Arvin, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOE G. FANUCCHI & SONS/ TRI-FANUCCHI FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 84-CE-127-D 12 ALRB No. 8

DECISION AND ORDER

This matter has been submitted to the Agricultural Labor Relations Board (ALRB or Board) pursuant to section 20250 of the Board's regulations. (Cal. Admin. Code, tit. 8, § 20100, et seq.) Under that regulation, Charging Party, the United Farm Workers of America, AFL-CIO (UFW or Union), Respondent, Joe G. Fanucchi & Sons, and ALRB General Counsel, have filed a stipulation of facts and have waived an evidentiary hearing before an Administrative Law Judge.

The stipulated facts focus on the chronology and history of the certified Union's bargaining relationship with Respondent, and the filing and disposition of various unfair labor practice charges arising therefrom.

Pursuant to the provisions of Labor Code section 1146[1/] the Board has delegated its authority in this matter to a

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[1/] All section references are to the California Labor Code unless otherwise specified.

three-member panel.[2/]

The UFW was originally certified as the exclusive collective bargaining representative of Respondent's employees on October 21, 1977. On October 27, 1977, the Union requested that negotiations begin. On November 29, Respondent replied that it would refuse to bargain with the UFW, ostensibly as a means of obtaining judicial review of the election.[3/]

Ten months later, on September 4, 1978, the UFW filed unfair labor practice charge number 78-CE-50-D alleging that Respondent's failure to meet and bargain violated section 1153(a) and (e). On September 8, Respondent agreed to commence negotiations and the charge was dismissed. Some exchange of correspondence and bargaining took place thereafter, but their extent is unclear from the record.

From May 4, 1979, when Respondent's representative sent a letter asking for clarification from the Union regarding its designated negotiator, until July 1981, no communications between the parties took place and no negotiating sessions were scheduled. In July 1981, the Union asked the Company to resume bargaining.

[2/] 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.

[3/] Since a certification is not a "final order" of the Board under Labor Code section 1160.8, it is not subject to direct judicial review. Only by "technically" refusing to bargain may an employer obtain appellate court review of the certification, pursuant to the court's scrutiny of the basis for a Board finding that an unfair labor practice (a refusal to bargain with the certified representative) has been committed. (Nishikawa v. Mahoney (1977) 66 Cal.App.3d.781.)

On July 14, 1981, Respondent conducted a "poll" among its employees regarding their desire to be represented by the UFW.[4/] Based on that poll, Respondent concluded that a majority of its employees no longer desired UFW representation, and that it could not, in "good faith", continue to bargain with the Union. The Union was so informed on July 17.

The Union filed a charge on October 30, 1981, alleging that Respondent had refused to bargain in good faith in violation of section 1153(a) and (e). During the pendency of the investigation of this charge, on March 25, 1982, the Board issued its Decision in Nish Noroian Farms (1982) 8 ALRB No. 25. The holding in that case makes it plain that employee polls indicating a loss of union majority cannot be utilized as a justification for an employer to decline to negotiate, and that an employer can be relieved of its obligation to bargain with a certified representative only after a Board-conducted election results in the decertification of the incumbent union or the certification of a rival union.

Despite this clear pronouncement of the applicable rule of law, the Regional Director dismissed the charge on May 17, 1982. The Union did not seek review of this dismissal. (Cal. Admin Code, tit. 8, § 20219.)

On April 19, 1984, after a lapse of nearly two years, the UFW requested that collective bargaining resume. On May 2, 1984, Respondent declined the Union's request for negotiations, giving

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[4/] The mechanics of the poll are not described in the stipulation.

as its reason the 1981 employee poll, the dismissal of the 1981 unfair labor practice charge, and its previously stated belief that " . . . it would be an unfair labor practice to negotiate with the UFW." The Union filed the instant charge on June 25, 1984, and a complaint issued on July 10, 1985.

Respondent characterizes this situation as one of " . . . delay, mistake, and failure to act . . . ." Indeed, a review of the chronology indicates a series of unexplained lapses: nine months between Respondent's initial refusal to bargain and the UFWs filing a pertinent charge; nearly two years between communications by the parties, after preliminary negotiations had begun; a bad faith bargaining charge filed three months after Respondent's second refusal to meet; a six and one-half month interval between charge and erroneous disposition, from which there was no appeal taken; almost two years following with no action by the Union, then a letter request for bargaining; a charge filed within a reasonable period thereafter as a result of Respondent's third announced refusal to negotiate; and finally, a span of greater than one year between the filing of the charge and the issuance of the instant complaint, a complaint which essentially involves no factual dispute and well-established applicable legal standards.[5/] In sum, the matter concerning Respondent's obligation to bargain with the UFW has gone unresolved for nearly nine years.

Respondent asserts the equitable defense of laches based on inaction by the Union, and the dilatory processing of both the

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[5/] This is discussed in greater detail infra.

instant charge and the one that preceded it. Clearly, these delays have impeded final resolution of the issue of Respondent's duty to bargain with the UFW. Nevertheless, it is well-established that laches is unavailable as a defense in proceedings by the ALRB or the National Labor Relations Board (NLRB). The consequences of any administrative delays, however inordinate, should not be borne by employees seeking the vindication of statutory rights. (M. B. Zaninovich, Inc. v. Agricultural Labor Relations Bd. (1981) 114 Cal.App.3d 665, 682-683 [171 Cal.Rptr. 55]; NLRB v. J. H. Rutter-Rex Manufacturing Co. (1969) 396 U.S. 258 [72 LRRM 2881]; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2172]; Southland Manufacturing Company v. NLRB (D.C.Cir. 1973) 475 F. 2d 414. [82 LRRM 2897]; 0. E. Mayou & Sons (1985) 11 ALRB No. 25; Mission Packing Company (1982) 8 ALRB No. 47; Golden Valley Farming (1980) 6 ALRB No. 8.) We note that Respondent's refusal to bargain, save for a seven-month interval, was the well-spring from which these attendant problems flowed.

Respondent argues further that the Union should be "estopped" from claiming the Company has a duty to bargain, since the Union failed to appeal from the dismissal of the 1981 unfair labor practice charge, and did not request negotiations for nearly two years afterward. In essence, Respondent contends that the Union has failed to exhaust its administrative remedies, has abandoned its claim to represent Respondent's employees, and therefore, should not now be permitted to resurrect the earlier charge, arising out of the same facts.

As a general rule, a party claiming estoppel must

demonstrate "(1) lack of knowledge and the means to obtain knowledge of the true facts; (2) good faith reliance upon the misleading conduct of the party to be estopped; and (3) detriment or prejudice from such reliance." (Oakland Press Co. (1983) 266 NLRB 107 [112 LRRM 282].) Preliminarily, the failure of a Regional Director to file a complaint is not a final decision on the merits (see, Ventura County Fruit Growers, Inc. (1984) 10 ALRB No. 45; NLRB v. Baltimore Transit Co. (4th Cir. 1944) 140 F.2d. 51 [13 LRRM 739] cert. den. (1944) 321 U.S. 795 [14 LRRM 952]), and hence could provide no justifiable basis for Respondent's reliance. In addition, " . . . the [National] Board has in a number of cases held that it is obliged to give paramount consideration to the provisions of the Act regardless of earlier positions taken by any party." (Oakland Press Co., supra, 266 NLRB 107.) While the record indicates that, for extended periods, the Union failed to pursue its interest in representing Respondent's employees, the provisions of the Act, and the cases interpreting, it (discussed infra), allow the Union to revive its representative status, once achieved through certification, and to maintain its viability.

Moreover, estoppel will not lie in this case since Respondent has not shown that any detriment resulted from its reliance on the Union's neglect of its representational responsibilities. To the contrary, Respondent was left free for extended periods to unilaterally determine the wages, hours, and working conditions of its employees without being called to task by the Union, either across the bargaining table or via the Board's processes.

Turning to the merits of the case, Respondent's undisputed refusal to meet and bargain with the Union, at or near the filing of the instant charge, constitutes *a* per se violation of section 1153(e) of the Act. (Lab. Code § 1155.2; see also McFarland Rose Production, et al. (1980) 6 ALRB No. 18; Masaji Eto, et al. (1980) 6 ALRB No. 20; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) As its central rationale for refusing to meet and negotiate, Respondent relied upon an employee "poll" which indicated that the UFW did not have the support of the majority of workers in the bargaining unit. Under the Act, neither an actual loss of majority support, nor a reasonable good faith belief in that occurrence constitutes a cognizable defense to a section 1153(e) refusal to bargain allegation. (Nish Noroian Farms (1982) 8 ALRB No. 25; F & P Growers Association (1983) 9 ALRB No. 22, affd. (1985) 168 Cal.App.3d 667.) Not unlike the instant case, in both the F & P and Ventura County cases cited above, considerable lapses of time between communications and/or requests for bargaining were, in part, relied upon by those employers to evidence its "good faith belief" that the Union had lost the support of a majority of employees in the unit. Neither the high rate of employee turnover typical in California agriculture (F & P Growers Association, supra, 9 ALRB No. 22), nor the theoretical employee disillusionment with a Union which fails to diligently pursue its representational prerogatives (Ventura County Fruit Growers, Inc., supra, 10 ALRB No. 45) can be said to produce, ipso facto, a diminution of Union support.

Our decision of March 29, 1982, in Nish Noroian, supra, 8 ALRB No. 25, explains that agricultural employers are explicitly

precluded from exercising any prerogatives in conjunction with the recognition process.

> An employer under the ALRA does not have the same statutory rights regarding employee representation and election as employers have under the NLRA. Under the ALRA, employers cannot petition for an election, nor can they decide to or voluntarily recognize or bargain with an uncertified union. By these important differences the California legislature has indicated that agricultural employers are to exercise no discretion regarding whether to recognize a union; that is left exclusively to the election procedures of this Board. Likewise, whether or not recognition should be withdrawn or terminated must be left to the election process. (Nish Noroian Farms, supra, 8 ALRB No. 25, pp. 13-14.) (Emphasis added.)

More recently the Court of Appeal has addressed this issue directly and has specifically affirmed this rule of law. (F & P Growers v. ALRB (1985) 168 Cal.App.3d 667.)

> We agree that these differences in the NLRA and the ALRA, with respect to employer participation in the certification and decertification petitions, shows [sic] a purpose on the part of the Legislature to prohibit the employer from being an active participant in determining which union it shall bargain with in cases arising under the ALRA.... . . . [T]he Legislature's purpose in enacting the ALRA was to limit the employer's influence in determining whether or not it shall bargain with a particular union. Therefore, to permit an agricultural employer to be able to rely on its good faith belief in order to avoid bargaining with an employee chosen agricultural union, indirectly would give the employer influence over those matters in which the Legislature clearly appears to have removed employer influence. This court will not permit the agricultural employer to do indirectly, by relying on the NLRA loss of majority support defense, what the Legislature has clearly shown it does not intend the employer to do directly. (Id. at 676.)

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Finally, claims that the Union had "abandoned" the unit,[6/] as demonstrated by its lack of diligence, are similarly unavailing as a defense to this refusal to bargain allegation. As in Ventura County Fruit Growers, Inc. supra, 10 ALRB No. 45, and 0. E. Mayou, supra, 11 ALRB No. 25, the applicable test to determine abandonment is whether the Union was unable or unwilling to represent the employees in the bargaining unit. (Citing Pioneer Inn (1977) 228 NLRB 1263 [95 LRRM 1225] enforced(9th Cir. 1978) 578 F.2d 835 [99 LRRM 2354.]; Road Materials, Inc. (1971) 193 NLRB 990 [78 LRRM 14.48].) By its recurrent requests for bargaining, the Union "affirmatively notified Respondent of its desire and intent to actively represent unit employees in the conduct of negotiations." (Ventura County Fruit Growers, Inc., supra, 10 ALRB No. 45.)

It is therefore abundantly clear that Respondent's refusal to bargain with the UFW, in violation of section I153(e), was without justification or arguable legal support. Under section 1160.3, the Board is empowered to exercise its discretion in deciding whether or not to impose makewhole relief in cases of this nature. The standard for awarding makewhole, where section 1153(e)is violated in a "non-technical"[7/] bargaining situation, is applied on a case-by-case basis, according to

> ... the extent to which the public interest in the employer's position weighs against the harm

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[6/] While the abandonment issue was not explicitly raised by Respondent, it was implied in its arguments regarding the Union's failure to appeal the erroneous dismissal of the 1981 charge, and the span of time between that dismissal and the Union's 1984'request for bargaining.

[7/] See footnote 3, supra.

> 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 to bargain. (F & P Growers Association, supra, 9 ALRB No. 22.)

As we held in F & P, and Ventura County,

> ... once the Board had clarified the exclusivity of the decertification process in its related Decisions in Nish Noroian Farms, supra, 8 ALRB No. 25 and Cattle Valley Farms (1982) 8 ALRB No. 24, the employer could claim no public interest in refusing to bargain based on good faith doubt of the Union's majority support, especially while its employees had sought no decertification or rival union election.... [L]itigation of the claim of loss of majority support could not possibly further the policies and purposes of the ALRA....

(See also F & P Growers Association v. Agricultural Labor Relations Bd. (1985) 168 Cal.App.3d 667, 683.) Since Respondent's defense here is identical to that rejected in F & P,. makewhole relief, dating from May 2, 1984,[8/] is appropriate.[9/] The makewhole remedy will continue until such time as Respondent corrects its unlawful conduct by recognizing the UFW as the exclusive bargaining

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[8/] As may be recalled, this is the date on which Respondent formally declared its intention to refuse to bargain following the Union's most recent request. The Union's refusal to bargain charge was filed within six months of that date, thus permitting the makewhole remedy to run from that date.

[9/] Respondent asserts that the ruling in Harry Carian Sales v. ALRB (1985) 39 Cal.3d 209, which affirmed the Board's authority to order the certification of a bargaining agent even in the absence of a representation election, should prompt a reexamination of the Nish Noroian "certified until decertified" rule, since the Board "may find it appropriate to decertify a union as well." A similar contention was rejected by the Court of Appeal in F & P Growers Association v. ALRB, supra, 168 Cal.App.3d 667. After discussing the exclusion of employers from the representation process, the court specifically noted that "nothing in Carian v. ALRB... negates what we have said here." (Id. p. 676, n. 6.)

representative of its employees and entering into good faith negotiations with the UFW upon the Union's acceptance of Respondent's offer to bargain.[10/] If the Union does not act upon Respondent's offer to bargain within *a* reasonable period after the offer is made, Respondent's makewhole obligation will terminate at the end of such period.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Joe G. Fanucchi & Sons and Tri-Fanucchi Farms, its 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 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 Agricultural Labor Relations Act (Act).

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

[10/] We note that the record discloses no evidence of Respondent having engaged in surface bargaining during the short period when negotiations between the parties were taking place. We have no reason to anticipate that Respondent's prior refusal to bargain will be supplanted by surface bargaining once negotiations begin. An allegation of a failure of the duty to bargain in good faith after good faith negotiations have commenced would appropriately be the subject of a new unfair labor practice charge.

(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) 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 refusal to bargain, 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 May 2, 1984, until such time as Respondent recognizes the UFW as the exclusive bargaining representative for its employees and enters into good-faith bargaining with the UFW upon the Union's timely acceptance of Respondent's offer to bargain.

(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 Respondent 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 Respondent at any time between May 2, 1984, and 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.

(h) 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 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 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 Joe G. Fanucchi & Sons/Tri-Fanucchi Farms is hereby extended for one year from the date of issuance of this Order.

Dated: May 16, 1986

JOHN P. McCARTHY, Member

GREGORY L. GONOT, Member

CHAIRPERSON JAMES-MASSENGALE, Concurring and Dissenting:

I concur in the majority opinion in all respects except as to the duration of the makewhole period.

The violation which we have found in this case is pure and simple -- a refusal by Respondent to bargain with the certified bargaining representative of its agricultural employees. Accordingly, Labor Code section 1160.3 accords the Agricultural Labor Relations Board the authority to remedy only that conduct. An appropriate remedy would be a makewhole order commencing from the time Respondent refused to bargain until such time as Respondent ceases that refusal by offering to bargain with the certified bargaining representative.

The additional requirements of the remedial order directed by the majority unnecessarily complicate the determination of compliance by adding the uncertainty of what constitutes a reasonable period for the United Farm Workers of America, AFL-CIO to accept Respondent's offer to bargain. Moreover, the requirement

that the makewhole period remain open until good faith bargaining commences adds further uncertainty to the determination of when the makewhole period ends and bears little relation to the violation at issue.

Dated: May 16, 1986

JYRL JAMES-MASSENGALE, Chairperson

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office by the United Farm Workers of America, AFL-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, Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, 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 farmworkers 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 May 2, 1984., 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:

JOE G. FANUCCHI & SONS/
TRI-FANUCCHI FARMS

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

Joe G. Fanucchi & Sons/
Tri-Fanucchi Farms
(UFW)

12 ALRB No. 8
Case No. 84-CE-127-D

BOARD FINDINGS

The UFW was originally certified in October 1977. Within a week, it requested that bargaining take place. Respondent informed the Union on November 29, that it would "technically" refuse to bargain to contest the validity of the election. Ten months later, on September 4, 1978, the Union filed a charge alleging a refusal to bargain. On September 8, Respondent agreed to negotiate and this charge was dismissed. Some bargaining took place up to May of the following year.

From May 4, 1979 until July 1981, there were no communications between the parties. In July 1981, the Union requested that bargaining resume. On July 14., 1981, the Respondent conducted a "poll" among its employees. It later reported to the Union that the poll indicated that its employees no longer wanted to be represented by the Union, and that on that basis, it could not, in "good faith," continue to bargain.

On "October 30, 1981, the Union filed another refusal to bargain charge. While the charge was being investigated, the Board issued its decision in Nish Nororian Farms (1982) 8 ALRB No. 25, which announced the "certified until decertified" rule. Under that decision, employee polls could not be utilized as a good faith basis for refusing to bargain. Nish Nororian notwithstanding, the Regional Director dismissed the October 1981 charge. The UFW did not appeal the dismissal.

Nearly two years later, on April 19, 1984, the UFW again requested bargaining. On May 2, 1984, the Respondent declined the request citing as its reasons for doing so the 1981 employee poll, the dismissal of the previous charge, and its belief that it would be an unfair labor practice to negotiate with the UFW. On June 25, 1984, the Union filed the instant charge which resulted in the issuance of a complaint on July 10, 1985. The case was submitted to the Board on the basis of a stipulated record.

BOARD DECISION

The Board held that Respondent violated section 1153(a) and (e) of the Act by refusing to bargain. Under well-established principles, Respondent's defenses, including laches resulting from UFW and/or ALRB delay or inaction, estoppel, and ultimately its employee poll, were unavailing. Agricultural employers are precluded from exercising any prerogatives in conjunction with the recognition process. The Board reiterated the rule of Nish Noroian: once a certification

has been obtained, an employer is relieved of its obligation to bargain with a certified union only after a representation election which results either in that union being decertified or a rival union being elected in its stead.

Under the standard of F & P Growers (1983) 9 ALRB No. 22, in a case of this nature whether makewhole is awarded is determined according to "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." As Respondent's refusal to bargain was without justification or arguable legal support, its decision to litigate did not further any purpose or policy of the Act. Makewhole was therefore deemed appropriate.