD, p. 91; Chula Vista Farms, Inc. (1975) 1 ALRB No. 23, p. 40; Veg-Pak, Inc. (1976) 2 ALRB No. 50, p. 7; Lancer Corp. (1984) 271 NLRB 1426, fn. 3, ALJD, p. 1446 [117 LRRM 1220].)[1/] Nor do allegations that authorization cards were distributed to voters waiting in line to cast their ballots, absent some showing of fraud, constitute grounds for setting aside the election. Lastly, the allegation that employees may have had to wait in line for as long as several hours, in the'absence of a showing that such a wait disenfranchised an outcome-determinative number of potential voters, also fails to state grounds for setting aside the election. Indeed, in this case, Respondent's declarations only indicate that 17, out of a possible 554 eligible voters, failed to vote due to the long wait at the voting site.

Respondent's continued litigation of the foregoing dismissed objections is unreasonable. S & J's deficient declarations either (1) do not present a "close" case of election

[1/]Although the majority finds these cases distinguishable, it cannot be disputed that both the NLRB and ALRB have found that wearing union insignia while waiting in line to vote does not constitute grounds for setting aside an election. Using a similar analysis, carrying a UFW flag into the polling area cannot be said to constitute grounds for setting aside an election. And, the mere fact that a large number of prospective voters wore union buttons or carried UFW flags cannot serve as a basis for overturning the election absent a showing that such displays of partisanship tended to affect the outcome of the election. None of Respondent's declarations indicate that the display of buttons or flags was coercive or tended to affect the outcome of the election. Under such circumstances, it cannot be said that it was reasonable for S & J to continue to litigate its electioneering objections.

misconduct or (2) fail to allege conduct tending to affect the outcome of the election. Nor do the objections raise novel legal issues. The majority's finding of a reasonable litigation posture based on the dismissed electioneering objections is directly contrary to well-established Board precedent. (E.g. D. Papagni Fruit Co. (1985) 11 ALRB No. 38; George A. Lucas & Sons (1984) 10 ALRB No. 14; Robert J. Lindeleaf (1983) 9 ALRB No. 35; and Ron Nunn Farms (1980) 6 ALRB No. 41.) The logical extension of the majority's analysis of the dismissed objections in this case would result in a decision to decline to award makewhole in virtually every technical refusal to bargain case. Surely this was not what the Supreme Court intended in J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1 [160 Cal.Rptr. 710].

I agree with my dissenting colleague in his analysis of Respondent's litigation posture with respect to the employer identity issue. For the reasons expressed both in his dissent and in the majority opinion in San Justo Ranch/Wyrick Farms (1983) 9 ALRB No. 55,[2/] I would find that S & J's continued litigation of

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[2/]The Board's decision in San Justo Ranch/Wyrick Farms, supra, was upheld in part and reversed in part in the unpublished decision in San Justo Ranch/Wyrick Farms v. Agricultural Labor Relations Bd., October 30, 1986, Case No. A024698; a petition for review in the Supreme Court is currently pending.

To the extent that the majority's analysis in San Justo Ranch/Wyrick Farms, supra, 9 ALRB No. 55, engendered some confusion with its analogy to the standard for judicial review of National Labor Relations Board (NLRB) unit determinations, it is important to note that the majority did not rely on National Labor Relations Act (NLRA) precedent in analyzing the employer's litigation posture. Rather, in assessing the reasonableness of the employer's continued litigation of the employer identity issue

[fn. cont. on p. 6]

the employer identity issue both failed to present a close case as to the validity of the election as an expression of employee free choice and served no policy under the ALRA.

Dated: December 30, 1986

JORGE CARRILLO, Member

[fn. 2 cont.]

after the expert agency had ruled on the question, the Board found that its determination of such matters would be entitled to considerable deference from the California courts, just as the federal courts defer to NLRB unit determinations. Inasmuch as NLRB unit determinations and ALRB resolutions of employer identity issues both involve a flexible, case-by-case approach which focuses on practical realities in resolving sometimes difficult or complicated policy issues, the majority's analogy was both accurate and useful. It was, however, only an analogy to NLRA precedent. The majority applied the Supreme Court's Norton test in awarding makewhole in that case, just as both I and my dissenting colleague do in determining makewhole to be appropriate in this case.

MEMBER HENNING, Dissenting:

Over four years ago, we conducted an election among the agricultural employees of S & J Ranch (S & J). Those farm workers overwhelmingly selected the United Farm Workers of America, AFL-CIO (UFW) as their bargaining representative, authorizing the UFW to bargain on their behalf with their employer regarding the wages, hours and terms and conditions of their employment at S & J. S & J chose to avoid bargaining with the certified representative and instead sought review of our decision certifying this election.

By repudiating the powerful remedial tools available under the Agricultural Labor Relations Act (ALRA), my colleagues have decided today that S & J's unlawful refusal to bargain should not be subjected to any significant risk and that no realistic compensation be assessed. To understand the fallacy of my colleagues' position, some discussion of the legislative history of the National Labor Relations Act (NLRA) and the ALRA is

required.

In both the NLRA and the ALRA, representation (or election) decisions are not final administrative orders, and are not, therefore, subject to immediate appellate review. To obtain appellate review, the parties to our election proceedings must await the issuance of an order predicated upon the election, such as an order to bargain collectively with elected representatives. (See §§ 1158, 1160.8 of the ALRA,[1/] § 9(d), 10(b) of the NLRA, 29 U.S.C. §§ 159(d), 160(b).) This convoluted procedure was designed to avoid delay in the designation of a bargaining agent. The drafters intended that the election decision, a preliminary determination of whether a bargaining representative has majority support in the designated bargaining unit, should not be delayed by long appeals, at least until the bargaining obligation had been imposed. This determination of congressional intent was explained in American Federation of Labor (AFL) v. N.L.R.B. (1940) 308 U.S. 401 (60 S.Ct. 300).

> Section 9(d) [29 U.S.C. § 159(d)] of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10(c) [29 U.S.C. § 160(c)] is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c) [29 U.S.C. § 159(c)]. The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10(e) or (f) [29 U.S.C. § 160(e), (f)] the

[1/] All code sections are to the California Labor Code unless otherwise stated.

> Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10(b) and 10(c) [29 U.S.C. § 160(b), (c)]." House Rep., No. 1147, Committee on Labor, 74th Gong., 1st Sess., p. 23.

Id. 308 U.S. at 410, n. 3 (60 S.Ct. at 304-305, n. 3).

When the ALRA was enacted, the California Legislature also desired to avoid lengthy preelection proceedings. To accomplish this aim, the authors of the ALRA duplicated the convoluted appeal process and revised the election challenge provision.[2/]

However, the procedure devised has been singularly inadequate in avoiding significant periods of delay from the date of the determination that an election is appropriate to the start of actual bargaining, the ultimate goal of the ALRA and NLRA. Employers[3/] routinely challenge election results under the ALRA and the national act, thereby delaying the legal obligation to bargain collectively for years while the administrative and appellate review processes wend their way to completion. Recognizing the debilitating effect of long delay between the assertion of organizing strength by a certified representative and actual good faith bargaining between that representative and the employer, the California Legislature granted this Board a significantly broader remedial authority than possessed by the national board. In J.R. Norton (1978) 4 ALRB No. 39, we decided

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[2/] See sections 1158 and 1160 of the ALRA.

[3/] Union, rival union, and decertification petitioners have no readily available statutory method to obtain appellate review of adverse agency determinations in representation proceedings.

to utilize this broad remedial authority, and directed that a "technical" refusal to bargain warranted the award of an order directing the employer to make whole its employees for any losses of pay and economic benefits incurred by the employer's refusal to bargain with the certified union. We reasoned that since the employer was causing the delay by its refusal to accede to our previous representation decision, it should bear the costs of the delay.

The California Supreme Court reversed and remanded the decision, finding that a blanket rule awarding the significant bargaining make whole remedy against all employers seeking review of election determinations was an abuse of our remedial discretion. Specifically, the Court held:

> On remand, 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. 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 hind-sight 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.

> In short, a per se remedy is impermissible in this setting. Not only are there degrees of violations (citation omitted) but, more fundamentally, other factors peculiar to labor relations may outweigh the appropriateness of make-whole relieve in particular cases. (Citation omitted.) The Board's remedial powers do not exist simply to reallocate monetary loss to whomever it considers to be most deserving; they exist as appears from the statute itself, to effectuate the policies of the Act.
>
> J.R. Norton v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, 39-40.

On remand, the Board determined that the makewhole remedy was still appropriate, even under the case-by-case analysis imposed by the Supreme Court. (J.R. Norton (1980) 6 ALRB No. 26.)

My colleagues, purporting to apply the above standard, perceive three bases for denying the use of our powerful remedial tools in the present matter. While they spend a great deal of time on the "question" of the appropriate unit, that basis for their determination is easily rejected, and is in fact rejected by their own decision. (See S & J Ranch, Inc. (1986) 12 ALRB No. 32, at p. 8, n. 9.) Respondent's obligation to bargain extends to an appropriate unit. (Labor Code §§ 1153(e), 1156, and 1156.2; see also Sumner Peck Ranch, Inc. (1984) 10 ALRB No. 24; Exeter Packers, Inc. (1983) 9 ALRB No. 76.) In Paul W. Bertuccio dba Bertuccio Farms (1984) 10 ALRB No. 16, the ALJ, whose decision was affirmed by the Board, we noted that the filing of a petition for unit clarification does not suspend the duty to bargain over the employees in question.[4/]

[4/] The majority suggests that May Department Stores Company (1970) 186 NLRB 86 [75 LRRM 1308] supports the proposition that when the basic appropriateness of the unit is at issue, the duty to bargain may well be suspended. (S & J Ranch, Inc., supra, at

[fn. cont. on p. 31]

As we stated in Exeter Packers, Inc. (1983) 9 ALRB No. 76, the ALRA is drafted to limit our authority to designate bargaining units smaller than all the agricultural employees in the state. (See also, Harry Tutunjian & Sons (1986) 12 ALRB No. 22, Prohoroff Poultry Farms (1983) 9 ALRB No. 68; Baker Brothers (1985) 11 ALRB No. 23; Cream of the Crop (1984) 10 ALRB No.43.) Here, the UFW petitioned for the broad, statutory unit and for reasons never made part of the representation record, the apparent unit in which the election was conducted was somewhat smaller. Absent demonstration by the party objecting to the statutory unit of factors raising questions concerning the scope of the bargaining unit, we lack discretion to designate other than a broad, comprehensive unit. (Exeter Packers, supra.) Hence, our certification in this matter and the rejection of S & J's motion for reconsideration.

Regardless of this procedural history, however, S & J still had an obligation to bargain over some bargaining unit. No matter how meritorious its objections to the unit may have been, they do not justify a refusal to bargain. (Paul W. Bertuccio, supra.) No argument can credibly be made that the issue of the scope of the bargaining here had any impact upon the conduct of

[fn. 4 cont.]

pp. 8-9.) In May Department Stores, the NLRB found an employer's refusal to bargain based solely upon the scope of the appropriate unit to be an unfair labor practice, and did not merit reconsideration after being settled in the election proceeding. The NLRB granted the general counsel's motion for summary judgment on the employer's previously resolved unit questions and substantially extended the initial period of certification. (May Deparment Stores, supra, 186 NLRB at 88.) As such, the facts of this case are at best marginal support for the principle asserted by the majority.

this election. My colleagues' finding that S & J's unit questions are interrelated with its election objection must accordingly be rejected. (See S & J Ranches, supra, at p. 10, n. 15.)

The majority finds that S & J's election objections concerning electioneering also warrant repudiation of our remedial ability to restore the injured employees to their pre-refusal to bargain strength. It is important to note the posture of these election objections. The UFW won this election by a margin of nearly 4 to 1. The burden imposed upon S & J to set aside such an electoral mandate is a heavy one. (Bright's Nursery (1984) 10 ALRB No. 18; J.R. Norton v. ALRB, supra, pp. 12-19.) S & J's election objections, discussed by the majority here, were all dismissed by the Executive Secretary for failure to present evidence which, if true, would result in sufficient grounds to refuse to certify this election.

Therefore, S & J's justification for its unlawful refusal to bargain is that we abused our discretion by affirming the Executive Secretary's dismissal of election objections. (J.R. Norton v. ALRB, supra, 26 Cal.Sd at 9.) We developed the rules regarding dismissal of election objections to avoid the wasting of limited agency resources by holding meaningless hearings on allegations, which, even if established, would not be legally sufficient to set aside an election. (See, e.g. Dyestuffs Chemical, Inc. v. Fleming (8th Cir. 1959) 271 F.2d 281, 286.) A requirement that a hearing be held only if based upon substantial and material facts is "not only proper but necessary to prevent dilatory tactics by employers or unions disappointed in election

returns . . . ." (NLRB v. Air Control Products of St. Petersburg, Inc. (5th Cir. 1964) 335 F.2d 245, 249.) We determined no such hearing was warranted here and, normally, do not relitigate our election determinations in unfair labor practice decisions. Since S & J cannot be said to have raised meritorious objections to the election (the majority does not argue that our prior dismissal of those objections was an "arbitrary administrative action"), makewhole should be applied to fulfill the competing compensatory aims of restoring employees to bargaining health and discouraging frivolous election challenges pursued as a dilatory tactic. (J.R. Norton v. ALRB, supra, 26 Cal.3d at p. 29.)

My colleagues have determined that the election objections were meritorious, or at least nearly meritorious, because S & J could make a "reasonable" (but not persuasive) argument that another standard of evaluating poll site electioneering should have been applied. They state:

> In the instant case, the alleged electioneering occurred in close proximity to the polls, occurred over an extended period of time and involved very visible acts in support of the UFW. While we adhere to our position that the conduct was not sufficient to warrant setting aside the election, we find that it was not unreasonable for Respondent to refuse to bargain to test the union's certification since under either Aaron Brothers, [v. NLRB (9th Cir. 1977) 563 P.2d 409] or Boston Insulated Wire, [(1982) 259 NLRB 1118, affd. (5th Cir. 1983) 703 F.2d 876] Respondent had arguable grounds for its litigation position.
>
> S & J, supra at pp. 14-15. (footnote omitted).

No public interest in judicial review can be found in permitting such dilatory tactics by the employer in continuing to assert objections to the election which my colleagues have agreed

are meritless. Makewhole should not be denied on this basis.

Turning to the final rationale proffered by the majority for their failure to award effective remedial relief, they state that the admittedly close question of the identity of the statutory employer supports their conclusion. Even if the litigation posture of S & J consisted solely of its disagreement with our extensive treatment of the statutory employer issue and was not encumbered with the above dilatory arguments, such a disagreement should not permit S & J to freely avoid its bargaining obligations. (See, e.g., Comment, Employee Reimbursement for an Employer's Refusal to Bargain: The Ex-Cell-0 Doctrine (1968) 46 Tex.L.Rev. 758, 770.)

The determination of the statutory employer, a mixed question of fact and policy, goes to the 'heart of election responsibilities of this Board. (See Boire v. Greyhound Corp. (1964) 376 U.S. 473, 481-82 [84 S.Ct. 894].) While legal questions may arise, they generally arise peripherally, and the issue comes framed as one of weighing policy concerns and factual findings to determine who has the significant long term interest in the ongoing agricultural enterprise. (See, e.g., Sahara Packing (1985) 11 ALRB No. 24.) Our determinations in this area are accorded considerable deference by Courts. (Phelps Dodge Corp. v. Labor Board (1941) 313 U.S. 177, 194 [61 S.Ct. 845]; J.R. Norton v. Agricultural Labor Relations Bd., supra, 26 Cal.3d 1, 38; Rivcom Corp. v. Agricultural Labor Relations Bd. (1983) 34 Cal.3d 743, 756-757.) The fact that we viewed the matter as a close factual and policy issue because of Rio Del

Mar's employer-like attributes means that S & J received a full and fair evidentiary hearing with the opportunity to raise all of its many arguments in favor of finding Rio Del Mar to be the statutory employer. However, we unanimously determined to the contrary, finding S & J to have the long term interest in the harvest and to be the appropriate employer. Only in the rare instance when, for example, new evidence is later presented (or in other similarly extraordinary circumstances) should we encourage further litigation over the exercise of our expertise in this area. (See, e.g., Sutti Farms (1983) 8 ALRB No. 63.) Here, however, S & J had a full hearing and we properly performed our statutory function. No purpose in further review of our decision would be served by encouraging appellate review of such questions, for all such factual questions are likely to present "close" or "reasonable" issues.

I accordingly dissent from the failure to award make whole relief in remedying S & J's unlawful refusal to bargain with the certified bargaining representative and lament the further delays we permit before collective bargaining can begin in this now ancient case.

DATED: December 30, 1986

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office by the United Farm workers of America, APL-CIO (UFW), the certified bargaining agent of our employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, S & J Ranch, Inc., had violated the law. Following a review of the evidence submitted by the parties, the Board has found that we failed and refused to bargain in good faith with the 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 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 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.

Dated: S & J RANCH, INC.

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 627 Main Street, Delano, California, 93215. The telephone number is (805) 725-5770.

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

S & J Ranch, Inc. (UFW)

12 ALRB No. 32
Case No. 84-CE-168-D

BOARD DECISION

This technical refusal to bargain case was submitted to the Board with a stipulated statement of facts. Respondent had refused to bargain on the following grounds: (1) the unit certified was improper; (2) S & J was not the statutory employer; and (3) improper electioneering occurred in close proximity to the polls.

The Board found that the unit certified was improper and no makewhole was owing up to the date the appropriate unit was certified. It also determined that the statutory employer and electioneering issues presented a close case and that, Respondent's litigation posture rested on legal theories which have reasonable support in precedent. Therefore, although Respondent failed in its duty to bargain in good faith, makewhole was not appropriate.

DISSENT/CONCURRENCE

Member Carrillo concurred with the majority opinion insofar as it found the makewhole remedy to be inappropriate for the period of time up to May 1, 1985, when S & J was contesting the scope of the bargaining unit in the election. However, he disagreed with the majority's failure to award makewhole after May 1, 1985. In his view, the majority's conclusion is contrary to Board precedent wherein the Board has found that it is unreasonable to refuse to bargain based upon objections which fail to state even a prima facie case for setting aside the election. Member Carrillo also finds that Respondent's litigation posture with respect to the employer identity issue is unreasonable for the reasons stated in Member Henning's dissent in this case and in the majority opinion in San Justo Ranch/Wyrick Farms (1983) 9 ALRB No. 55.

DISSENT

Member Henning dissented from the failure to award makewhole relief to remedy the unlawful "technical" refusal to bargain by S & J. He rejected each rationale proffered by the majority. He found the question concerning the scope of the unit had been properly and expeditiously dealt with through the appropriate Board unit clarification procedure. Unit clarification procedures would not suspend S & J's duty to bargain in any case, nor was any evidence given to support the majority's finding that the unit issues were related to S & J's election concerns. Member Henning rejected the arguments put forth in support of summarily dismissed election objections, finding nothing novel or close or warranting

judicial review in those arguments. Finally, Member Henning rejected review of the Board's policy and factual determination of the appropriate employer, an issue previously resolved by the Board and central to the election functions of the Board. He accordingly saw nothing close or novel in S & J's refusal to bargain meriting judicial review and would have utilized the remedial authority of the Board to fully compensate injured farm workers.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.