El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

VENUS RANCHES, INC. Respondent, and CRUZ MOLINA, Charging Party.	}	Case No. 79-CE-60-EC 14 A.LR3 No. 17 (8 AlRB No.60)

SUPPLEMENTAL DECISION AND ORDER

On July 20, 1988, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Decision in this matter. Thereafter, Respondent timely filed exceptions and a supporting brief and the General Counsel filed a reply brief. The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the AL J ' s Decision in light of Respondent's exceptions and the briefs of the parties, and has decided to affirm the ALJ ' s rulings, findings, and conclusions, except as modified herein, and to adopt his recommended Order with modifications.

Background

In the underlying liability proceeding in this case, the Board determined that Respondent had violated the Labor Code Section 1152[1/] rights of Charging Party Cruz Molina by discharging him for engaging in protected concerted activities under our Act. (See Venus Ranches, Inc. (1982) 8 ALRB No. 60) The Board directed Respondent to cease and desist from such conduct, and to take

[1/] All sectional references are to the California Labor Code unless otherwise indicated.

certain affirmative action including offering Molina immediate reinstatement and making him whole

> for all losses of pay and other economic losses he has suffered as a result of his discharge, reimbursement to be made in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(Id. at p. 9, emphasis added.) Following Respondent's timely petition for judicial review under section 1160.8, the Fourth District Court of Appeal affirmed the Board's Order in an unpublished decision issued December 8, 1983.

Compliance procedures then commenced. On March 21, 1986, Respondent was informed by the Board's El Centro Regional Office that Respondent's backpay liability to Molina was $2,209.13 exclusive of interest and expenses. As the ALJ noted, the record in this proceeding does not indicate that Respondent ever replied to this notification. On August 21, 1986, the Regional Director of the El Centro Regional Office issued a Notice of Hearing and Backpay Specification in accordance with standard Board practice. The specification found Respondent's total net backpay liability amounted to $2,209.13 (Id. at p. 3), and alleged further that "[t]he obligation of Respondent to make whole discriminatee Cruz Molina under the terms of the Board's Order will be discharged by paying the total amount specified in Paragraph 5 above [i.e., $2,209.13], plus interest calculated in accordance with the Board's Decision in Lu-Ette Farms, Inc., supra." (Id. at pp. 3-4, emphasis added.) Although required to do so by Title 8, California Code of Regulations section 20290(d)(l), Respondent filed no

answer controverting the allegations of this specification.

Thereafter on September 3, 1986, Respondent was notified by letter from the Regional Director of the El Centre Regional Office that if Respondent's answer to the specification were not received within 5 days from receipt of the notification, the General Counsel would proceed to take Respondent's default under the provisions of Title 8, California Code of Regulations section 20290(d)(3). Rather than answering the specification, however, Respondent forwarded a check in the amount of its net backpay liability, exclusive of interest, $2,209.13, to the El Centro Regional Office on September 23, 1986. Respondent accompanied the check with a cover letter that stated in pertinent part:

> Enclosed is a check made payable to the Agricultural Labor Relations Board in the sum of $2,209.13 as full and complete payment of any and all sums due to the deceased discriminatee in this matter,2/

On October 3, 1986, the Regional Director again contacted Respondent by letter, informing Respondent's counsel that the $2,209.13 payment on principal had been received on September 24, 1986, and that interest on that sum as of the date of payment by Respondent amounted to $1,593.25. The Regional Director's letter reminded Respondent that the Board's Order provided for interest on the net backpay liability, and demonstrated the method of calculating the amount of interest due. Respondent, however,

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2/ The record states without elaboration that Charging Party Cruz Molina died about August, 1983. It is well-settled that the death of a discriminatee does not void the Board's remedy; all amounts due are payable to the deceased discriminatee's estate. (See, e.g., UFW (Odis W. Scarbrough) 9 ALRB No. 17.)

still made no reply. On October 10, 1986, Respondent's check was deposited by the El Centro Regional Office, and the funds were disbursed to Molina's estate on October 21, 1986. On November 7, 1986, Respondent was informed by the El Centro Regional Office that its interest payment still had not been received and was considered overdue. Respondent was informed that further legal action would follow to collect the interest due if Respondent did not remit the amount owing by November 21, 1986.

On November 26, 1986, Assistant General Counsel Eugene Cardenas of the El Centro Regional Office memorialized, by letter of that date to Respondent, the substance of a conversation held with Respondent's counsel on the previous day. In that conversation, Respondent had raised, apparently for the first time, the argument that the payment of $2,209.13 on September 23 operated as a complete discharge of Respondent's entire monetary obligation under the Board's Order. Cardenas reminded Respondent's counsel of the efforts made by the regional office to communicate with Respondent concerning meeting its liability under the Board's Order, and specifically cited the Order's requirement of interest and the regional staff's efforts to collect the interest after the tender of the $2,209.13 on September 23. Respondent's counsel apparently remained uncertain about Respondent's posture as to its obligation concerning the interest due, since he indicated that he would contact Cardenas by December 3, 1986, to indicate whether Respondent would pay the outstanding interest.[3/]

[3/] The record does not reflect whether Respondent's counsel did in fact contact Cardenas on December 3.

No interest payment was made in 1986 or 1987. Following a final unsuccessful effort at persuasion by the General Counsel in January, 1988, the El Centre Regional Office issued a second Notice of Hearing and Backpay Specification on February 2, 1988, alleging interest due in the amount of $1,593.25. Respondent's timely answer denied any interest owing, and set up the payment of $2,209.13 on September 23, 1986, as a complete discharge of all its monetary obligations under the Board's Order.[4/] ALJ Sobel's decision issued on July 20, 1988, and Respondent excepted to the ALJ's determination that it owed discriminatee Cruz Molina $1,593.25 in interest on its net backpay liability.

Analysis

Before the Board, Respondent argues that Civil Code Section 1584 supplies the legal justification for its contention that payment of the net backpay liability of $2,209.13 on September 23, 1986 operated as a complete discharge of its monetary obligation to Cruz Molina. California Civil Code section 1584 provides:

> Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal.

[4/]Respondent also argued in its answer that the proper forum for determining questions concerning compliance with the Board's Order was in the Superior Court of Riverside County. General Counsel had applied for enforcement of the Board's Order, on July 22, 1986, and the Superior Court decreed enforcement on September 3, 1986. Although respondent maintained at the Pre-hearing Conference and before ALJ Sobel that the Board was without jurisdiction to conduct compliance proceedings as to the $1,593.25 in outstanding interest because of the superior court's decree of enforcement, it did not file exceptions to ALJ Sobel's contrary finding, and thus abandoned any opportunity to litigate this question further before the Board.

Respondent construes this language in its own favor when it states:

> In this case the proposal made in the letter was that the respondent would pay the sum of $2,209.13 to the ALRB if that sum would be full and complete payment of all sums due from the respondent. The proposal was not rejected, since the check was not returned. The check was negotiated. ... The general counsel had the option to reject the offer made by the letter with the check. The general counsel could simply have returned the check, with a rejection of the proposal contained in the letter. Instead, the check was retained by the general counsel and eventually negotiated by the board and paid. There is no basis for any argument that there was not an acceptance of the proposal made by respondent's attorney in the letter of September 23, 1986." (Respondent's Exceptions to Decision of Administrative Law Judge and Proceedings and Brief in Support Thereof at pp. 3-5.)

On the contrary, we find that there are at least three very good arguments for finding that there has been no "acceptance" of any purported "proposal."

First, we do not believe that a reasonable person in the position of the Assistant General Counsel in the El Centro Regional Office, to whom'the letter and check of September 23, 1986 were directed, could possibly have interpreted as a bona fide settlement offer the statement that payment of the net backpay liability alone would extinguish Respondent's entire monetary obligation to Cruz Molina. It is, of course, well-settled that the legal effect of words of purported offer or proposal is determined by the interpretation placed on those words by a reasonable person in the position of the purported offeree. (See, e.g., Calamari and Perillo, Contracts (2d ed. 1977) § 2-2, pp. 24-25: "A party's intention will be held to be what a reasonable man in the position of the other party would conclude

his manifestations to mean." [footnote omitted];
accord 1 Williston on Contracts (3d ed. 1957) § 21, p. 42; 17 C.J.S., Contracts, § 35, p. 646; Fowler v. Security-First National Bank (1956) 146 Cal.App.2d (37, 47 [303 P.2d 565]; Findleton v. Taylor (1962) 208 Cal.App.2d 651, 652 [25 Cal.Rptr. 439].)

To such reasonable person we must impute knowledge of the Board's settlement regulations (see California Code of Regulations, title 8, § 20248 and 20298) and the policies and procedures of the Board's Compliance Manual Section 4-5000, et. seq., as well as the knowledge that by failing to file an answer to the specification of August 21, 1986, Respondent failed to controvert the fact that interest was due, thereby making Respondent subject to default for the amount owing. Thus, a reasonable person in the position of the purported offeree in this case would know that she was without authority to accept such an offer, and that the offer would have to be submitted in writing for the Board's approval prior to its having any legal effect whatsoever. A reasonable person would also know that the purported offer proposed *a* wholly one-sided and unnecessary compromise of two undisputed monetary obligations by payment of only one of those obligations.

On the basis of the above circumstances, we find that a reasonable person in the position of the recipient of Respondent's purported "proposal" could not have considered the terse and, at best, enigmatic statement accompanying the tender of the check on September 23, 1986, as a bona fide settlement offer. Respondent

thus has failed to show a "proposal" to which Civil Code Section 1584 could give legal effect.

Second, even if we could find a reasonable belief in the presence of a bona fide settlement offer in the letter accompanying the check of September 23, we would still be unable to find an operative "acceptance" of that purported offer. It is clear that the parties' conduct following receipt of purported consideration is relevant in determining whether in fact an acceptance of an alleged proposal has occurred. (See, e.g., Ten Winkel et al. v. Anglo California Securities Co. (1938) 11 Cal.2d 707, 723 [81 P.2d 958] [offerer's conduct after submission of offer and receipt of consideration by offeree defeats application of California Civil Code section 1584]; Wright v. County of Sonoma (1909) 156 Cal. 475, 478 [105 P. 409] [county's retention of consideration for purported offer not acceptance under relevant circumstances].) The totality of the circumstances present in this case demonstrates that the Board's agents never accepted Respondent's alleged settlement proposal.

On October 3, 1986, Regional Field Examiner Jose Carlos, acting for Regional Director Homer T. Ball, Jr., informed Respondent through Respondent's counsel that:

> [t]he principal payment on backpay for Cruz Molina in the above-captioned case was received on September 24, 1986. The above-captioned Board Order provides for interest on the backpay due. Attached you will find interest calculations [sic] forms which indicate interest due Cruz Molina. Please make a check payable to the Agricultural Labor Relations Board for the total amount of $1,593.25.

On November 7, 1986, Field Examiner Mauricio Nuno, again acting on behalf of Regional Director Homer T. Ball, Jr., informed Respondent through Respondent's counsel that:

> [wjith exception of the posting and reading, there remains the payment of the interest in the amount of $1,593.25 which by letter dated October 3, 1986, you were requested to submit the payment (copy attached). Please be advised that the interest payment is overdue and should be remitted without further delay. Should said payment not be received by November 21, 1986, I will assume Respondent does not intend to comply and at that time I will refer the matter to our legal department.

On November 26, 1986, Assistant General Counsel Eugene Cardenas informed Respondent through Respondent's counsel that:

> Respondent Venus Ranches has yet to comply with the payment of interest due. ...[T]he amount of interest due is $1,593.25. ...Please be advised that if voluntary payment of interest will not be forthcoming, then alternatives will be sought in order to receive the payment of interest.

This contemporaneous and consistent conduct by the Board's agents demonstrates with more than requisite clarity that no "acceptance" of Respondent's purported settlement proposal ever occurred.

Third, Respondent's theory violates black-letter contract law that tender of a sum constituting a pre-existing legal obligation does not furnish legally sufficient consideration to support an additional promise on the part of the offeree. As succinctly stated in Corpus Juris Secundum: "[t]he performance of, or promise to perform, an existing legal obligation is not a valid consideration." (17 C.J.S. Contracts § 110, p. 827; accord Calamari and Perillo, opn. cited, pp. 145, 150-53; Williston,

opn. cited, pp. 557, et seq.; Albino v. Starr (1980) 112 Cal.App.3d 158, 168 [169 Cal.Rptr. 136].)

Respondent was found liable under the Board's Order for payment of $2,209.13 in net backpay to Cruz Molina. It did not dispute this obligation, and in fact paid it on September 23, 1986. Since Respondent was already legally obligated to pay $2,209.13 to the Board, it would suffer no additional detriment simply by paying what it owed. The $2,209.13 payment, therefore, cannot serve as consideration for the Board's alleged promise to compromise the remaining interest obligation. Having failed to present adequate consideration for its purported settlement "proposal," Respondent has failed to bring itself within the provisions of California Civil Code section 1584 that require a legally sufficient proposal supported by similarly sufficient consideration.

We therefore find, as did the ALJ, that Respondent owes discriminatee Cruz Molina $1,593.25 in interest on its net backpay liability. We find further, however, that given the undue passage of time since the tender of the backpay portion of Respondent's total obligation, the payment of $1,593.25 would represent inadequate compliance with the Board's earlier order. We, therefore, find that, pursuant to our responsibility to provide such relief as will effectuate the policies of the ALRA, the Charging Party, Cruz Molina, is entitled to interest on the liquidated sum of $1,593.25 from October 3, 1986 when Respondent was informed of the

exact amount of its undisputed interest obligation.[5/6/]

The same policy interests that justify the addition of interest to outstanding backpay and contractual makewhole awards in the first instance also counsel utilization of this remedy. The obligation to pay the liquidated sum of $1,593.25 creates a creditor-debtor relationship between the Charging Party and Respondent. (See Florida Steel Corp. (1977) 231 NLRB 651 [96 LRRM 1070] citing Isis Plumbing & Heating Co. (1962) 138 NLRB 716 [51 LRRM 11223.) Delay in paying this obligation results in a "forced loan" by Charging Party to Respondent of the amount due, thus depriving Charging Party of the use of its funds until payment is made. (Ibid.) In addition to producing a more equitable result, the imposition of interest on this liquidated sum will serve to encourage more prompt compliance with Board orders without placing a significant additional burden on Respondent. (Ibid.)

We will therefore order Respondent to pay Charging Party Cruz Molina the sum of $1,593.25 plus interest from October 3,

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[5/] We note that the liquidated sum of $1,593.25 could also be considered the residual "principal" amount due under the Board's original order requiring backpay and interest in order for complete compliance to be obtained. We start the interest period on the liquidated amount from October 3, rather than from the September 23 tender of the backpay amount, as it is within our discretion to do so (see W. R, Grace & Co. (1980) 247 NLRB 698, 699 [104 LRRM 1181]), and will serve to foreclose a subsequent argument by Venus that it lacked notice of the amount of interest owing when it paid its net backpay liability on September 23.

[6/]Member Ramos Richardson does not believe that W. R. Grace supports the proposition that the Board had the discretion to stop

(fn. 6 cont. on p. 12)

1986, computed in accordance with current Board precedent.[7/]

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Venus Ranches, Inc., its officers, agents, successors, and assigns shall pay to Cruz Molina the sum of $1,593.25 plus interest thereon from October 3, 1986, computed from October 3, 1986 to April 26, 1988 in accordance with the formula established in Lu-Ette Farms, Inc. (1982) 8 ALR3 No. 55, and thereafter in accordance with that set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5. DATED: December 19, 1988

BEN DAVIDIAN, Chairman[8/]

JOHN P. MCCARTHY, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

(fn. 6 cont.)

the accrual of interest once a Board order requiring the payment of interest has been issued pursuant to Florida Steel.

[7/] As a matter which deserves some comment, we note that the record herein is replete with Respondent's disregard for and misuse of the Board's compliance processes. This conduct has had the unfortunate effect of delaying receipt of the entire amount to which this discriminatee's estate is legally entitled. We will seek to deter such reprehensible conduct in the future.

[8/] 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 Jim Ellis did not participate in this case.

CASE SUMMARY

Venus Ranches, Inc.
(Cruz Molina)

14 ALR3 No. 17
Case No. 79-CE-60-EC

ALJ Decision

In Venus Ranches, Inc. (8 ALRB No. 60) the Board found that Venus Ranches, Inc. (Respondent or Venus) had violated Labor Code section 1153(a) by discharging Charging Party Cruz Molina (Molina) for engaging in protected concerted activities. The Board ordered Venus to cease and desist from such conduct, and to offer Molina immediate reinstatement with interest on the backpay award in accordance with precedent. Venus did not answer the subsequent backpay specification as required by regulation, but prior to the Board's seeking a default judgment, sent a check to the regional office in the amount of the net backpay owed with a cover letter stating that amount was payment in full. Venus thereafter refused to pay the liquidated interest owing, claiming that the payment of the net backpay amount operated as a complete discharge of its obligations under the Board's order. The ALJ determined that Venus owed Molina's estate liquidated interest in the amount of $1,593.25. The ALJ found that neither the prerequisites of estoppel nor those of California Civil Code section 1526 (Accord and Satisfaction) were present. In its post-hearing brief Venus raised the provisions of Civil Code Section 1584 as binding the Board. California Civil Code section 1584 provides that "[p]erformance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal." The ALJ, finding Venus's argument based on Civil Code Section 1584 likewise unavailing, recommended that the Board order Venus to pay Molina's estate $1,593.25.

Board Decision

The Board upheld the rulings, findings, and conclusions of the ALJ as modified, and adopted his recommended order with modifications. Since in its exceptions to the Board Venus relied entirely on California Civil Code section 1584, the Board devoted its analysis to that section. The Board determined that a reasonable person in the position of the Board agent to whom Venus's counsel transmitted its purported settlement proposal would not have understood its contents to be a bona fide settlement offer. The Board's agents, moreover, had conveyed their rejection of the purported proposal by continuing to insist on the payment by Venus of the liquidated interest owing. The Board also determined that Venus's profferred consideration was insufficient. The Board imposed interest on the liquidated sum from the time the Board's agents informed Venus's counsel of the amount due.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: VENUS RANCHES, INC., Respondent, and CRUZ MOLINA, Charging Party.	Case No. 79-CE-60-EC (8 ALRB No. 60) DECISION PURSUANT TO ORDER REMANDING RECOMMENDED DECISION

After the issuance of my decision in this case, it came to my attention that Respondent had submitted a Post-Hearing Brief in this matter consisting of a letter addressed to Chief Administrative Law Judge Wolpman. Because the letter never found its way to me, I issued my decision without taking it into account. In view of this office's timely receipt of the letter, the Executive Secretary ordered my decision re-opened in order to give me an opportunity to consider the position expressed in the letter-brief. In the letter-brief, Respondent cites California Civil Code §1584 in support of its position that General Counsel's "acceptance" of its tender of the net backpay amount extinguished its backpay obligation.

Civil Code §1584 provides that "[p]erformance of the conditions offered with a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal." Respondent's argument follows:

> "When the check was negotiated and therefore accepted, the consideration for the proposal set forth in the

first paragraph of my letter constituted acceptance of the proposal. Once the proposal was accepted and the check negotiated, the Respondent has no further obligation to make any further payments to the discriminatee."

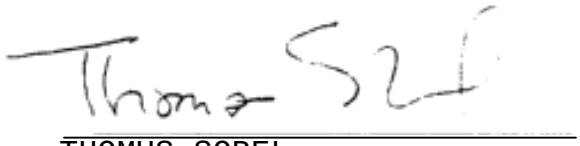
Section 1584 recognizes unilateral contracts. Davis v. Jacoby (1934) 1 Cal.2d 370. A check is a unilateral contract, insofar as it is a promise to pay the instrument "according to its tenor," so that, if dishonored, the check will support a cause of action in the amount stated on the instrument. Roff v. Crenshaw (1945) 69 Cal.2d 536,540.

But whether Respondent can be said to have agreed to pay at least the amount it tendered is not the issue in this case. The issue is whether General Counsel agreed to accept the tendered amount in full satisfaction of Respondent's backpay obligation. That Civil Code §1584 does not speak to this question is clear from consideration of related statutes. First, the Unform Commercial Code expressly provides that acceptance of a negotiable instrument does not "affect any liability in contract, tort or otherwise." Cal. UCC §3409(2) and esp. Official Comment §3. Since this section must be harmonized with Civil Code §1584, to the extent §1584 applies to the present case, Roff v. Crenshaw, supra, would appear to describe the limits of any contract that might have been created by General Counsel's "acceptance" of the check.[1/] Second, if the existence of UCC

[1/]I should point out here that there is a separate question concerning the nature of General Counsel's "acceptance" in this case. General Counsel asserts, and Respondent has presented no evidence to contradict his assertion, that General Counsel did not

§3410 does not alone imply a limitation on the nature of the contract created by §1584, it seems to me that Civil Code §1526 would, for in that section the legislature plainly set down the conditions under which "acceptance" of Respondent's check would operate to extinguish General Counsel's claim. Those conditions not being present, I affirm my previous ruling for the reasons earlier expressed.

DATED: July 20, 1988



THOMUS SOBEL
Administrative Law Judge

(Footnote 1 continued)

deposit Respondent's check until after Respondent was notified that General Counsel did not consider the amount tendered to be in full compliance. Joint Ex. 11. Since, under the UCC, the drawee's signature only became operative when the instrument was presented, UCC §3410(1), Respondent was presumably on notice that General Counsel's acceptance was conditional. Whether the provisions of Civil Code §1526 provide the only means for expressing conditional acceptance -- that is, by the drawee's striking out the notation -- is a question I do not have to reach in view of my earlier expressed conclusion that the conditions precedent for the operation of Civil Code §1526 do not apply. Similarly, I do not have to decide whether under §1526, the condition has to be expressed on the instrument presented for deposit, as opposed to being expressed on the tear-away portion of the instrument.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: VENUS RANCHES, INC., Respondent, and CRUZ MOLINA, Charging Party.	Case No. 79-CE-60-EC

Appearances:

David E. Smith, Esq. Palm Springs, California for the Respondent

Eugene Cardenas
El Centre, California
for the General Counsel

Before: Thomas Sobel
Administrative Law Judge

DECISION OF ADMINISTRATIVE LAW JUDGE

THOMAS SOBEL, Administrative Law Judge:

This case was heard by me in April, 1988 and it concerns General Counsel's attempts to obtain the interest on the backpay awarded to Cruz Molina in 8 ALRB No. 60. The dispute arose this way:

On August 31, 1982 the Board issued its Decision and Order in 8 ALRB No. 60 directing Respondent to take certain affirmative action (including the Board's conventional posting and mailing remedies), and to make whole discriminatee Cruz Molina for all losses of pay and other economic losses suffered as a result of his discharge, plus interest thereon to be computed in accordance with Board precedent. Respondent timely sought review of the Board's Decision in the Court of Appeal which affirmed the decision of the Board on December 8, 1983. Respondent failed to seek hearing in the Supreme Court.

On March 21, 1986, the Regional Director of the El Centre Region through Associate General Counsel Eugene Cardenas, advised Respondent's Counsel David Smith that Respondent was liable for backpay in the amount of $2,209.13 exclusive of (1) Molina's expenses in seeking interim employment and (2) whatever interest would be owing on the compensatory award. (Jt. 7) Apparently Respondent made no reply (at least none in writing exists) and on August 21, 1986, Regional Director Homer T. Ball issued a Notice of Hearing and Backpay Specification alleging, in conformity with the letter of March 21st, that Respondent owed net backpay in the

amount of $2,209.13 plus interest calculated in accordance with applicable Board precedent. (Jt. Ex. 8, Paragraphs 5, 8.) Respondent filed no response to the Specification.

Meanwhile, on July 17, 1986 General Counsel had filed an application for Order of Enforcement in connection with 8 ALRB No. 60, seeking "an order directing Respondent Venus Ranches, Inc....to comply with the Decision and Order of the Board in Case No. 8 ALRB No. 60." (Jt. 10) On September 3, 1986, the Superior Court issued its Judgment and Order of Enforcement, ordering Respondent, among other things, to immediately offer Molina reinstatement and to make him whole for all losses of pay and other economic losses plus interest on the compensatory award. (Jt. 9)

On the same day the Court issued this Order, Regional Director Ball advised Respondent that if no Answer to the Backpay Specification were filed shortly, he would move for a finding that the Allegations of the Backpay Specification were true (that is, he would seek default against Respondent. However, default was not sought; instead, on September 3, 1986, Smith sent General Counsel a check in the amount of $2209.13, the amount of net backpay alleged to be owing in the specification exclusive of interest. In the letter accompanying the check, Smith described this net amount as "full and complete payment":

> Enclosed is a check made payable to the Agricultural Labor Relations Board in the sum of $2,209.13 as full and complete payment of any and all sums due to the deceased discriminatee in this matter.

On October 3, 1986, Ball wrote to Smith acknowledging receipt of the $2,209.13, which he characterized as "the principal

payment on backpay due for Cruz Molina", and further stating:

> The Board Order provides for interest on the backpay due. Attached you will find interest calculations forms which indicate interest due Cruz Molina. Please make a check payable to the Agricultural Labor Relations Board for the total amount of $1,593.25. Please note that no deductions may be made on interest payments.

On November 7, 1986 Ball wrote to Respondent:

> In your letter dated September 23, 1986 addressed to Eugene Cardenas, you informed him that the employer will be at peak during March 1987, and that the reading and posting can be accomplished then.
>
> Please be advised that I have calendared to conduct the reading and posting on March 9, 1987 at 10:00 a.m. If you have any problems/conflicts with the above date and time, please contact me without delay. Additionally, for purposes of the posting period, I need to know the duration of the season, and for the reading, the number of employees the company anticipates to have on payroll.
>
> With exception of the posting and reading, there remains the payment of the interest in the amount of $1,593.25 which by letter dated October 3, 1986, you were requested to submit the payment (copy attached). Please be advised that the interest payment is overdue and should be remitted without further delay. Should said payment not be received by November 21, 1986, I will assume Respondent does not intend to comply and at that time I will refer the matter to our legal department.

Apparently, Cardenas spoke to Smith on November 25, 1986, because on November 26 he wrote:

> This is to confirm our telephone conversation of November 25, 1986, regarding the above-referenced case. I informed you that despite requests made by Regional Personnel, Respondent Venus Ranches has yet to comply with the payment of interest due. I informed you that the amount of interest due is $1,593.25.
>
> You responded that it was your understanding that the payment of $2,209.13 to the discriminatee was a complete payment of any and all sums due. I informed you that the Board Order in the above-referenced case provided for the payment of interest and that correspondence sent to you after the payment of the principal amount ($2,209.13) requested the payment of interest owed.

> Please see letter attached from Regional Field Examiner Jose Carlos which requested payment of interest owed and explained how interest was calculated.
>
> You informed me that you would get in touch with me by Wednesday, December 3, 1986, and inform me whether the interest payment would be paid or not.
>
> Please be advised that if voluntary payment of interest will not be forthcoming, then alternatives will be sought in order to receive payment of interest.

Apparently there was further discussion and correspondence between Smith and General Counsel Dave Stirling after Cardenas' November 26th letter. The record only contains the General Counsel's letter to Smith dated January 8, 1988 in which the General Counsel sums up the dispute which had emerged and is now at the center of this hearing:

> Following my letter to you of May 15, 1987, which noted that your client's failure to pay the amount of $1,593.25 in interest on the principal amount was in contempt of the court order of enforcement, you called me to state that there was a letter or document, of which a representative of this agency had been a party to, that supported your position that the sum your client paid constituted full and complete payment under the Board's Order. In my follow-up letter of June 23, 1987, *I* stated that it was doubtful that such a letter would support your position because no agency representative is authorized to modify a Board Order in such fashion.
>
> In your letter of June 26, 1987, you enclosed a copy of a letter you sent to the El Centro Regional Office which states that the check in the amount of $2,209.13 was "full and complete payment of any and all sums due to the deceased discriminatee in this matter." You stated in your June 26 letter that the above reflects "the understanding that was reached at the time of the tender."
>
> There are several flaws in your position. First, there was never any express understanding between our agency and your office that acceptance of the sum of $2,209.13 would constitute full and complete payment, thereby eliminating any obligation on the part of your client as to the interest owing. No agent of the ALRB did, or would having the authority to, enter into such an

agreement, and the ultimate authority in such matters, the Board, would never accept it. In essence, you are arguing that by accepting the check accompanied by the language of your letter (unilaterally submitted by you), this Agency is bound by the terms thereof notwithstanding the absence of an express agreement to do so and notwithstanding the language of the Board Order itself as enforced by the Superior Court. This position on its face is without merit.

Second, you should be advised that your client's check was not deposited by the ALRB until October 10, 1986, nor an agency check drawn on these funds until October 21, 1986. By your own admission, you were notified in a letter from the Region dated October 3, 1986, that the interest amount was still owing. Thus, while you were on notice of our position prior to our cashing the check and distributing the funds, it was not until November 25, 1986, that you raised your argument to the Region that the prior check constituted "complete" payment. Under such circumstances, I am confident that no court will give your position credence.

Nevertheless, Respondent continues to maintain it[1]

CONCLUSIONS OP LAW

1. The procedure in unfair labor practice cases established by this Board calls for a two stage adjudication process upon complaints brought by the General Counsel. The first stage is devoted to determination of the liability of a Respondent, That stage is represented in this case by the Board's Decision and Order in 8 ALRB No. 60, in which Respondent was found to have discriminated against Cruz Molina. Once that liability finding

[1]I should point out that Respondent has not submitted a Post-Hearing brief. In speaking of its contentions, therefore, I am referring to those expressed by way of its Answer, at the Pre-Hearing Conference and in the hearing itself.

became final, the Regional Director embarked upon the second stage of procedures, namely, determination of the amount, if any, that was required to make Molina whole.

In line with the next step of this bifurcated procedure, the Regional Director issued a backpay specification on August 21, 1986 alleging that Respondent owed backpay in the amount of $2,209.13 and further, that "the obligation of Respondent to make Molina whole would be discharged by paying the $2,209.13 plus interest calculated in accordance with [Board precedent.]" The Specification alleged no particular amount attributable to interest.

Under Board regulations, Respondent had five days to answer the specification; in the event of its failure to file an answer, the regulations provide that the Board may find the specification to be true. Cal. Code of Regulations, Title 8, section 20290(d). The backpay procedures thus contemplate issuance of a new Board order fixing the amount of backpay. Such an order is a new final order and, as such, is subject to the statutory procedures for both review and enforcement. Labor Code section 1160.8.

Although it is not entirely clear, I infer from the sequence of events briefly sketched above that the reason the Regional Director ceased to pursue the backpay procedures to their ordinary conclusion in a default against Respondent was Respondent's tender of the $2,209.13. It is also clear from all

the attendant circumstances, that General Counsel did not intend to accept the $2,209.13 in full satisfaction of the Specification.[2]

Respondent has argued that because the Board sought and obtained enforcement of the "make-whole provision" in Superior Court on 8 ALRB No. 60, Jt. 9 & 26, it lost jurisdiction to continue to prosecute the backpay proceedings by way of having a hearing on the Regional Director's specification.[3] While it is true that the Board did obtain an enforcement order which purports to enforce the makewhole provision, the fact is that, as I have outlined above, there has never been any final backpay order to enforce. The Petition for Enforcement could have been plead and the final Order of Enforcement drafted, to more accurately reflect the stage of the proceedings the parties were then at, but it seems to me that, the Board never having had an occasion to pass upon the amount of backpay owing to Respondent, it never "lost" jurisdiction of the question of the amount of backpay owing. This is the first occasion the Board has had to pass upon the amount of liability. The Board has jurisdiction.

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[2]Whether Respondent may rely upon Civil Code section 1526 to imply an acceptance is a separate question which I will shortly address; in this section, I am only trying to locate this case along the Board's well-known process in order to sort out Respondent's jurisdictional contention.

[3]General Counsel made an analogous argument in his letter of January 8, 1988 when he treated Respondent's refusal to pay interest as contempt of the Court order.

2.

Although, as I have noted, Respondent has not troubled to brief the issues it raised by Answer, at the hearing it appeared to be relying on two doctrines to resist the payment of interest: (1) estoppel and (2) accord and satisfaction. I will deal with each in turn.

a.

I do not believe estoppel applies since there is no showing that Respondent was induced by any conduct on the part of the Board to believe that it owed no interest. The Board's position, expressed throughout this proceeding, has always been that Respondent owes interest. 7 Witkin, Summary of Cal. Law (8th ed. 1974) §132. As a result, Respondent cannot show it acted in reliance upon anything the Board did. Finally, it can show no detriment. In re Lisa R. (1975) 13 C3d 636, 645.

b.

The final question is whether General Counsel's failure to note its protest of Respondent's claim of full payment on the draft itself may be said to imply an accord and satisfaction. Civil code section 1526 provides:

> Where a claim is disputed or unliquidated and a check or draft is tendered by the debtor in settlement thereof in full discharge of the claim, and the words "payment in full" or other words of similar meaning are noted on the check or draft, the acceptance of the draft does not constitute an accord or satisfaction if the creditor protests against accepting the tender in full payment by striking out or otherwise deleting that notation or if the acceptance of the check or draft was inadvertent or

without knowledge of the notation.[4]

I do not believe Respondent can rely on this section since, at the time of the tender, General Counsel's claim was neither disputed nor unliquidated.

It must not be forgotten that Respondent never filed an answer to the initial Specification; accordingly, it made no contest of either (1) the amount of the compensatory award ($2,209.13) sought by the Regional Director or (2) the Board's right to collect interest on that award. Accordingly, General Counsel was never on notice that there was any dispute at all and Respondent cannot create a dispute by the partial tender itself. Neither was the interest portion of this claim unliquidated merely because no numerical amount was stated since the interest was "capable of being made certain by calculation." Overholser & Elynn (1968) 267 Cal. App.2d 800, 810; Pizer v. Brown (1955) 133 Cal. App.2d 367, 374. Accordingly, the statutory preconditions for the operation of section 1526 do not exist.[5]

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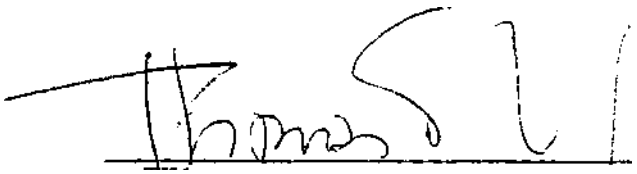
[4]I should point out that, although I have concluded that General Counsel did not intend to accept the $2,209.13 in satisfaction of the backpay claim, I find that General Counsel is chargeable with knowledge that Respondent intended the check to constitute full payment. Although no evidence was presented on how the check was processed, the accompanying letter put General Counsel on notice of Respondent's contention.

[5]Since Respondent has never identified any authority for its claims, I am only assuming that it is relying on section 1526 which specifically applies to tender and acceptance of checks. I should point out that, to the extent Respondent is not relying on section 1526 to imply an accord and satisfaction, but is contending there was some other sort of "accord" reached, it would have to show an agreement to accept less than was due (Civil Code section 1521: "An accord is an agreement to accept, in extinction

In the absence of any dispute as to the amount of interest owing, I hereby recommend that Respondent pay to Cruz Molina $1593.25.

DATED: June 14, 1988



THOMAS SOBEL
Administrative Law Judge

(Footnote 5 Continued)

of an obligation, something different from or less than that to which the person agreeing to accept is entitled.")