Santa Paula, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LIMONEIRA COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 85-CE-13-OX 15 ALRB No. 20

DECISION AND ORDER

This is a technical refusal to bargain case. General Counsel, Charging Party United Farm Workers of America, AFL-CIO (UFW or Union), and Respondent Limoneira Company (Respondent) have submitted this case directly to the Agricultural Labor Relations Board (ALRB or Board) on a stipulated record for findings of fact and conclusions of law under Title 8, California Code of Regulations, section 20260, and have waived their right to an evidentiary hearing before an Administrative Law Judge.

On May 2, 1978, the Board certified the Union as the exclusive collective bargaining representative of all Respondent's agricultural employees in the State of California. (See Decision and Order Clarifying Bargaining Unit in Limoneira Company (1981) 7 ALRB No. 23.) Pursuant to a petition to decertify the Union filed with the Board on February 13, 1985, in Case No. 85-RD-l-OX, the Board conducted a decertification election among Respondent's agricultural employees on February 20, 1985. The tally of ballots indicated that 75 votes were cast for the UFW, 79 were cast for

"no union", and 2 unresolved challenged ballots remained outstanding.

The Union timely filed objections to the election. Following a hearing on the Union's objections, Investigative Hearing Examiner (IHE) Marvin j. Brenner issued his decision on January 14, 1986. He recommended that the Union's objections be dismissed and the results of the election be certified. Thereafter, the Board, on the basis of the Union's timely exceptions to the IHE's recommended decision, found that misconduct had occurred that tended to affect the results of the election, and it therefore set aside the election. (See Limoneira Company (1987) 13 ALRB No. 13.) Respondent's Motion for Reconsideration was denied by the Board on August 24, 1987.

On or about March 6, 1985, Respondent refused to bargain with the Union, and has continued to maintain that position. The Union filed charge no. 85-CE-13-OX, the basis of this proceeding, on April 23, 1985, alleging that Respondent's conduct violated Labor Code section 1153(e) and (a).[1/]

On October 22, 1987, General Counsel reactivated the Union's refusal to bargain charge in Case No. 85-CE-13-OX by issuing the Notice of Hearing and Pre-Hearing Conference and Complaint on that date. General Counsel's First Amended Complaint of January 20, 1988, included a request for the bargaining makewhole remedy. On February 5, 1988, the parties executed the stipulations that bring this matter directly before

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

the Board.

Refusal to Bargain

This Board has consistently followed the practice of the National Labor Relations Board (NLRB or national board) in refusing to permit, in unfair labor practice proceedings, the relitigation of matters previously determined in representation proceedings absent a clear showing that evidence has been newly discovered or was previously unavailable, or a demonstration of extraordinary circumstances warranting such reconsideration. (Pleasant Valley Vegetable Co-op (1986) 12 ALRB No. 31; Adamek & Dessert, Inc. (1985) 11 ALRB No. 8; D'Arrigo Bros, of California (1978) 4 ALRB No. 45.) Respondent makes no such showing or demonstration.

Respondent, however, asks us to relitigate the Union's objections in 13 ALRB No. 13 under the authority provided by T. Ito & Sons Farms (1985) 11 ALRB No. 36. That case follows the decision of the national board in Sub-Zero Freezer Co., Inc. (1984) 271 NLRB 47 [116 LRRM 1281] which provides a limited exception to the general proscription against relitigation for cases manifesting widespread threats accompanied by property damage. No such factors are present in this case. We therefore will follow our general rule, and will not re-examine the legal effect of the Union's objections as previously determined in 13 ALRB No. 13.

Because Respondent has thus failed to demonstrate that the election results were improperly set aside, we conclude that Respondent has violated sections 1153(e) and (a) of the

Agricultural Labor Relations Act (ALRA or Act) by failing and refusing to meet and bargain with the UFW.[2/]

The Makewhole Remedy

Respondent argues alternatively that makewhole may not appropriately be awarded in view of the precepts of the California Supreme Court in J. R. Norton Co. v. ALRB (1979) 26 Cal.3d 1 [160 Cal.Rptr. 716] and the Board's own policy determinations as indicated in F & P Growers Association (1983) 9 ALRB No. 28 and John Elmore Farms (1985) 11 ALRB No. 22. Respondent argues that this case is a "close case" under Norton, that it presents "novel legal issues," and that Respondent's interest in this matter is coincident with the public interest in not forcing agricultural employees to bargain with a union that they have not freely chosen. For the reasons that follow, we agree that the makewhole remedy should not be imposed in this case.

In Norton the Supreme Court rejected the Board's earlier rule that awarded the makewhole remedy in every technical refusal to bargain case. (See Perry Farms, Inc. (1978) 4 ALRB No. 25, rev. on other grounds in Perry Farms, Inc. v. ALRB (1978) 86 Cal.App.3d 448 [150 Cal.Rptr. 495].) The Board's rationale for

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[2/]Respondent's argument on this issue was submitted to the Board prior to our decision in Ace Tomato Company, Inc./George B. Lagorio Farms (1989) 15 ALRB No. 7. In Ace we followed our observation in Ito, supra, that where actual, as opposed to merely threatened, violence was present in the pre-election setting, an atmosphere of fear and coercion sufficient to justify relitigating election objections and setting aside the election was readily established. (Ito, supra, at p. 11, fn. 11.) Respondent's request for relitigation of the Union's election objections contains no facts demonstrating actual violence sufficient under Ace to justify reconsidering and setting aside our decision in 13 ALRB No. 13.

the automatic imposition of makewhole was that

> [w]hen an employer refuses to bargain with the certified representative of its employees it commits an act which strikes at the very heart of the system of labor-management relations which the Legislature sought to create. It has thereby deprived the employees of their statutorily created right to be represented by their Board-certified agent in the negotiation of the wages, hours, and other terms and conditions of their employment. The employees suffer this same loss whether the employer's refusal to bargain is designed solely to procure review in the courts of the underlying election issues or is of the flagrant or willful variety.

(Perry Farms, Inc., supra, at p. 10.) In rejecting this rationale, the court noted that the Board had lost sight of the purpose of both the National Labor Relations Act (NLRA or national act) and the ALRA. That purpose is not exclusively to promote collective bargaining per se, but to promote such bargaining by the employees' freely chosen representatives. (Norton, supra, at p. 34.)

Thus, an employer's technical refusal to bargain implicates two considerations that are both fundamental to the promotion of ALRA policy: (1) the need to discourage frivolous election challenges pursued by employers as a dilatory tactic designed to stifle employee self-organization, and (2) the equally important interest in fostering judicial review as a check on arbitrary administrative action when the Board rejects a meritorious election objection. (Id. at p. 30.) The Board's Perry Farms rule failed in that it entirely disregarded the second interest in favor of the first by making no distinction between potentially meritorious objections and frivolous challenges pursued as a tactic to stifle employee organization. (Norton at

p. 31.)[3/]

In rejecting the Perry Farms per se rule, the court redefined the Board's responsibility under section 1160.3 as requiring a consideration of the totality of the circumstances in determining

> whether [the employer] went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted.

(Norton at p. 39.) By way of example, the court identified "close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice" (ibid.) as instances in which an employer's objections were not frivolous so as to warrant the imposition of makewhole. Since merely colorable claims of the violation of election "laboratory conditions" will not insulate an employer from the remedy, the Board can require that the employer reasonably and in good faith believe that the asserted violation would have affected the outcome of the election. (Ibid.)

[3/]Of equal importance in the court's rationale for overturning the per se makewhole rule then in force was the fact that the rule rendered statutory language mere surplusage. Section 1160.3 provides for the imposition of the makewhole remedy when the Board "deems such relief appropriate." The Perry Farms rule would allow the Board discretion to ignore the necessity of determining when makewhole may be appropriately imposed, thus rendering the statutory language superfluous. (See Norton, supra, at p. 37.) Thus, any rule having the effect of isolating a discrete set of technical refusal to bargain cases from Norton analysis is immediately suspect, since the first lesson from Norton is that the applicability of the makewhole remedy must be determined on a case-by-case basis. (Frudden Produce, Inc. (1983) 9 ALRB No. 73.)

Respondent contends that a "close case" is presented by the factual question of whether it promised its employees improved medical benefits in the event that the Union lost the decertification election. It rests this contention on three bases. First, it argues that the Board has admitted the poor quality of the testimony of the Union's sole witness to the statement, Hinojosa. Second, it relies on the fact that the IHE found Hinojosa's testimony to be so untrustworthy that he placed no reliance on it, and recommended upholding the election results. Third, it cites the fact that two dissenting Board members in 13 ALRB No. 13 agreed that Hinojosa's testimony was not entitled to being credited on the promise of benefit issue, and would have affirmed the IHE's decision.[4/]

Respondent, moreover, finds this case to be similar to

[4/]The basis for Respondent's contention that the Board has conceded the closeness of the case is contained within the Board's Order Denying Employer's Motion for Reconsideration. Therein the Board acknowledged the "ambiguities" in the record as well as the varying interpretations of which Hinojosa's testimony was susceptible. The gaps and uncertainties which caused the IHE to discredit Hinojosa included (1) Hinojosa's failure to describe other matters which must have been discussed at the pertinent meeting; (2) his vague and contradictory testimony as to when the meeting at which the promise was made allegedly occurred; (3) the fact that the Union called no other witnesses to corroborate Hinojosa; and (4) the likelihood that since Hinojosa testified that employees were told that the new medical plan would be the same as the plan presently granted to foremen, Respondent may have merely invited employees to compare the two programs. (See 13 ALRB No. 13 at p. 3, fn. 3.) Troubled by the above weaknesses, Acting Chairman Gonot and then-Member McCarthy were "left with serious doubts as to whether [Hinojosa's] description of the meeting was accurate." (Id. at p. 19, Members McCarthy and Gonot, dissenting.) They considered Hinojosa's testimony so untrustworthy that they would have found the Union could not have met its burden to rebut the presumption in favor of certification by relying on it alone. (Ibid.)

the situation in Pleasant Valley Vegetable Co-op, supra, in which the Board declined to award makewhole given the closeness of the question of the Union-agent status of an employee who impermissibly campaigned in the election quarantine area. (See id. at pp. 10-11; see also Pleasant Valley Vegetable Co-op (1982) 8 ALRB No. 82 at pp. 2-8; id. at pp. 21-22, Member McCarthy, dissenting.) As in this case, the IHE in Pleasant Valley took a different view of the critical testimony from that subsequently taken by the Board, and the IHE's interpretation was supported by a dissenting Board Member. In deciding that the agency question presented a close case under Norton, the Board explicitly acknowledged that an increased factor of reasonableness was conferred on the employer's position as a result of the IHE's and dissenting Board Member's agreement with the employer's position. (Pleasant Valley Vegetable Co-op, 12 ALRB No. 31 at p. 11, fn. 7.)

We find that we are constrained by the principles of Norton, supra, to agree with Respondent. Although we do not disturb the findings of the Board majority in 13 ALRB No. 13, we are convinced that the proof provided by Hinojosa's testimony does not justify the imposition of the makewhole remedy. Aside from its inherent implausibilities, Hinojosa's testimony attains whatever persuasive force it has merely by virtue of the operation of an evidentiary rule whose applicability in this case is wholly fortuitous. In 13 ALRB No. 13, the Board cited the rule from Martori Brothers Distributors v. ALRB (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626], in support of Hinojosa's testimony, that uncontradicted testimony must be believed in the absence of

rational grounds for disbelief. (Id. at pp. 4-5.) Respondent, however, did present contradictory evidence which the IHE chose to discredit. It did not sit silent in the face of damaging proof. (Cf. Martori Brothers, supra, at p. 728 [union's witness did not deny or dispute damaging proof when given opportunity to do so].)

Nor are we persuaded that we should reach a different result because the "close case" herein rests on a factual, rather than a legal, issue. We note initially that Norton itself creates no such distinction among cases presenting non-frivolous, potentially meritorious objections, nor does it single out and stigmatize factually frivolous, as opposed to legally frivolous, objections. (See, e.g., id. at pp. 31, 32, 35, 36, and 39.)

Moreover, we are particularly impressed by the court's language in the example which has become the paradigm for demonstrating the reasonableness of an employer's objections. The court explicitly indicated that "close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees right of free choice" (id. at p. 39) would not support the imposition of makewhole. It seems self-evident that issues concerning the manner in which the election was conducted pre-eminently implicate factual questions. Thus, we believe, the Norton court anticipated that factual questions would support a reasonable litigation posture on the part of an employer.[5/]

[5/]Our belief is confirmed by the statement of the Supreme Court to that effect in Robert J. Lindeleaf v. ALRB (1986) 41 Cal.3d 861, 880 [226 Cal.Rptr. 119]: "In J.R. Norton we emphasized that

(fn. 5 cont. on p. 10)

In sum, we find that Respondent has presented a close case under Norton. Although we do not disturb our determination in 13 ALRB No. 13 that Respondent has made an impermissible promise of benefit that reasonably tended to affect the results of the election, we believe that the poor quality of the testimony of the sole witness to that promise of benefit does not establish the reality of that promise with sufficient force and clarity to render Respondent's continued litigation of the question unreasonable. Likewise, the IHE's failure to place any reliance on that testimony and his subsequent decision upholding the election,

(fn. 5 cont.)

makewhole relief is not automatically available whenever the Board finds that an employer has failed to present a prima facie case in support of its objections; any other view would inhibit challenges in close cases raising important questions of fact or law concerning the fairness of an election." (Citing Norton, supra, 26 Cal.3d at p. 39; emphasis added.) Moreover, in reviewing the Board's practice concerning the status of factually-based election objections, we have had occasion to examine some 56 cases in which the bargaining makewhole remedy was proposed after Norton. In none of these cases is there majority support for the contention that only legally-based objections can present a Norton close case. Such an opinion is expressed clearly for the first time only in the dissenting opinion of then-Members Henning and Carrillo in Pleasant Valley Vegetable Co-op (1986) 12 ALRB No. 31 at p. 25. We continue to reject that opinion. Insofar as the Henning-Carrillo dissent characterizes our decision in Robert J. Lindeleaf (1983) 9 ALRB No. 35 as supporting such .an understanding of our practice, we reject that characterization also. Although the standard of review to which an appellate court subjects our decisions may, in some circumstances, be relevant to a determination of the reasonableness of an employer's litigation posture, we do not believe that we can foreclose the reasonableness of an employer's litigation posture by our own decision prior to appellate review. If, as Norton teaches, the reasonableness of an employer's litigation posture cannot be determined merely by the outcome of its litigation in the Court of Appeal (id. at p. 39), we believe, a fortiori, it cannot be foreclosed merely by our resolution of factual issues in a representation proceeding below.

together with the fact that two Board Members also found the witness's testimony wholly unreliable and would have upheld the IHE's and Respondent's position, are persuasive on the Norton reasonableness inquiry. (Cf. Pleasant Valley Vegetable Co-op, 12 ALRB No. 31, supra.) We will not, therefore, include an award of makewhole in our remedial order.[6/]

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Limoneira Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith as defined in section 1155.2(a) of the Agricultural Labor Relations Act (Act), with the United Farm Workers of America, AFL-CIO (UFW) as the certified exclusive bargaining representative of its agricultural employees.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employees in the exercise of the rights guaranteed them by section 1152 of the Act

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

[6/]Because we find Respondent's litigation posture reasonable on the factual question of whether an impermissible promise of benefit was made, we do not reach its other arguments. We note, moreover, that as the stipulated record contains no facts upon which a finding of bad faith could be based, we conclude that Respondent's litigation posture was asserted in good faith. (Pleasant Valley Vegetable Co-op, supra.)

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees with respect to the said employees' rates of pay, wages, hours of employment, and other terms and conditions of employment and, if agreement is reached, embody such agreement in a signed contract.

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

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

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

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all of the agricultural employees employed by Respondent at any time from March 6, 1985, until the date of this order, and thereafter until Respondent recognizes the UFW and enters into good faith negotiations with the UFW upon its timely acceptance of the Respondent's offer to bargain.

(f) Arrange for a representative of Respondent or a Board agent to read the attached Notice, in all appropriate

languages, to all its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation in order to compensate them for time lost at this reading and question-and-answer period.

(g) Notify the Regional Director, in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's

Dated: December 13, 1989

GREGORY L. GONOT, Acting Chairman[7/]

JOSEPH C. SHELL, Member

[7/]The signatures of Board Members in all Board Decisions appear with the signature of the (Acting) Chairperson first, if participating, followed by the signatures of the participating Board Members in order of their seniority. There is currently one vacancy on the Board.

MEMBER RAMOS RICHARDSON, Concurring:

As part of the majority in the underlying Decision herein, I am concerned that elements of this Decision may create a false impression that we no longer support the Board's findings and conclusions in 13 ALRB No. 13. For example, I am troubled that this Decision makes references to the "inherent implausibilities" and "gaps and uncertainties" in Hinojosa's testimony (see footnote 4), without making any corresponding references to the Board's crediting of Hinojosa's testimony and the IHE's failure to discredit the testimony, which he found "appeared believable." Moreover, I disagree with the claim that Respondent "did present contradictory evidence" and "did not sit silent in the face of damaging proof" (p. 9), as well as the assertion that Hinojosa's testimony was persuasive "merely by virtue of the operation of an evidentiary rule whose applicability in this case is wholly fortuitous" (p. 8). I believe that the majority in 13 ALRB No. 13 properly applied the evidentiary rule

expressed in Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 728 ("An administrative board must accept as true the intended meaning of uncontradicted and unimpeached evidence."), since the Respondent chose not to call either Colton or Galvan (his Spanish-speaking interpreter) to testify, but rather relied solely on the testimony of two employees who merely said they "did not hear" the supervisor discuss medical benefits.

Nevertheless, I agree that the Board's acknowledgment of ambiguities in the record and the varying interpretations to which Hinojosa's testimony was susceptible, as well as the IHE's failure to rely on Hinojosa's testimony and the dissenting Board members' conclusion that Hinojosa's testimony was wholly unreliable, are persuasive on the Norton reasonableness inquiry. Consequently, I concur in the conclusion that makewhole is not an appropriate remedy herein.

Dated: December 13, 1989

IVONNE RAMOS RICHARDSON, Member

MEMBER ELLIS, Concurring in Part and Dissenting in Part:

Unlike the majority, I am persuaded that this Board can, and c should, relitigate the Union's objections in Limoneira Company (1987) 13 ALRB No. 13, and that upon reconsideration of the underlying representation proceeding, it must find that the Decision and Order setting aside the election in 13 ALRB No. 13 should be vacated because of its faulty findings of facts and conclusions of law. To do otherwise would result in an order requiring Respondent to bargain with a union that has not attained the status of majority representative from an indisputably free and fair election.

I am in agreement with the majority in its characterization of Hinojosa's testimony as containing inherent implausibilities and a number of gaps and uncertainties. (See page 8 of the Decision.) And like the majority, I also find that the Board's application of the evidentiary rule from Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981)

29 Cal.3d 721 [175 Cal.Rptr. 626] in support of its reliance on Hinojosa's testimony in 13 ALRB No. 13 was indeed "wholly fortuitous", if not erroneous. However, where I part company with my colleagues is on their treatment of the faulty findings, rulings and conclusions in the underlying representation proceeding. The majority has chosen to find only that makewhole may not be appropriately awarded in this case under the standards of J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1 [160 Cal.Rptr. 716]. Instead, I would simply reconsider the prior Decision under the authority and powers provided by the Agricultural Labor Relations Act (ALRA or Act),[1/] and conclude thereby that 13 ALRB No. 13 should be vacated and the complaint herein dismissed.

Since I am in disagreement with the prior Decision, I obviously find that Respondent's present litigation posture in the

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[1/]See California Labor Code section 1160.3, which allows the Board to modify or set aside, in whole or in part, any finding or order made or issued by it so long as the record has not been filed with a reviewing court (cf. Cramp Shipbuilding Co. (1943) 52 NLRB 309, 310 [13 LRRM 1]). See also Sutti Farms (1981) 7 ALRB No. 42 and Triple E Produce Corp. (1980) 6 ALRB No. 46, revd. on other grounds, Triple E Produce Corp. v. Agricultural Labor Relations Bd. (1983) 35 Cal.3d 42 [196 Cal.Rptr. 518] where election-related issues were reconsidered because of errors due to oversight by a prior Board; and T. Ito & Sons Farms (1985) 11 ALRB No. 36 and Ace Tomato Company, Inc./George B. Laqorio Farms (1989) 15 ALRB No. 7 where relitigation of the underlying representation proceeding was justified on a record that readily established an atmosphere of fear and coercion during and prior to an election. The National Labor Relations Board itself has relitigated representation issues in ACL Corporation dba Atlanta Hilton and Towers (1984) 273 NLRB 87 [118 LRRM 1032], vacated on other grounds, 275 NLRB 1413 [120 LRRM 1003] where reconsideration was deemed justified by a prior erroneous decision; and in Sub-Zero Freezer Co., Inc. (1984) 271 NLRB No. 7 [116 LRRM 1281] where an earlier certification was vacated and a complaint alleging a refusal to bargain was dismissed on a finding of an atmosphere of fear and coercion during an election.

instant matter is premised on a reasonable good faith belief that the election results were improperly set aside by the Board in 13 ALRB No. 13. Therefore, I concur with my colleagues insofar as they find under the Norton standards that award of the makewhole remedy would not be appropriate in the circumstances of this case.

Dated: December 13, 1989

JIM ELLIS, Member

CASE SUMMARY

Limoneira Company
(UFW)

15 ALRB No. 20
Case No. 85-CE-13-OX

Background

This technical refusal to bargain case came before the Agricultural Labor Relations Board (ALRB or Board) for findings of fact and conclusions of law on a stipulated record under the provisions of Title 8, California Code of Regulations, section 20260. That record shows that the United Farm Workers of America, AFL-CIO (UFW or Union) was certified by the Board as the exclusive bargaining representative of the agricultural employees of Limoneira Company (Respondent) in 1978. Thereafter, a petition for decertification of the Union having been duly filed, a decertification election was conducted by the Board among Respondent's agricultural employees on February 20, 1985. The results of the election showed 79 votes in favor of "no union," 75 in favor of the UFW, and 2 unresolved challenged ballots remained outstanding. On the basis of the tally of ballots, Respondent refused to bargain further with the UFW. The UFW, however, timely filed objections to the conduct of the election in which it alleged that Respondent had made an impermissible promise of improved medical benefits that tended to affect the outcome of the election. At hearing on this and other objections, the Investigative Hearing Examiner (IHE) , refused to place any reliance on the testimony of the Union's sole witness to the alleged promise of benefit, and recommended that the election results be certified. The Board, however, upon consideration of the Union's timely filed exceptions to the decision of the IHE, credited the Union's witness to the promise of benefit, and set aside the decertification election on that basis. (Limoneira Company (1987) 13 ALRB No. 13.) Thereafter the General Counsel issued a complaint on the Union's refusal to bargain charge in this matter, and this proceeding followed.

Board Decision

The Board refused to allow the relitigation of the election objections previously resolved in 13 ALRB No. 13, as Respondent had presented no newly discovered or previously unavailable evidence, alleged no extraordinary circumstances, nor demonstrated facts sufficient to allow relitigation under the limited exceptions recognized under T. Ito & Sons Farms (1985) 11 ALRB No. 36 or Ace Tomato Company, Inc./George B. Lagorio Farms (1989) 15 ALRB No. 7. The Board, however, determined that an award of the bargaining makewhole remedy would not be appropriate since Respondent had demonstrated a "close case" under the decision of the California Supreme Court in J. R. Norton Company v. ALRB (1979) 26 Cal.3d 1 [160 Cal.Rptr. 716] on the factual question whether a promise of benefit had actually been made. The Board noted that the weak and ambiguous quality of the sole testimony in

support of the alleged promise, together with the IHE's explicit rejection of that testimony as a basis for setting aside the election, and the agreement with the IHE and Respondent of two dissenting Board members in the representation proceeding (13 ALRB No. 13), satisfied the Norton reasonableness inquiry. The Board specifically rejected the contention that only legal, as opposed to factual, questions could present a "close case" under Norton. Since the stipulated record was devoid of facts that would support a finding of bad faith, the Board also found that Respondent had asserted its reasonable litigation posture in good faith.

Concurrence

In her concurring opinion, Member Ramos Richardson expressed her concern that portions of the majority decision may create a false impression that the Board no longer supports its findings and conclusions in 13 ALRB No. 13. Nevertheless, because of the Board's acknowledgment of ambiguities in the record and the varying interpretations to which the primary witness's testimony was susceptible, she agreed that the Employer's litigation posture was reasonable under Norton and that makewhole was consequently not an appropriate remedy herein.

Concurrence/Dissent

Member Ellis is in agreement with the majority in its characterization of Hinojosa's testimony as containing inherent implausibilities and a number of gaps and uncertainties, and that the Board's application in Limoneira Company (1987) 13 ALRB No. 13, of the evidentiary rule from Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721 was "wholly fortuitous", if not erroneous. However, instead of simply finding that makewhole may not be appropriately awarded in this case under the standards of J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, Member Ellis would relitigate the Union's objections in the underlying representation proceeding, and thereby find that because of its faulty findings of facts and conclusions of law, 13 ALRB No. 13 should be vacated and the complaint herein dismissed.

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

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NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Oxnard Regional Office by the United Farm Workers of America, AFL-CIO (UFW), the certified bargaining agent of our employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Limoneira Company, had violated the law. Following a review of the evidence submitted by the parties, the Board has found that we failed and refused to bargain in good faith with the UFW in violation of the law. The Board has told us to post and mail this Notice. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives you and all farm workers in California these rights:

1. To organize yourselves;

2. To form, join, or help unions;

3. To vote in secret ballot elections to decide whether you want a union to represent you;

4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;

5. To act together with other workers to help and protect one another; and

6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL in the future meet and bargain in good faith, on request, with the UFW about a collective bargaining contract covering our agricultural employees.

Dated: LIMONEIRA COMPANY

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

* * *

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE