Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| SAN JUSTO RANCH/WYRICK FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party. | ) | Case No. 82-CE-2-SAL<br>14 ALRB No. 1<br>(9 ALRB No. 55)<br>(7 ALRB No. 29) |

SUPPLEMENTAL DECISION AND MODIFIED ORDER

In accordance with the unpublished decision of the Court of Appeal of the State of California for the First Appellate District, Division Five, in San Justo Ranch/Wyrick Farms v. Agricultural Labor Relations Board (October 30, 1986) Case No. A024698 [nonpub. opn.], the Agricultural Labor Relations Board (ALRB or Board) has reexamined the makewhole order in San Justo Ranch/Wyrick Farms (1983) 9 ALRB No. 55 under the standard deemed proper by the court, and hereby modifies its original order as set forth below.[1/]

In an earlier decision certifying the United Farm Workers of America, AFL-CIO, (UFW or Union) as the exclusive bargaining representative of all agricultural employees of San Justo Farms, a

[1/] The Board's Decision in San Justo Ranch/Wyrick Farms, supra, 9 ALRB No. 55 is a technical refusal to bargain case following the Board's Decision in San Justo Farms, a Partnership of Frank Wyrick and Wyrick Farms, Inc. (1981) 7 ALRB No. 29. The caption "San Justo Ranch/Wyrick Farms" refers to the original employer designated by the earlier caption "San Justo Farms, a Partnership of Frank Wyrick and Wyrick Farms, Inc."

Partnership of Frank Wyrick and Wyrick Farms, Inc. (San Justo), in the State of California, the Board determined that San Justo was the employer of the garlic harvest workers. (San Justo Farms, a Partnership of Frank Wyrick and Wyrick Farms, Inc., supra, 7 ALRB No. 29.) In analyzing the whole activity of each of the parties, the Board found that although San Justo and Vessey Foods, Inc. (Vessey) each had a substantial interest in the garlic crop grown on San Justo's property and had significant ties to the garlic harvest workers, San Justo, rather than Vessey, had the continuing employment relationship with the garlic harvest workers. This relationship, combined with the facts that San Justo owned the land, participated in the cultivation and harvesting of garlic, and negotiated an access agreement with the UFW, supported the Board's finding that San Justo was the agricultural employer of the garlic harvest workers.

In San Justo Ranch/Wyrick Farms, supra, 9 ALRB No. 55, a technical refusal to bargain case following the Board's Decision in San Justo Farms, a Partnership of Frank Wyrick and Wyrick Farms, Inc., supra, 7 ALRB No. 29, the Board applied a two-prong test as set forth in J. R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1 (J. R. Norton), whereby the Board must determine whether the employer's refusal to bargain with the employees' certified collective bargaining representative

was both reasonable and undertaken in good faith.[2/] The Board concluded that San Justo demonstrated a lack of good faith by (1) its failure to respond in a timely manner to the UFW's request for bargaining; (2) supervisor Rafael Duarte's statements indicating that San Justo would not sign a contract with the Union; (3) San Justo's refusal to rehire garlic harvest workers after the election in retaliation for their pro-Union votes; and (4) San Justo's denial of access to a UFW organizer.

Concerning the reasonableness of San Justo's litigation posture, the Board held that San Justo's further litigation of its election objections was unreasonable since its arguments were not

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[2/] That test was explained by the J. R. Norton court as follows:

> . . . 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.
> (J. R. Norton Co. v. Agricultural Labor Relations Board, supra, 26 Cal.3d 1, 39.)

consistent with the policies of the Agricultural Labor Relations Act (ALRA or Act). In reaching this conclusion, the Board relied on its previous determination that San Justo was the employer of the garlic harvest workers and that its resolution of the employer identity issue was consistent with past Board determinations that stable businesses and long-term employment relationships tend to produce stable labor relations. (San Justo Ranch/Wyrick Farms, supra, 9 ALRB No. 55, p. 14.) The Board stated that its decisions on the appropriate employer issue were analogous to National Labor Relations Board (NLRB) unit determinations and, therefore, would be upheld by reviewing courts unless found to be arbitrary and capricious. Because of this judicial deference, the Board held that San Justo's court challenge to certification could not reasonably have been expected to prevail.

The Court of Appeal held that the Board's Decision fixing employer status on San Justo was supported by substantial evidence in the record. However, the court found that the Board had erroneously applied the J. R. Norton test for imposing the makewhole remedy. The court concluded that the arbitrary and capricious standard did not apply to review by the courts of Board determinations fixing employer status, and that in evaluating whether San Justo's litigation posture was reasonable, the Board erred in its analogy to NLRB unit determinations. The court set aside the makewhole order and remanded the case to the Board for further review under the principles enunciated in J. R. Norton:

> In light of the absence of judicial precedent at the time San Justo refused to bargain, the Board under the appropriate standard might have decided that San Justo

> sought judicial review of a 'close [case] that raise[d] important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice.' (J. R. Norton Co. v. Agricultural Labor Relations Bd., supra, 26 Cal.3d at pp. 38-39.)

Pursuant to the court's remand, the Board must review the Board's makewhole order under the proper standard. Although the court only addressed the reasonableness of San Justo's litigation posture, and did not reach the question of San Justo's bad faith, the Board is required to review both the good faith and reasonableness of San Justo's litigation posture under the J. R. Norton standard.

Good Faith

After reviewing the factors relied upon by the Board in its prior Decision (San Justo Ranch/Wyrick Farms, supra, 9 ALRB No. 55) to find that San Justo had demonstrated a lack of good faith, we now conclude that these factors were either insufficient to support a finding of bad faith or should not have been considered by the Board.

With regard to San Justo's delay in not responding to the UFW's October 12, 1981, request to bargain until December 21, 1981, the Board agrees with the Administrative-Law Judge (ALJ) that a delay of this length, absent other evidence of bad faith, is not highly probative of the issue of San Justo's good faith. In cases involving a longer and more significant delay between the request and refusal to bargain, the Board might conclude that such a delay, in itself, would support a finding of bad faith. Also, in circumstances involving other indicia of bad faith, a delay of

this duration could be considered as one factor in the totality of the circumstances which might persuade the Board that a respondent was acting in bad faith.[3/] However, San Justo's two-month delay between the request and refusal to bargain, by itself, is insufficient for the Board to find bad faith.

The Board has reexamined the remaining factors relied upon in the prior Decision, and concludes that these factors should not have been considered by the Board. In analyzing the alleged statements by supervisor Rafael Duarte, employee Nemorio Ramirez testified that Duarte said that even if the election was valid, the Company was not going to sign any contract with the Union. Duarte denied making these statements. The ALJ concluded that Duarte was an incredible witness, but also that Ramirez testified with "a palpable hostility bordering on the vengeful." As the ALJ expressly discredited Duarte and refused to credit Ramirez and ascribe the same weight to this evidence as given by the General Counsel and Union, the Board is unwilling to rely on Ramirez' testimony to support a finding that San Justo refused to

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[3/] This case is distinguishable from Holtville Farms, Inc. (1981) 7 ALRB No. 15, a technical refusal to bargain case which involved a two-month delay by the employer in responding to the UPW's request to bargain, a unilateral wage increase, and alleged statements by the employer's agents, including threats and promises of benefit, regarding the formation of a small, independent union, which the Board found constituted an unlawful attempt to promote a decertification drive. Unlike Holtville Farms, Inc., this case involves only a two-month delay by San Justo in its response to the UFW's request to bargain. As alleged unfair labor practice violations were not being litigated in the election objection proceedings, any other indicia of bad faith from the election objections proceedings should not be considered by the Board as evidence of bad faith in subsequent unfair labor practice proceedings. (See Albert C. Hansen dba Hansen Farms (1978) 4 ALRB No. 41.)

bargain in bad faith.

The Board concludes that it was improper to rely upon San Justo's alleged refusal to rehire garlic harvest workers and denial of access to a UFW organizer, as litigated in the election objection proceedings, to find bad faith. The sole issue litigated in the election objection proceedings was the identity of the employer. The testimony involving the refusal to rehire garlic harvest workers was admitted by the ALJ for the explicit and restricted purpose of showing work force continuity. Similarly, the testimony regarding interference with access was elicited only to show Wyrick's interest in the crew, which related solely to the question of employer identity. The question whether access was actually denied was not fully litigated.

In determining whether San Justo lacked good faith in its refusal to bargain with the UFW, the only factor the Board can consider in its decision is the two-month delay in San Justo's response to the UFW's request to bargain. Absent other evidence of bad faith, this factor alone is insufficient to support a finding of bad faith. The Board therefore declines to impose the makewhole remedy on the basis of lack of good faith.

Reasonable Litigation Posture

Pursuant to the court's remand, the Board must determine whether San Justo's litigation posture was reasonable and therefore precludes a makewhole award on that ground. It is the Board's policy not to award makewhole in situations involving novel legal theories or in close cases that raise important issues concerning whether an election was conducted in a way that

protected the employees' right of free choice. (S & J Ranch, Inc. (1986) 12 ALRB No. 32 citing J. R. Norton Co. v. Agricultural Labor Relations Board, supra, 26 Cal.3d 1; Adamek and Dessert, Inc. (1985) 11 ALRB No. 8, affd. (1986) 78 Cal.App.3d 970.)

At the time of San Justo's refusal to bargain (December 21, 1981), there was no judicial precedent on the employer identity issue.[4/] There was ALRB precedent which held that the Board must look to the whole activity of each entity in light of ALRA policy favoring the establishment of stable bargaining relationships. (Joe Maggio, Inc. (1979) 5 ALRB No. 26; Napa Valley Vineyards Co. (1977) 3 ALRB No. 22; see also Gourmet Harvesting and Packing (1978) 4 ALRB No. 14.) The factors considered and the weight given to those factors in the "whole activity" test vary from case to case, depending on the facts of

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[4/] On October 17, 1983, in Rivcom Corporation v. Agricultural Labor Relations Board (1983) 34 Cal.3d 743 (Rivcom), the California Supreme Court approved the Board's method fixing employer status, and found it appropriate to fix employer responsibilities on the party who had "the substantial long-term interest in the ongoing agricultural operation." However, in determining whether an employer's litigation posture is reasonable, the Board must examine the employer's litigation posture at the time of its refusal to bargain. Here, San Justo refused to bargain with the UFW on December 21, 1981. At that time, there were no judicial decisions directly on point. Additionally, the facts in Rivcom are distinguishable. Rivcom involved a new owner of a business who was attempting to avoid successorship status by refusing to rehire the predecessor's employees. Despite the hiring of labor contractors with some characteristics of custom harvesters, the court held that the new owner was the statutory employer due to its "substantial long-term interest in the ongoing agricultural operation." Even assuming that the new owner hired custom harvesters, the court stated it would find that the new owner was the statutory employer. Thus, the fact that the California Supreme Court subsequently approved the Board's "whole activity" test has no bearing on San Justo's litigation posture in this case.

each case. Here, San Justo and Vessey divided the responsibilities concerning the garlic crop, shared the total harvest costs, and split the profits equally. After analyzing these factors and admitting that Vessey clearly played a substantial role in the garlic-growing operation on San Justo's property, the Board found that San Justo was the primary employer of the garlic harvesting employees. The Board stated that San Justo, rather than Vessey, had a continuing relationship with a substantial number of the harvesting employees, and that San Justo would provide a stable collective bargaining relationship. Therefore, designating San Justo the employer for purposes of collective bargaining would further the purposes and goals of the Act. (San Justo Farms, a Partnership of Frank Wyrick and Wyrick Farms, Inc., supra, 7 ALRB No. 29.) As the "whole activity" test, by its nature, involves a consideration of various factors on a case-by-case basis, and there was no judicial precedent at the time of San Justo's refusal to bargain, the Board finds that this case was a close case raising important issues concerning the employer identity issue and its effect upon the election. In light of this finding, the Board concludes that San Justo's litigation posture was reasonable.

Accordingly, as the Board has found that San Justo's refusal to bargain was not undertaken in bad faith and that its litigation posture was reasonable, we do not invoke the makewhole remedy. The Board hereby issues the following Modified Order.

## MODIFIED ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent San Justo Ranch/Wyrick Farms, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive bargaining representative of its agricultural employees in violation of Labor Code section 1153(e) and (a).

(b) In any like or related manner interfering with, restraining or coercing agricultural employees 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 its agricultural employees, and if an understanding is reached, embody such understanding in a signed agreement.

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

(c) Mail copies of the attached Notice, in all

appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from December 21, 1981, until December 21, 1982.

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

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

(f) 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 exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year commencing on the date on which Respondent commences to bargain in good faith with the UFW.

Dated: February 1, 1988

BEN DAVIDIAN, Chairman[4/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

[4/] The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority. Member Smith did not participate in the consideration of this matter.

MEMBER McCARTHY, Concurring and Dissenting:

Although I agree with the majority's holding regarding the reasonableness and good faith of San Justo in ultimately choosing to litigate the employer identity issue herein, I would hold that San Justo did not act reasonably and in good faith in failing promptly to notify the United Farm Workers of America, APL-CIO (UFW or Union), of the Employer's decision to challenge the Union's certification. The facts herein indicate that the Union first requested bargaining on October 12, 1981. The Employer waited until December 21, 1981 -- a period of more than two months -- before it refused to bargain. Nowhere in the record is there any explanation as to why San Justo took such an inordinate length of time to respond to the Union's request. A delay of nearly 70 days in responding to a bargaining request is not reasonable where the employer has made no showing of why it did not respond more promptly. Such delays in cases where, as here, the certification of the Union is ultimately upheld on

appeal, simply mean that the achievement of a bargaining contract between the parties is needlessly postponed.

I see no reason why employers should not be required, in the absence of extraordinary circumstances, to reply to a union's request for bargaining within 30 days.[1/] I would hold that an unexplained delay of more than 30 days is evidence of a lack of reasonableness and good faith, and that a makewhole remedy should be imposed in such instances for the period of undue delay. Thus, I would impose makewhole in the instant case from November 12, 1981, until December 21, 1981, when San Justo finally indicated to the Union that it had decided to pursue a challenge to the Union's certification.

Dated: February 1, 1988

JOHN P. McCARTHY, Member

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[1/] The majority does not explain why this delay of more than two months in responding to a bargaining request is insufficient for a finding of unreasonableness or bad faith.

**NOTICE TO AGRICULTURAL EMPLOYEES**

After investigating charges that were filed in the Salinas Office by the United Farm Workers of America, AFL-CIO (UFW), the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint that alleged that we, San Justo Ranch/Wyrick Farms, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by refusing to meet and bargain with the UFW about a contract. The Board has told 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 farm workers these rights:

1. To organize yourselves;
2. To form, join or help any union;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain a contract covering 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 or 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 NOT do anything in the future that forces you to do, or stops you from doing any of the things listed above.

WE WILL, on request, meet and bargain with the UFW about a contract because it is the representative chosen by our employees.

Dated: SAN JUSTO RANCH/WYRICK 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 112 Boronda Road, Salinas, California 93907. This telephone number is (408) 443-3161.

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

San Justo Ranch/Wyrick Farms (UFW)

14 ALRB No. 1
Case No. 82-CE-2-SAL

BOARD DECISION

On remand from the Court of Appeal, the Board reviewed its makewhole order under the two-prong test set forth in J. R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1. After reexamining the factors relied upon by the Board in its prior Decision (San Justo Ranch/Wyrick Farms (1983) 9 ALRB No. 55) to find that San Justo had demonstrated a lack of good faith, the Board found that the approximate two-month delay between the request and refusal to bargain, absent other evidence of bad faith, was insufficient to support a finding of bad faith. The Board concluded that the remaining factors involving a supervisor's statements indicating that San Justo would not sign a contract, San Justo's refusal to rehire garlic harvest workers, and San Justo's denial of access, should not have been considered by the Board. The testimony involving the supervisor's alleged statements was not relied upon by the ALJ due to credibility resolutions, and the issues involving San Justo's refusal to rehire and denial of access were not fully litigated in the election objection proceedings.

In determining whether San Justo's litigation posture was reasonable, the Board found that at the time of San Justo's refusal to bargain, there was no judicial precedent on the employer identity issue. ALRB precedent held that the Board must look to the whole activity of each entity. As the whole activity test, by its nature, involves a consideration of various factors on a case-by-case basis, and there was no judicial precedent at the time of San Justo's refusal to bargain, the Board found that this was a close case raising important issues concerning the employer identity issue and its effect upon the election. Accordingly, as the Board found that San Justo's refusal to bargain was not undertaken in bad faith and that its litigation posture was reasonable, the Board did not invoke the makewhole remedy.

CONCURRENCE/DISSENT

Member McCarthy would hold that the Employer's unexplained delay of nearly 70 days in responding to the Union's bargaining request is evidence of lack of reasonableness and good faith. He would impose a makewhole remedy from November 12, 1981, (30 days after the Union's bargaining request) until December 21, 1981, when the Employer finally indicated to the Union that it had decided to pursue a challenge to the Union's certification.

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