Fillmore, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

VENTURA COUNTY FRUIT GROWERS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 83-CE-109-OX, et al. 15 ALRB No. 18 (10 ALRB No. 45)

SUPPLEMENTAL DECISION

On October 24, 1984, the Agricultural Labor Relations Board (ALRB or Board) issued a Decision and Order in 10 ALRB No. 45, the underlying liability phase of this case, in which it concluded, inter alia, that Ventura County Fruit Growers, Inc. (Respondent) had violated Labor Code section 1153(e) and (a)[1/] by failing or refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW or Union). Pursuant to section 1160.3, the Board ordered Respondent to commence bargaining in good faith with its employees' exclusive bargaining representative and to remedy its past failure to bargain by compensating employees for the difference, if any, between actual wages and fringe benefits received and what they likely would have received in wages and fringe benefits had Respondent bargained in good faith to contract. (Ventura County Fruit Growers, Inc. (1984) 10 ALRB No. 45.)

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

On October 15, 1985, the California Court of Appeal for the Second District, Division Six, denied Respondent's Petition for Review of the Board's Decision and Order in 10 ALRB No. 45. On July 16, 1987, the Board's Regional Director (RD) for the Salinas Region, acting for the General Counsel in compliance matters, issued a proposed makewhole specification setting forth his computation of the amount of Respondent's monetary liability to its agricultural employees. As Respondent filed an answer in opposition to the proposed specification, the matter was set for an evidentiary hearing. On November 23, 1987, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Supplemental Decision. General Counsel and Respondent each timely filed exceptions to the ALJ's Supplemental Decision with briefs in support of their exceptions, as well as additional briefs in response to the other's exceptions. The UFW also filed a response to exceptions by the General Counsel and Respondent.

On December 30, 1987, one month after the ALJ rendered his Decision in the instant proceeding, the Board issued a Decision in another case in which it reviewed the Board's established method for measuring the bargaining makewhole remedy for an employer's failure or refusal to bargain in good faith. (O. P. Murphy Company, Inc. (Murphy) (1987) 13 ALRB No. 27.) Respondent herein filed a Motion to Reopen the Record in order to file a supplemental brief concerning the applicability of Murphy to the instant case. On February 22, 1988, the Board granted the motion and invited all parties to brief the question posed by Respondent. Both Respondent and General Counsel filed such briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings, and conclusions of the ALJ, but only to the extent consistent herewith.

Basis for Measuring Bargaining Makewhole Relief

Respondent is primarily a harvester and packer of citrus commodities for growers in the Ventura County area, as is the Limoneira Company and as was the L & 0 Growers Association.[2/] Both Limoneira and L & 0 entered into collective bargaining agreements with the UFW. Limoneira, unlike either L & 0 or Respondent, provides housing for its employees. The RD contends that Limoneira's housing, although above-standard and of considerable market value, was nevertheless made available to 80 percent of its employees at nominal cost, as reflected in the parties' collective bargaining agreement, and, as such, is an employee benefit. Thus, when preparing the initial makewhole specification, he was of the view that the Limoneira housing factor rendered that contract problematical as an appropriate comparison and that therefore the L & 0 contract alone should serve as the "model" contract for measuring Respondent's makewhole liability. On that basis, he estimated that Respondent owed its employees approximately $24,000, exclusive of interest.

In response to Respondent's position that only Limoneira provided an appropriate contractual comparison, the RD proposed that the Board could assess Respondent's liability on the basis of

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[2/]L & 0 Growers Association ceased operations in 1985

an averaging of the L & 0 and Limoneira contracts, but only after the value of the Limoneira housing is costed out and factored into the makewhole formula. On that basis, he estimated Respondent's makewhole obligation to its employees would amount to $119,000, exclusive of interest.

As a threshold matter at the hearing, the ALJ observed that since the initial submissions of the parties indicated a marked similarity in the operations of all three entities, General Counsel had an affirmative obligation to demonstrate, at the outset, why the housing factor should render Limoneira inappropriate. The ALJ found, and we agree, that failure to meet this test removed the issue of housing.[3/] Absent housing as a factor, he also found that were Limoneira utilized as the sole comparable contract, no makewhole would be owing. The ALJ then pointed out that the RD, when preparing the initial backpay specification in this matter, had three choices: (1) utilize only Limoneira, in which event no makewhole is owing; (2) utilize only L & 0, in which case there is makewhole; or (3) average L & 0 and Limoneira, in which case again no makewhole is apparently due. He then

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[3/] In contrast to Respondent, the Board does not view its decision in J. R. Norton (1984) 10 ALRB No. 42 as rendering all employee housing immune from consideration as an element of the basic wage or fringe benefit negotiations process when assessing a makewhole remedy. We do not read Norton so narrowly as to preclude such consideration in an appropriate case. Accordingly, we have examined the relevant testimony in that regard and conclude that, although a matter of discussion among the parties during the contract negotiations, employee housing did not influence the ultimate agreements concerning the wage rate schedules. The record reveals that relatively few unit employees resided in company housing and that those excluded, for whatever reason, from such housing did not receive a housing allowance or set-off in any other manner.

defined the pivotal question in this manner: since Respondent would owe makewhole under the L & 0 contract, but not under Limoneira, was the RD' s choice of L & O alone reasonable or did the RD in making that choice abuse his discretion? He found that it was not arbitrary for the RD to have assumed at the outset that, since the Board had determined that Respondent had violated the Act, Respondent owed its employees some amount of monetary compensation.[4/] He therefore concluded that the RD did not abuse his discretion in relying solely on the one contract under which makewhole would be owing.[5/]

Respondent asserts that since the ALJ found both L & O's

[4/] Although, given the rationale of our decision herein, we have no need to pass directly on the correctness of the ALJ's analysis purporting to establish the reasonableness of the RD's selection of only the L & 0 contract as the comparable contract, we do not adopt any implication in that analysis that the ruling of the Third District Court of Appeal in William Dal Porto & Sons, Inc. v. ALRB (1987) 191 Cal.App.3d 1195 [237 Cal.Rptr. 206] independently justifies that selection. The Dal Porto court's creation of a rebuttable presumption of contract formation calling for higher wages is intended to operate on the question of the propriety, not the amount, of the makewhole remedy. In a compliance hearing such as this, an employer in Respondent's posture must make whatever showing it can that even if makewhole could properly be imposed, nevertheless for economic reasons, no makewhole is owing. If damages are "presumed" at the compliance stage because of a respondent's prior illegal conduct, this becomes an impossible showing.

[5/]It was generally on the basis of an alleged abuse of discretion by the RD that Respondent moved the ALJ to grant attorney fees and costs against the General Counsel. The ALJ found that the Board's decision in Neumann Seed (1982) 7 ALRB No. 23 precluded such an award. Respondent renewed the request in its exceptions brief which was filed prior to a decision by the California Supreme Court in Sam Andrews' Sons v. Agricultural Labor Relations Board (1988) 47 Cal.3d 157 holding that attorney costs and fees are not recoverable under the Agricultural Labor Relations Act. Thus, under either Neumann Seed or Sam Andrews' Sons, the ALJ's ruling must be affirmed.

and Limoneira's operations to be comparable to that of Respondent's, the Board's decision in Murphy mandates that we now average the two contracts. General Counsel, on the other hand, argues that Murphy merely restates established Board precedent and affirms earlier findings of the Board that, in certain circumstances, reliance on a single contract is appropriate. Murphy does in fact lend support to both positions. Murphy also makes clear that even should the Board find the RD's makewhole specification both reasonable and consistent with Board standards, that specification may be rejected should the Board also determine that the employer has "present[ed] some other method of determining the makewhole amount which is more appropriate." (0. P. Murphy Co., Inc. (1987) 13 ALRB No. 27, at p. 10, quoting from Kyutoku Nursery, Inc. (1982) 8 ALRB No. 73.)[6/]

[6/]In Murphy, the Board engaged in an historical review of the principles governing the means by which makewhole should be measured. At page 11, the Decision states:

> Rarely has the Board deviated from the concept of averaging multiple "comparable contracts" for determining the average general labor hourly wage. There are, however, two notable exceptions to the general rule first enunciated in Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24 ... In Holtville Farms, Inc. (1984) 10 ALRB No. 13 ... the Board approved of the General Counsel's reliance on only one contract (i.e., Sun Harvest) for the general labor base rate because Holtville operated in the same general area as Sun Harvest, raised the same crops, drew from the same labor pool, and in, particular, had twice raised wages to meet the Sun Harvest contract rate. Similarly, in Kyutoku [Kyutoku Nursery, Inc. (1982) 8 ALRB No. 73], the Board affirmed General Counsel's reliance on a single contract for the basic measurement but on the grounds that the nature of the nursery business is unique and there were no other industry guidelines. (Emphasis in original).

The Board has always contemplated that "comparability" for purposes of measuring makewhole would be founded on a similarity of operations with regard to such factors as crops, locale, nature of the industry, methods of operation, and work force. (See, e.g., Adam Dairy, supra; Kyutoku Nursery, supra; J. R. Norton, supra.) Indeed, as the ALJ in this case correctly observed: "The criteria the Board generally uses to determine whether a contract is comparable has nothing to do with what wages and benefits are contained within it. Rather the Board looks to see whether the units [operations] are similar; if they are, the contract (with whatever its wages and benefits happen to be) is then applied to the makewhole employer." (ALJD at p. 4, fn. 2.) Accordingly, we believe that where, as here, two or more similar operations are under contract, an averaging of their respective contracts presents a more appropriate basis by which to measure monetary liability for a failure to bargain.

Thus, in conformity with the Board's established practice, as reiterated in Murphy, and cognizant of the principle that the Board looks to a similarity of operations when selecting the basis of a makewhole measurement, we find that Respondent's monetary liability for the general hourly wage rate is properly determined by an averaging of the corresponding L & 0 and Limoneira contractual rates, and that the fringe benefits package will be assessed in accordance with J. R. Norton Company, Inc. (1984) 10 ALRB No. 42. Accordingly, we remand this proceeding to the RD for the purpose of averaging the L & 0 and Limoneira

contracts in accordance with our Decision herein,

Dated: November 22, 1989

GREGORY GONOT, Acting Chairman[7/]

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[7/]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. The Board currently has one vacancy.

CASE SUMMARY

Ventura County Fruit Growers, Inc. (UFW)

15 ALRB No. 18
Case Nos. 83-CE-109-OX, et al.

Background

In Ventura County Fruit Growers, Inc. (1984) 10 ALRB No. 45, the Board found that the Employer (Ventura or Respondent) had failed to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW or Union), its employees' certified bargaining representative and concluded that makewhole was an appropriate remedy for Respondent's violation of the Agricultural Labor Relations Act (ALRA or Act). Accordingly, Respondent was ordered to pay its employees the difference, if any, between what they had been earning and what they likely would have earned had Respondent entered into a collective bargaining agreement with the Union.

After a California Court of Appeal denied Respondent's Request for Review of 10 ALRB No. 45, the Regional Director (RD), acting for the General Counsel in compliance matters, prepared a makewhole specification setting forth his assessment of the amount of pay Respondent owed its employees. As a general rule, the makewhole obligation for the general hourly wage rate is measured according to the average of such rates in contracts derived from comparable operations. Although the RD acknowledged at the outset that there were at least two farming operations comparable to that of Respondent's, and that each of them had a contract with the Union, he rejected one of the contracts on the grounds that it had an employee housing component which allegedly influenced final contract proposals whereas Respondent herein did not provide such housing. As Respondent filed an answer in opposition to the RD's reliance on a single contract, the matter was set for an evidentiary hearing.

ALJ's Decision

At the outset of the hearing, the RD agreed that the contract which he had previously rejected might be included in the averaging formula but only after the housing was costed out and factored into the general hourly wage rate. The ALJ found that: (1) under the RD's single-contract formulation, Respondent owed $24,000 in makewhole wages and fringe benefits; (2) under the rejected contract alone, no makewhole was due unless housing was added in accordance with the RD's computations in which event Respondent would owe $119,000; and (3) were the two contracts averaged, without any allowance for housing, no makewhole would be due.

Given the critical importance that the housing element appeared to have, the ALJ ruled that General Counsel had an initial and affirmative obligation to prove that the general wage rate in the excluded contract included an offset for housing. He ultimately found that while the requisite level of proof with regard to the

housing issue had not been met by General Counsel, the RD's reliance on a single contract, under the circumstances of this case, did not constitute an abuse of discretion and therefore his specification should stand.

Board Decision

Immediately after the ALJ issued his decision, the Board decided another case in which it emphasized that, wherever possible, makewhole should be measured by averaging multiple contacts. (0. P. Murphy Company (1987) 13 ALRB No. 27). The Board granted Respondent's motion to reopen the record in light of Murphy, supra, and ultimately held that under Murphy, the averaging of two or more contracts, where available, produced a more appropriate result. Thus, the Board remanded the matter to the RD for a new makewhole specification, if necessary, in accordance with Murphy.

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

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STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: VENTURA COUNTY FRUIT GROWERS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 83-CE-109-OX, et al, (10 ALRB No. 45)

Appearances:

Cliff R. Meneken
Salinas, California for
the General Counsel

William S. Marrs Marrs
and Robbins Valencia,
California for the
Respondent

Karl Lawson Oxnard,
California for the
Charging Party

Before: Thomas Sobel
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS SOBEL, Administrative Law Judge:

This case was heard by me on July 29 and 30, 1987 in Oxnard, California. On July 16, 1987, the Regional Director issued a Makewhole Specification alleging that Respondent owed its employees approximately $24,000 for the loss of pay suffered by them when Respondent unlawfully refused to bargain with the United Farm Workers of America, AFL-CIO (UFW or Union). General Counsel based his contention as to the lost earnings by comparing Respondent's wage/benefit package to the wage/benefit package contained in the union's contract with L & 0 Growers Association during the makewhole period.

Respondent filed an answer contending that the union's contract with the Limoneira Company was comparable and that its employees suffered no loss of pay when their wages and benefits were compared to those of Limoneira's employees during the applicable period. Further contending that the General Counsel's actions in this case were in "bad faith," "frivolous," "arbitrary," "capricious," "malicious" and "punitive," Respondent asked for attorneys fees and costs against General Counsel.[1]

The Regional Director initially took the position that Limoneira could not be considered comparable because:

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[1]I struck this request on the grounds that the board has determined it has no power to make such an award against the General Counsel. Neumann Seed (1982) 7 ALRB No. 23.

> its wage benefit package was based on company housing, which was provided to 80% of the work force. This housing was of considerable value yet was given to workers at nominal cost. This benefit to the workers was negotiated between the UFW and Limoneira and was reflected in the parties Collective Bargaining Agreements. Accordingly, based on the above factors, for purpose of makewhole contract comparability, the Limoneira CBA was not included in the [specification.] GCX IE Amended Makewhole Specification, paragraph 5

Despite the Regional Director's taking this position in the specification, General Counsel took the position at the Pre-Hearing Conference that Limoneira could be considered comparable but only if company housing were assigned a monetary value as a benefit and Limoneira's wage/benefit package increased accordingly. It is this so-called "alternate" theory which was principally at issue at hearing. Under the "alternate" theory, makewhole is owing under the Limoneira contract.

Before addressing the parties' substantive contentions about treating company housing as a benefit, I will briefly outline the procedural difficulties to which General Counsel's "alternate" theory gave rise. Prior to the commencement of the hearing Respondent moved to prevent General Counsel from putting on any evidence relating to his "alternate" theory on the grounds that General Counsel should be bound by his pleadings. General Counsel opposed the motion, contending that his "alternate" theory was essentially in the nature of rebuttal. General Counsel's characterization of his "alternate" theory as rebuttal made sense; he was not primarily contending for it and it was relevant to qualify what Respondent had assumed the burden of establishing. I denied Respondent's motion.

Upon completion of General Counsel's case-in-chief I ordered General Counsel to present evidence on his "alternate" theory before Respondent put on its case. It seemed to me after hearing General Counsel's case that, with three units as similar as the stipulations and testimony had by now shown Respondent, L & 0 and Limoneira to be, General Counsel did had an affirmative obligation to show why he contended that unless housing were considered a benefit Limoneira was not comparable. Now that all the testimony and arguments are in, it is clear that at bottom General Counsel has not even attempted to prove that the Limoneira contract is not comparable as the Board ordinarily defines "comparability". The real dispute between General Counsel and Respondent concerning use of the Limoneira contract is over whether to evaluate housing as part of Limoneira's economic package.[2] Since I decide that question against General Counsel, the remaining issue is: given two "comparable" contracts under one of which makewhole is owing, and under the other not, does the Regional Director abuse his discretion in choosing the one under which makewhole is owing?

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[2]To make this clear, the criteria the Board generally uses to determine whether a contract is comparable has nothing to do with what wages and benefits are contained within it. Rather the Board looks to see whether the units are similar; if they are the contract (with whatever its wages and benefits happen to be) is then applied to the makewhole employer.

FACTS

Ventura County Fruit Growers (VCFG) harvests and packs citrus (primarily oranges and some grapefruit, but no lemons) in Ventura County. Its harvest employees work in crews of approximately 30 so that at peak of season when three crews are employed its work force ranges between 80 and 90 employees. VCFG's harvest employees are paid on piece rate with wages varying depending upon how much each picks.

L & 0 harvests citrus in the Ventura County area. Its peak work force ranges between 80-100 employees. Like VCFG, L & 0 primarily harvests oranges, but also harvests a considerable quantity of lemons. Its employees work on piece rate, but the contract specifies that the rate is to be determined by a number of factors, such as the quality and production of the trees. Unlike VCFG, L & 0 picks no grapefruit and it does not have a packing house.

Limoneira, also located in Ventura County, harvests and packs primarily lemons and oranges, but also avocados and some grapefruit. Since 1920 it has provided rental housing for its employees. The housing consists of a couple of different styles of bungalows and trailers. Alfonso Guillen, who represented Limoneira during contract talks with the union, took the position that the union's proposal on wages should be lower because the employees already had a substantial economic benefit in the housing supplied by the company. According to Karl Lawson, the

Union's assistant negotiator, Guillen maintained that the housing was worth at least $300.00 "above" the employees' wages. Guillen testified the union essentially replied that housing had nothing to do with economics.

Jose Rodriguez and Humberto Guzman, members of the negotiating committee, corroborated Guillen's testimony that the union refused to come down on wages because of the company housing, contending that housing was not a part of negotiations since the workers already had it. Karl Lawson testified the Union told Guillen it couldn't reduce its wage proposal because it had gotten the same wage rates at other employers and it was seeking "similar" wages from Limoneira. Lawson also testified that the Union used the company housing to persuade the negotiating committee to accept the wage package to which the parties eventually agreed. Neither of the employees who testified mentioned any trade-off between housing and wages. There is no question that Limoneira's economic package (irrespective of housing) is lower than that of L & 0 since no makewhole is owing under it.

The Limoneira contract does refer to housing. Article 28 provides that employee housing shall be made available first to employees already waiting for it according to their order on the "housing list" and, upon exhaustion of that list, according to seniority. Limoneira also agreed to charge only the actual cost of providing and maintaining the housing and utility service and

to continue to operate its company store where it provided merchandise at cost. It also agreed to maintain its bus service to and from the store. There was no wage differential between those employees who received company housing and those who did not.

ANALYSIS

There is little question that according to the sort of gross criteria to which the Board has typically resorted, both L & 0 and Limoneira could be considered comparable: both operated in the same geographic area; both harvested citrus; both contracts existed during the makewhole period.[3] As noted previously, General Counsel initially contends that under these circumstances he has met his burden of proof. Respondent replies that since either contract could be considered comparable, General Counsel's selection of L & 0 as comparable is perforce arbitrary and punitive since the only reason for choosing L & O is that

[3]Respondent properly points out that only the Limoneira contract existed throughout the "entire" makewhole period. I can't make much of this since the Board does not require that contracts be in effect throughout the entire makewhole period. J. R. Norton (1984) 10 ALRB No. 42, p. 11, rev'd on other grounds unpubl'd opinion E001505, Fourth District, Div. I. Moreover, since General Counsel is only seeking makewhole under the L & 0 contract during that part of the period in which L & 0 operated under the contract, if "makewhole period" is taken to mean the period during which makewhole "accrues," the L & O contract can be said to have existed throughout the "entire" makewhole period.

makewhole is owed under it.[4] Respondent also independently argues that if we narrow our focus to take into account certain other characteristics, Limoneira will be seen as even more "comparable" to VCFG than L & 0 is. To all of this, General Counsel responds that Limoneira can only be considered comparable if the cost of company-provided housing is considered a benefit.

I shall take this last argument first.

In J. R. Norton, (supra) the Board held that a employer was not entitled to a deduction[5] for the value of company-provided housing:

> There are also certain types of fringe benefits which are difficult to evaluate in monetary terms, and which, more importantly, are provided to employees as a necessary part of their employment, to benefit the employer as much as the employee. These benefits are not given to employees as regular compensation for their labor, but are necessary to attract workers or as gifts intended to boost-morale or reward loyalty to the employer. Such benefits include, but are not limited to, tools, protective clothing, housing such as labor camps, transportation to the work site, awards, etc. The value of such benefits shall not be deducted from an employee's makewhole award, since the benefit does not flow only to the employee, but also to the employer. We affirm the ALJ's finding that housing, awards dinners

[4]In support of this point, Respondent relies on General Counsel's previous use of the Limoneira contract to measure makewhole in another citrus case, F & P Grower's Association (1984) 10 ALRB No. 28 which was the subject of a bilateral settlement approved by the Board. General Counsel conceded at hearing that the Limoneira contract had been used as a comparable contract in the F & P case.

[5]Although the question whether an employer is entitled to a credit for housing is technically distinct from the question whether housing should appear as a benefit (that is, on the other side of the ledger,) the standard the Board used to determine the "credit" question is equally applicable to the "benefit" question.

> and bus transportation Respondent made available to employees shall not be deducted from the makewhole award as voluntary fringe benefits paid to an employee.
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> 10 ALRB No. 42, p. 22

Respondent contends that the Board has thus held, as a matter of law, that housing cannot be considered a benefit. General Counsel contends that Norton announces no such rule, but that housing was excluded as a benefit in that case only because (1) of difficulties inherent in assigning it a value (which General Counsel proposes he was overcome in this case) and (2) the type of housing provided by the particular respondent in that case was significantly different from that provided by Limoneira. Although it is true that the ALJ in Norton described the housing as "barracks-type," 10 ALRB No. 42, ALJD at 15, I do not read the Board's opinion as turning upon the type of housing Norton made available to its employees. I do not think Norton could be distinguished on this basis.

General Counsel is correct that the Board rejected housing as a benefit partly because of difficulties in computing the cost of housing. Since I am not persuaded this was the primary reason for the Board's decision, I do not believe I can include housing as a benefit merely because General Counsel has proposed a means of evaluating it. To me, the primary reason the Board refused to consider housing as a benefit was its view that "housing" was not a part of "regular compensation." General Counsel proposes to eliminate this difficulty by proving that in the Limoneira contract the parties intended housing to be a part

of regular compensation. Although I am not sure the Board intended to treat the housing-as-benefit-question as a question of fact, the decision is ambiguous enough to warrant considering whether General Counsel has proven that Limoneira and the Union intended housing to be a component of "regular compensation."

General Counsel's case for treating housing as a part of compensation consists of the testimony of Guillen that Limoneira sought a break on wages because the company provided housing; the testimony of Lawson that the union reduced its wage demands "after the company made its comments about housing" (II: 197-98); and finally, that Union representatives then "sold" these reduced demands to the negotiating committee on the grounds that Limoneira had provided housing.

Even though the technical rules of contract creation and interpretation may not bind this Board in construing the parties' agreement, NLRB v. Donkin's Inn, Inc. (9th Cir. 1976) 532 F2d 138, 141, General Counsel has not demonstrated that the contract reflects agreement that housing was a part of regular compensation. Although Guillen did testify the company sought to treat housing as a component of compensation, he also testified (and union witnesses admitted) that the union rejected his position. I don't see how it can now be argued, based upon an intention never manifested to Limoneira, that the contract embodies agreement that housing is an element of compensation. Since aside from this contention General Counsel has presented no

evidence that Limoneira cannot be considered a comparable, I must conclude that Limoneira is at least as comparable to Respondent as L & 0 is. I next consider General Counsel's argument that he only needs to show his selection of L & 0 was reasonable in order to prevail, and Respondent's arguments that selection of L & 0 is unreasonable because "arbitrary" and, moreover, that it has shown Limoneira to be even more comparable than L & 0. These positions reflect the Board's description of the parties respective burdens of proof in makewhole cases of which the following statement from Martori Bros. (1985) 11 ALRB No. 26, pp 10-11, is representative.

> In makewhole cases, where the General Counsel has established at hearing that the makewhole amounts were calculated in a manner that is reasonable and conforms to the standards set forth in our decisions, the Board will adopt the General Counsel's formula and computations. The Board may reject or modify the General Counsel's formula and/or computation where a respondent or charging party can demonstrate that the General Counsel's method of calculating makewhole is arbitrary, unreasonable or inconsistent with Board precedent, or that some other method of determining the makewhole amount is more appropriate. [Citations] The Board does not require a detailed showing of comparability. To establish a reasonable formula, it is generally sufficient for General Counsel to present contracts negotiated by the same union covering operations in at least some of the same commodities and location[s] as those of the respondent, and in effect during the makewhole period.
>
> Martori Brothers (1985) 11 ALRB No. 26, pp. 10-11

Under this standard, unless Respondent can show that General Counsel's choice of a contract is unreasonable, it does appear to have to show that its method of determining makewhole is

"more" appropriate than that of General Counsel. Respondent attacks the choice of L & 0 in both ways. First, it argues that Limoneira is "more" comparable because both Limoneira and Respondent had a packing house; because every crop harvested and packed by Respondent was harvested and packed by Limoneira; because both were commercial for-profit corporations, because both devoted approximately the same number of hours in 1983 to the orange harvest; and, finally, because both operated throughout the entire makewhole period.[6] These factors do not persuade me that Limoneira is "more" comparable than L & 0 is.

First, since Respondent's packing shed employees are not included in the makewhole specification, I presume they are not part of the unit, and since Limoneira's packing shed employees are not covered by the contract I conclude they are not part of the unit. I fail to see how the fact that both companies operate packing sheds that are not part of the unit bears upon the question of the relative comparability of the three units. Second, although it may be that the fact that both Respondent and Limoneira are for profit corporations has consequences for their bargaining positions, on this record Respondent did not show what they might have been. Third, I cannot see that there is anything in the number of hours spent picking oranges that makes it more

[6]Since I have already considered the matter of "timing" I will not further consider it here.

likely that Respondent would have signed a contract containing Limoneira as opposed to L & 0 wages. Once again, it may be that the structure of wages in a given unit bears some relationship to the amount of hours devoted to picking a given crop, but absent evidence about the nature of that relationship, this level of detail simply does not help me determine that one unit is "more[1] comparable than another.

It remains to consider Respondent's argument that General Counsel simply revealed his arbitrariness when, given two comparable contracts, he has chosen the one under which makewhole is owed.[7]

Both contracts being equally "comparable" and thus of equal weight, General Counsel had three choices: to choose L & 0 alone which leads to makewhole, to choose Limoneira alone which leads to no makewhole, or to average the two which also leads to no makewhole. The two latter choices being equal, practically speaking General Counsel had to conclude that Respondent owed some makewhole or that it owed none. If it be arbitrary in such circumstances to conclude that Respondent owes some makewhole, it

[7]Respondent claims that General Counsel's previous use of the Limoneira contract to settle a makewhole case proves that the only reason L & 0 was selected in this case was that makewhole is owed under it. Since I have concluded that both Limoneira and L & 0 are equally "comparable", Respondent's argument about General Counsel's use of Limoneira in a previous makewhole case does not add much force to the argument that General Counsel's use of L & 0 in this case is an abuse of discretion.

must be equally arbitrary to conclude that it owes none. Both choices being equally reasonable, I don't think Respondent has proven that the Regional Director abuses his discretion when he chooses the "formula" under which Respondent owes some makewhole. For his part, General Counsel has argued that so long as his choice is reasonable", I must accept it. Martori certainly says this; but independent of the Martori standard, the recent case of William Pal Porto & Sons, Inc. v. Agricultural Labor Relations Bd. (1987) 191 Cal.App.3d 1195 also supports use of the L & 0 contract in this case. In Dal Porto the court decided that in "bad faith" refusal to bargain cases, the Board had to provide an employer the opportunity to prove that it would not have entered into a contract for higher pay even if it had not unlawfully refused to bargain. The court distinguished such cases from those in which an employer never bargained at all;[8] in such circumstances, the Dal Porto court noted that "it would doubtless be impossible to tell whether the parties would have reached agreement had they bargained." Ibid, at 1209. In the absence of bargaining, than the Dal Porto court indicates that the Board may presume an agreement calling for higher pay would have been

[8]In drawing this distinction, the Dal Porto court was speaking of technical refusals to bargain. However, the notion which underlies the Dal Porto court's distinction, is that an outright "refusal" to bargain prevents any exchange of proposals and renders it impossible to prove that Respondent wouldn't have entered into a contract in the absence of its unlawful act. Thus "damages" may be presumed.

concluded. It is this presumption that justifies General Counsel's choice of L & 0 for, once the fact of damages is presumed "the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Bigelow v. RKO Radio Pictures, Inc. (1946) 327 U.S. 251, 265. California law is similar:

> It appears to be the general rule that, while a plaintiff must show with certainty that he suffered substantial damages by reason of the wrongful acts of defendant, once this precise amount is relatively unimportant.
>
> In cases where substantial damage is shown where the amount is entirely uncertain or extremely difficult of ascertainment the sum to be awarded is a question of fact for the jury in the exercise of its sound discretion. The fact that the full extent of the damages must be a matter even of speculation is not ground for refusing all damages.
>
> Monroe v. Owens (1946) 76 Cal.App.2d 23, 31

There being no dispute about the amount of makewhole owing under the L & 0 formula, I recommend General Counsel's Appendix A be adopted.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Ventura County Fruit Growers, its officers, agents, successors and assigns, pay to the employees listed below, who worked for Respondent during which time Respondent refused to bargain in violation of Labor Code section 1153(d) and (a), the amounts set forth beside their respective names, plus interest thereon in accordance with the Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

EMPLOYEE	HOURS	PRELIMINARY MAKEWHOLE	VACATION BENEFIT	MAKEWHOLE
				80.94
Aplinar Alvarez	426	80.94		33.44
Ruben V. Alvarez	176	33.44		33.44
Liborio Amaya	46	8.74		8.74
Jaun T. Ambriz	160	30.40		30.40
Salvador F. Andrade	224	42.56		42.56
Antonio Arrendondo	14	2.66		2.66
Arvenio Avila	16	3.04		3.04
Braulio C. Avila	427	81.13		81.13
Israel Bahena	223	42.37		42.37
Abel C. Barajas	448	85.12		85.12
Jose C. Barajas	273	51.87		51.87
Jose M. Barajas	238	45.22		45.22
Luis Bautista	6	1.14		1.14
Hector S. Becerra	134	25.46		25.46
David Robago Bravo	124	23.56		23.56
Gaudalupe T. Cagues	94	17.86		17.86
Gustavo M. Cardenas	612	116.28		116.28
Juvenal M. Cardenas	571	108.49		108.49
Rafeal m. Carranza	401	76.19		76.19
Rafeel E. Carrillo	203	38.57		38.57
Alberto G. Casrez	6	1.14		1.14
Michael P. Celaya	104	19.76		19.76
Francisco Cerillo	36	6.84		6.84
Aurelio Cervantes	22	4.18		4.18
Paschual Cervantes	39	7.41		7.41
Jaun S. Chavez	10	1.90		1.90
Francisco M. Cisneros	385	73.15		73.15
Antonio L. Cordova	15	2.85		2.85
Antonio L. Corona	345	65.55		65.55
Audel M. Corona	751	142.69	209.68	352.37
Benigno M. Corona	385	73.15		73.15
Dimas L. Corona	466	88.54		88.54
Francisco R. Cortez	264	50.16		50.16
Juventino Cortez	73	13.87		13.87
Fidel Cruz	14	2.66		2.66
Augustin Diaz	10	1.90		1.90
Constantino Dominguez	17	3.23		3.23
Pedro Fausto	86	16.34		16.34
Pedro Figueroa	50	9.50		9.50
Angel Flores	46	8.74		8.74
Jose Gallegos	131	24.89		24.89
Salvador Gallegos	111	24.09		21.09
Augustin Galvez	46	8.74		8.74
Aljandro Garcia	450	85.50		85.50
Augustine Garcia	80	15.20		15.20
Elias M. Garcia	823	156.36	229.79	386.16
Pedro Garcia	14	2.66		2.66
Efren C. Garibay	214	40.66		40.66
Javentino Garza	786	149.34	219.46	368.80

EMPLOYEE	HOURS	PRELIMINARY MAKEWHOLE	VACATION BENEFIT	MAKEWHOLE
Jaun Gomez	14	2.66		2.66
Santosh A. Gomez	193	36.67		36.67
Isirdo Gonsalez	36	6.84		6.84
Jaun Gonsalez	36	6.84		6.84
Luis Gonsalez	46	8.74		8.74
Angel Guevara	50	9.50		9.50
Santosh Guevara	51	9.69		9.69
Roberto Gusman	44	8.36		8.36
Albertp G. Gutierrez	345	65.55		65.55
John c. Heredia	30	5.70		5.70
Octavio B. Hernandez	639	121.41		121.41
Arturo R. Ibarra	530	100.70		100.70
lazaro Salazar	16	3.04		3.04
Rafeal R. Lara	132	25.08		25.08
Antonio Q. Lemus	669	127.11		127.11
Apolinar M. Lemus	420	79.80		79.80
Enrique C. Lemus	358	68.02		68.02
Filemon L. Lemus	182	34.58		34.58
Francisco M. Lemus	509	96.71		96.71
Guadalupe S. Lemus	362	68.78		68.78
Jaun Lemus	828	157.32	231.18	388.50
Juvenal M. Lemus	519	98.61		98.61
Moises L. Lemus	110	20.90		20.90
Ramon A. Lemus	890	169.10	248.49	417.59
Raul M. Lemus	780	148.20	217.78	365.98
Ventura J. Lemus	788	149.72	220.01	369.73
Jaime C. Lopez	738	140.22	206.05	346.27
Reveriano Lopez	12	2.28		2.28
Antonio C. Magana	518	98.42		98.42
Gabreil C. Magana	879	167.01	245.42	412.43
Jose C. Magana	286	54.34		54.34
Rafeal C. Magana	205	38.95		38.95
Jose D. Mariscal	359	68.21		68.21
Jose D. Mariscal	315	59.85		59.85
Eutimio P. Martinez	131	24.89		24.89
Miguel A. Martinez	894	169.86	249.61	419.47
Jerman C. Martinez	650	123.50		123.50
Jose c. Martinez	261	49.59		49.59
Jaun C. Martinez	323	61.37		61.37
Natividad Martinez	479	91.01		91.01
Ruben L. Martinez	727	138.13	202.98	341.11
Salud L. Martinez	511	97.09		97.09
Vicente t. Martinez	901	171.19	251.56	422.75
Martune r. Mercado	7661	144.59	212.48	357.07
Ruperto A. Monson	67	12.73		12.73
Luis P. Mora	602	114.38		114.38
Lupe V. Morales	15	2.85		2.85
Antonio G. Moralez	191	36.29		36.29
Inacio C. Murillo	526	99.94		99.94

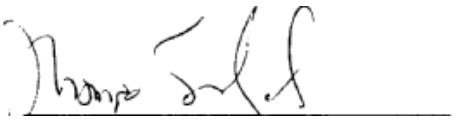
EMPLOYEE	HOURS	PRELIMINARY MAKEWHOLE	VACATION BENEFIT	MAKEWHOLE
Nicanor V. Ochoa	840	159.60		394.13
Raymond Ojeda	521	98.99		98.99
Samuel Ortega	61	11.59		11.59
Raul Bermudez	302	57.38		57.38
Isabel Pacheco	61	11.59		11.59
Pedro A. Paniagua	335	63.65		63.65
Luis Pena	83	15.77		15.77
Miguel G. Perez	80	15.20		15.20
Angel Z. Politron	176	33.44		33.44
Josefina Z. Politron	511	97.09		97.09
Rosalio V. Politron	527	100.13		100.13
Gregprio R. Ramos	212	40.28		40.28
Jesus Ramirez	14	2.66		2.66
Sylvestor Ramos	204	38.76		38.76
Vicente Rangel	169	32.11		32.11
Bonfacio Reyna	10	1.90		1.90
Rosalie Reyna	41	7.79		7.79
Esteban Rocha	46	8.74		8.74
Rogelio M. Rodriguez	31	5.89		5.89
Lorenzo Castro	174	33.06		33.06
David M. Salas	338	64.22		64.22
Auturo S.Sanchez	839	159.41	234.25	393.66
Everardo Sanchez	6	1.14		1.14
Guadalupe Sanchez	511	97.09		97.09
Arturo Sandoval	293	55.67		55.67
Antinio Santiago	14	2.66		2.66
Jaime Sandoval	16	3.04		3.04
Mario Serrano	63	11.97		11.97
Crisostomo B. Silva	275	52.25		52.25
Daniel Barajas	141	26.79		26.79
Hector Silva	89	16.91		16.91
Miguel Silva	138	26.22		26.22
Jaime Silverio	14	2.66		2.66
Mario Tello	33	6.27		6.27
Ignacio Tinajero	662	125.78		125.78
Francisco M. Torres	323	61.37		61.37
Pedro S. Torres	221	41.99		41.99
Rogelio Uvalle	17	3.23		3.23
Pedro C. Valadez	278	52.82		52.82
Juvenal Valdovinos	83	15.77		15.77
Rogelio S. Vergas	801	152.19	223.64	375.83*
Juan J. Verdin	46	8.74		8.74
Lobardo M. Zarate	906	172.14	252.96	425.10
Pedro V. Zepeda	42	7.98		7.98

* General Consuel's Appendix A has the Makewhole Figure for Rogelio Vargas as $152.19 instead of as the sum of $152.19 + $223.64. It is hereby corrected to reflect the vacation benefit.

EMPLOYEE	HOURS	PRELIMINARY MAKEWHOLE	VACATION BENEFIT	MAKEWHOLE
Cirilo Escobedo	1074	204.06	300	503.93
Margarita Arroyo	541	102.79		102.79
Daniel Meza	437.5	83.13		83.13
Enrique salazar	1011	192.09	282	474.37
Lazaro Lara	901.5	171.29	252	422.99
Isidro Medina	701.5	133.29	196	329.15
Martin Campa	1032	196.08	288	484.22
Celia Lopez	1109	210.71	310	520.35
Mertin Orosco	8	1.52		1.52
Bulmaro Medina	1040	197.60	290	487.97
Jose Medina	956.5	181.74	267	448.8
Luis Medina	706	134.14	197	331.26
Alfredo Rodriguez	914	173.66	255	428.85
Ubaldo Espinoza	603.5	114.67		114.67
Santos Felix	948	180.12	265	444.81
Alberto Felix	942	178.98	263	441.99
Jaun Hernandez	280	53.20		53.2
Rudolfo Ayala	914	173.66	255	428.854
Margarito Ayala	811.5	154.19	227	380.76
Jaun Mertinz	979.5	186.11	273	459.59
Donaciano Quesada	944.5	179.46	264	443.17
Luis Paniagua	1133	215.27	316	531.61
Santos Rizo	1128	214.32	315	529.26
Jenoveno Morales	700.5	133.10	196	328.68
David Avila	329	62.51		62.51
Ilario Hernandez	40.5	7.70		7.7
Francisco De Lopez	549.5	104.41		104.41
Antonio Caleino	850.5	161.60	237	399.06
Jose Luis Lopez	24.5	4.66		4.66
Pedro Paniagua	1072.5	203.78	299	503.22
Isabel Flores	1039.5	197.51	290	487.74
Pascual Sanchez	971	184.49	271	455.6
Joas Perez	883.5	105.17		105.17
apolinar Aguilar	637	121.03		121.03
Manuel Sanchez	553	105.07		105.07
Miguel Arroyo	472	89.68		89.68
Jose Cruz	615.5	116.95		116.95
Vincente Mendez	382.5	72.68		72.68
Enrique Negrete	436	82.84		82.84
Fausto Rivas	62.5	11.88		11.88
Jamie Lopez	94.5	17.96		17.96
Henry Rivas	20.5	3.90		3.9
German Paniagua	183	34.77		34.77
Jose Lopez	82	15.58		15.58
Jose Montoya	324	61.56		61.56
Octavio Murillo	579	110.01		110.01
Jose moreno	502	95.38		95.38
Maximiliano Quezada	472	89.68		89.68
Raul Fernandez	489	92.91		92.91
Federico Orosco	402	76.38		76.38
Jose Quezada	437.5	83.13		83.13

EMPLOYEE	HOURS	PRELIMINARY MAKEWHOLE	VACATION BENEFIT	MAKEWHOLE
Ruben Kelly	314	59.66		59.66
Alberto Perez	366	69.54		69.54
Aurelio Chavez	350	66.5		66.5
Raymundo Chavez	312	59.28		59.28
Domingo Quezada	290	55.1		55.1
Pedro Valdez	263	49.97		49.97
Francisco Rizo	247	46.93		46.93
Jaun Flores	174	33.06		33.06
Rafael Paniagua	181	34.39		34.39
Manuel Campos	175	33.25		33.25
Rogelio Rodriguez	22	4.18		4.18
TOTALS		14203.45	9998.92	24202.37

DATE : November 23,1987



THOMAS SOBEL
Administrative Law Judge