Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 81-CE-5-EC 15 ALRB No. 3 (13 ALRB No. 8)

DECISION AND ORDER

This matter comes before the Agricultural Labor Relations Board (ALRB or Board) on remand from the California Court of Appeal, Fourth Appellate District, Division One, for the purpose of considering the effect of William Pal Porto & Sons, Inc. v. Agricultural Labor Relations Bd. (1987) 191 Cal.App.3d 1195 [237 Cal.Rptr. 206] (Pal Porto) on the award of bargaining makewhole granted by the Board in the above-captioned case.[1/] Under Dal Porto we must determine whether, but for Respondent's bad faith bargaining, the parties would have reached agreement on

[1/] In Mario Saikhon, Inc. (1987) 13 ALRB No. 8, the Board found that Respondent Mario Saikhon, Inc. (Saikhon or Respondent) violated Labor Code sections 1153(e) and (a) by engaging in bad faith bargaining that consisted of delay of the bargaining process, failure to respond to or present proposals as promised, failure to furnish requested information, and repeated instances of unlawful unilateral wage increases. The Board, therefore, imposed a bargaining makewhole remedy from December 15, 1980, until February 24, 1983, and thereafter until Saikhon's commencement of good faith bargaining with the United Farm Workers of America, AFL-CIO (Union or UFW), the certified bargaining representative of Saikhon's agricultural employees. (Id. at p. 18.)

a collective bargaining contract. (Dal Porto, supra, 191 Cal.App.3d 1204.) In order to avoid a punitive application of the makewhole remedy, such remedy may not be imposed unless Respondent's bad faith conduct caused the failure of the parties to reach agreement. (Id. at p. 1206.) In making this determination, there is in effect a rebuttable presumption that, but for the bad faith conduct, the parties would have reached agreement. (Id. at p. 1207.) Respondent bears the burden of adducing relevant, admissible evidence sufficient to rebut the presumption and show that no contract would have been reached despite its bad faith conduct. (Id. at pp. 1208-1211.)

Procedural History

On November 16, 1987, following the Court of Appeal's remand, the Board issued its Interim Order Respecting All Bargaining Makewhole Cases Potentially Affected by William Pal Porto & Sons v. ALRB, supra, 191 Cal.App.3d 1195. That Order directed Respondent to file with the Board, no later than February 15, 1988, "legal arguments addressing the question of whether, but for the employer's bad faith bargaining conduct, the parties would have concluded a collective bargaining agreement." (Id. at p. 6.) Respondent timely complied with the Order, arguing that the Union's unwavering insistence on wage levels unacceptable to similarly situated Imperial Valley growers of vegetable and flat crops, together with its insistence on an "illegal" union security provision, prevented the reaching of an agreement and that, therefore, imposition of the bargaining makewhole remedy is inappropriate under Dal Porto.

In its opposition to Respondent's Dal Porto showing, the Union contended that Respondent had failed to carry its burden of rebutting the presumption that a contract would have been reached in the absence of bad faith conduct. It argued that Respondent's proof of the results of the Union's negotiations with other Imperial Valley growers was irrelevant to this case, and, in the absence of relevant proof of other intervening events, left only Respondent's bad faith bargaining conduct as the cause of the parties' failure to reach agreement. Arguing that Respondent's proffered evidence was legally insufficient under Dal Porto, the UFW urged the Board to decide this matter without further proceedings.[2/]

Following receipt and consideration of the parties' arguments in response to its November 16, 1987, Interim Order, the Board issued its Order Setting Issues for Evidentiary Hearing on July 8, 1988. Therein the Board determined that, at a hearing to be convened at a later time, evidence would be received on two questions, viz., whether the differences between the Salinas and Imperial Valleys, including those pertaining to economics, crops, seasons, and availability of farm labor, were of such a nature as to prevent Respondent from reaching agreement based on the Sun

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[2/]The General Counsel also filed a response to Respondent's Dal Porto showing. The General Counsel joined Respondent in arguing that throughout the course of negotiations with Respondent, the Union insisted on wage levels uniformly unacceptable to similarly situated Imperial Valley growers of row and flat crops.

Harvest wage rate,[3/] and whether the issue of union security was a crucial one in negotiations and precluded the parties from reaching agreement. Before such a hearing could be held, however, Respondent requested the Board by letter of September 7, 1988, to resolve these and other issues in its favor without further proceedings. Respondent's request was based on allegations that (1) the UFWs opposition did not dispute the factual assertions in Respondent's Dal Porto showing; (2) the UFWs opposition rested entirely on the legal insufficiency of Respondent's proof to rebut the presumption of contractual agreement; (3) the UFW itself asked for resolution of this matter without further hearing; and (4) the Board's recent decision in Abatti Farms, Inc. and Abatti Produce, Inc. (1988) 14 ALRB No. 8 (Abatti) demonstrated that no Imperial Valley grower would accept the Sun Harvest wages uniformly proposed by the UFW.[4/]

[3/] The "Sun Harvest" wage rate refers to the wage rate negotiated by the UFW with Sun Harvest, Inc., a Salinas Valley-based grower of mixed crops, covering the three-year period from September, 1979, to August, 1982, and intended by the UFW to serve as its master contract for vegetable and mixed crop growers throughout California.

[4/] While not styling its request as a motion for summary judgment, Respondent conceded that the procedure it was'requesting the Board to follow was "analogous to a summary judgment procedure brought under California Code of Civil Procedure Section 437c." Citing civil summary judgment law, Respondent argued that "[i]f the facts are undisputed, then the court can rule, as a matter of law, what the outcome should be." From this premise, Respondent further argued that, since the UFW did not dispute the facts presented by Respondent in its Dal Porto showing, the Board could use those facts in reaching its legal determination as to whether a makewhole remedy may be imposed.

The Union's response[5/] to Respondent's letter reiterated its prior position: (1) the UFW was flexible on wages and other topics of negotiation; (2) Respondent's proof is legally insufficient to rebut the presumption of contractual agreement; (3) Respondent's own bad faith conduct in unilaterally raising wages demonstrates that a contract calling for higher wages could have been reached; (4) Respondent's proof is inadmissible as falling outside the time limits previously established by the Board in earlier orders interpreting the Dal Porto process; and, (5) given the preceding facts, no further hearing is necessary, and the Board can rule as a matter of law that the makewhole award in this case was properly imposed.[6/]

Having considered the arguments of the parties, together with the evidentiary materials and briefs submitted in support thereof, the Board finds that there is no genuine issue as to any material fact concerning the propriety of an award of bargaining makewhole in this case, and further finds that Respondent is entitled to judgment in its favor under the law of Dal Porto. Our reasoning in reaching this conclusion is as follows.[7/]

[5/] The UFW's proof of service labeled its papers as an "Opposition to 7 September 1988 Request for Summary Judgment."

[6/] The General Counsel's response to Respondent's letter recognized that the letter was capable of construction as a motion for summary judgment. General Counsel disputed the UFWs claim to flexibility on Sun Harvest wages, and argued that Respondent's unilateral wage raises were so far below the UFWs wage proposals as to be of no probative value on the question of the possibility of agreement on Sun Harvest wages.

[7/] The decision we reach here obviates the need to consider, in connection with the parties' failure to reach agreement, the

(fn. 7 cont. on p. 6)

Propriety of Summary Disposition

This Board, like the National Labor Relations Board (NLRB or national board), utilizes a procedure similar to civil summary judgment proceedings to expedite its processes when no factual conflicts must be resolved prior to ruling on the legal rights of the parties. (See, e.g., Sunny Cal Egg & Poultry, Inc. (1988) 14 ALRB No. 14 at pp. 3-5 [summary judgment on Labor Code §1153(e) violation proper where no factual issue present on Board jurisdiction during period of admitted refusal to bargain].) While adopting no new procedural or evidentiary requirements with which the parties are unfamiliar, we look to well-settled case law interpreting Code of Civil Procedure section 437c for the basic principles which we apply here. Thus, we view our task when presented with a motion for summary judgment as the identification, not the resolution, of material issues of fact. (See, e.g., Anqelus Chevrolet v. State (1981) 115 Cal.App.3d 995, 1000 [171 Cal.Rptr. 801].) Although all parties agree that a summary disposition is proper, we will not abdicate our responsibility to independently scrutinize the record for the presence of genuine issues of material fact that would render a summary disposition improper. (Prison Law Office v. Koenig (1986) 186 Cal.App.3d 560, 564, n. 6 [233 Cal.Rptr. 590].) We do not grant summary judgment by default; we examine the legal sufficiency of the moving party's

(fn. 7 cont.)

effect of the Union's proposing a putative "illegal" provision for union security. We note, however, that during these proceedings the Ninth Circuit Court of Appeals has overruled the case relied upon by Saikhon. (See Beltran v. State of California (9th Cir. 1988) 857 F.2d 542.)

evidentiary presentation prior to examining the counter-presentation of the opposing party. (Witchell v. De Karne (1986) 179 Cal.App.3d 965, 974 [225 Cal.Rptr. 176].) For purposes of determining the propriety of summary disposition of a matter pending before us, we take as true the factual assertions of the opposing party which have adequate evidentiary support. (Desny v. Wilder (1956) 46 Cal.2d 715, 725 [299 P.2d 257].)[8/]

Respondent has submitted voluminous documentation in support of its contentions that the UFW insisted on wage levels that were uniformly rejected for economic reasons by similarly situated mixed crop growers in the Imperial Valley, and that the UFW did not deviate from that insistence throughout the course of its negotiations with Respondent.[9/] Initially we reject the

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[8/] In applying our procedure for summary disposition in this case, we note that the presence of the rebuttable presumption in Pal Porto does not affect our ability to apply this procedure as the parties have requested. The Dal Porto presumption is one affecting the burden of proof. (Dal Porto at pp. 1210-1211; 1 Witkin Cal. Evidence (1988 pocket supp.) Burden of Proof and Presumptions, § 178, p. 23.) However, "[n]either the placement of the burden of proof at trial, nor a presumption affecting the burden of proof, affects the power to grant summary judgment." (6 Witkin Cal. Procedure (3d ed. 1986) Proceedings without Trial, § 301, p. 596; accord Security Pacific National Bank v. Associated Motor Sales (1980) 106 Cal.App.3d 171, 179 [165 Cal.Rptr. 38]: since the placement of the burden of proof does not affect the showing required for a summary judgment, it is obvious that a presumption affecting the burden of proof is likewise irrelevant in that respect.)

[9/] Respondent has presented 186 pages of transcript testimony from the liability hearing in this case (Exhibit H to Dal Porto showing) as well as from those in Vessey & Co., Inc., Martori Brothers Distributors, Joe Maggio, Inc., et al. (1987) 13 ALRB No. 17 (Exhibit E to Dal Porto showing), and UFW (Maggio) (1986) 12 ALRB No. 16 (Exhibit F to Dal Porto showing), and from the compliance hearing in Abatti, supra, 14 ALRB No. 8 (Exhibit D to Dal Porto showing); Respondent has also presented 15 pages of negotiating notes from its own and the Union's negotiators

(fn. 9 cont. on pg. 8)

Union's argument that such proof is irrelevant to determining whether Respondent would have reached agreement in the absence of its bad faith conduct. Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Cal. Evidence Code § 210, emphasis added.) Although no precise or universal test for the concept of relevancy exists (1 Witkin, Cal. Evidence (3d ed. 1986) § 309 pp. 278-79), the general test is whether the proffered evidence tends logically, naturally, and by reasonable inference to prove or disprove a material issue. (Id. at p. 279, citing People v. Jones (1954) 42 Cal.2d 219, 222 [266 P.2d 38] on definition of indirect evidence.) We find that Respondent's proof of the UFW's unwavering proposal of wage levels economically unacceptable to similarly situated Imperial Valley mixed crop growers does tend to prove the fact that no agreement would have been reached even in the absence of bad faith bargaining.

Moreover, Respondent cites to Board decisions that support its evidentiary showings. In Vessey & Co., Inc., Martori Brothers Distributors, Joe Maggio, Inc., et al., supra, 13 ALRB No. 17, the Board found that similarly situated Imperial Valley growers had not engaged in bad faith bargaining in likewise

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(fn. 9 cont.)

(Exhibit I to Dal Porto showing), 3 pages of production data and wage rates from the period of negotiations (Exhibits K and L to Dal Porto showing), and its own original contract with the UFW (Exhibit M to Dal Porto showing), and the contract between the UFW and Sun Harvest, Inc., covering the period September 1979 to August 1982, that figured prominently in the negotiations at issue here (Exhibit J to Dal Porto showing).

refusing to accede to Sun Harvest wages. (See id. at pp. 12-18.) Rather, for the time period December 1979 through March 1981, a time period that partially overlaps the bargaining conduct at issue here, the Board found that

> the Union's strategy was based on the Sun Harvest contract. Its position was that this master contract represented the Union's final terms on the major issues of concern, from which the Union was unwilling to bargain.
> (Id., at p. 18, emphasis added.)

Although in this case the Board found that Respondent had engaged in bad faith bargaining, the failure of similarly situated employers to reach agreement on Sun Harvest wages, even while bargaining in good faith, is highly probative that no agreement on the same wages would have been reached when bad faith bargaining is involved.

In Abatti, supra, on which Respondent also relies, the Board gave lengthy consideration to the question of whether the Sun Harvest contract at issue in this case was a "comparable" contract for purposes of calculating an award of bargaining makewhole. (See id. at pp. 19-27.) The Board, affirming the Administrative Law Judge's decision on comparability, relied heavily on expert testimony showing that regional differences between the Salinas and Imperial Valleys in crops, markets, and labor supply rendered Sun Harvest's Salinas Valley-based wage structure inappropriate for Imperial Valley growers of mixed crops. (Ibid.) Summarizing the law of "comparability," the Board decided,

> [s]ince makewhole represents what the parties were likely to have agreed to, and [since] we are convinced

> that they would not have agreed to Sun Harvest wages, we conclude that Sun Harvest is not a comparable contract. (Id. at p. 27, emphasis added.)

Thus we view these cases as establishing that the UFW steadfastly proposed Sun Harvest wages in its negotiations with Imperial Valley mixed crop growers; that, even where such growers otherwise bargained in good faith with the UFW, agreement on Sun Harvest wages did not occur; and that given the economic differences between the Salinas and Imperial Valleys, such agreement was impossible.

Rather than disputing these findings, the Union argues that such evidence is irrelevant to the bargaining conduct at issue in this case, a position we have rejected earlier herein, and that the Board's prior orders determining the appropriate parameters for evidentiary presentations under Dal Porto, supra, require the exclusion of such proof.[10/] To the extent the Union's latter argument is premised on the Board's April 25, 1988, all-parties Order Limiting Evidence and Setting Issues for Evidentiary Hearing in William Pal Porto & Sons, Inc. (1983) 9 ALRB No. 4, (1985) 11 ALRB No. 13 and its Interim Order of November 16, 1987, in this case, we must reject this argument as well.

In the aforesaid all-parties orders, the Board first announced and then confirmed its intention to refuse consideration

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[10/] Aside from its relevance challenge, the Union raises no other arguments against the admissibility of Respondent's proof. While we find Respondent's proof admissible, we also note that the failure to challenge the admissibility of evidence brought forward in support of a party's position on a summary judgment motion constitutes a waiver of further challenges to the admissibility of such proof. (3 Witkin, Cal. Evidence (2d. ed. 1986), § 2012, p. 1972.)

of any events occurring after the issuance of the Administrative Law Judge's Decision (ALJD) when such events are offered to show that no contract would have been reached between the bargaining parties even had the employer bargained in good faith.[11/] The UFW, however, points to no events relied upon by Respondent that violate this standard. The events considered by the Board in the transcripts submitted by Respondent all preceded the issuance date of the ALJD herein, September 30, 1983.[12/] If the Union means to apply this standard to the events considered in the Board's Vessey, supra, and Abatti, supra, decisions, it misconceives the limitation imposed in the all-parties orders. Although both the Vessey and Abatti decisions issued after the ALJD herein, the events litigated in those cases all occurred prior to the ALJD. The criterion for inclusion or exclusion of evidentiary materials is, of course, the date of occurrence, not the date of issuance of a decision that determined the legal effect of those occurrences. The Union's argument is thus not well-taken.

[11/] The Board subsequently modified this standard in its all-parties Order Granting Motion to Present Evidence of Events Occurring after Administrative Law Judge's Decision, December 28, 1988, in Dal Porto, supra. This subsequent modification has no effect on the contentions advanced by the Union herein.'

[12/] In the voluminous materials submitted by Respondent, we have detected reference to two post-ALJD events: (1) as of December 31, 1983. Sun Harvest, Inc., was no longer operational (Exhibit D to Dal Porto showing, transcript of Abatti compliance hearing at vol. 38, p. 110), and (2) on December 16, 1983, Abatti's negotiator informed the UFW that Abatti would go out of business as of June 30, 1984. if forced to agree to Sun Harvest wages. (Id. at vol. 44, p. 117.) We place no reliance on these asserted facts in reaching our decision here.

Besides its procedural relevance argument, the Union argues substantively that it was flexible on Sun Harvest wages, or, alternatively, that its steadfast proposal of Sun Harvest, or higher, wages was caused by Respondent's bad faith failure to supply requested information on wages and other mandatory topics of collective bargaining. Having liberally construed, as we must, the evidentiary support presented by the UFW for these arguments (see, e.g., Barbary Coast Furniture Co., Inc. v. Sjolie (1985) 167 Cal.App.3d 319, 330 [213 Cal.Rptr. 168]), we nevertheless conclude that the Union's evidence is insufficient to raise a triable issue on the above questions. (See Keene v. Wiggins (1977) 69 Cal.App.3d 308, 311 [138 Cal.Rptr. 3]: summary judgment granted where plaintiff's proof did not state facts sufficient to raise issue on duty of care on the part of an examining physician.)

As to the flexibility question, the UFW cites the testimony of Union negotiator David M. Martinez in the Abatti compliance hearing:

> Q: So it was not your intent to go below Sun Harvest with respect to wages, while you were the negotiator?
>
> A: It was not our intent? Well, actually, at the beginning it was our intent to get Sun Harvest, but the company [Abatti] refused that, so our intent didn't come very much into play. (R.T., Vol. XI, p. 167.)

Construed most broadly, this testimony establishes the Union's intent at the commencement of the Abatti negotiations and the frustration of that intent over the course of negotiations; it does not speak to the Union's conduct throughout the course of either those negotiations or the Saikhon negotiations at issue

here.

Regarding the reason for its steadfast position on Sun Harvest wages, the UFW again cites the testimony of Martinez, this time from the transcripts in this case:

> Q: Now, I noticed that you also proposed wages in this proposal, of Sun Harvest. How did you decide—how did you formulate this wage proposal?
>
> A: Well, it was very hard in view of the fact that we didn't have the information we had been requesting since November—October and November of '80, to make an intelligent proposal on the wages. Saikhon wouldn't give us the information. He was still holding back even on rates of pay, what the Company was then paying. So, we went with what were the Union Standards, Sun Harvest Standards, and the vegetable companies', in Salinas and Calexico; and we proposed what was applicable, out of Sun Harvest. (R.T., Vol. II, pp. 25-26.)

This colloquy, however, goes to the Union's conduct in connection with the proposal it made on February 16, 1982. (See id. at p. 22.) Although Respondent did not furnish until December 8, 1982, the information originally requested by the Union on October 30, 1980, the Union advanced a wage proposal on November 16, 1982, that in fact exceeded even the Sun Harvest wage levels previously unacceptable to Respondent. (See General Counsel's Exhibit No. 32.)[13/] Thus, even in the absence of the

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[13/] The Union's transmittal letter covering its proposal stated: "We have not received the information we requested in our letter of August 12, 1982 for the above listed Companies [i.e., Mario Saikhon, Inc. and Lu-Ette Farms, Inc.]. This information is essential for us to be able to prepare intelligent proposals and bargain reasonably. [¶] However, due to the time that has elapsed since our last meeting, to expedite negotiations we have

(fn. 13 cont. on p. 14)

information requested from Respondent, the Union was able to formulate wage proposals, and those proposals demonstrated no inclination to retreat from Sun Harvest levels. We therefore find the Union's proffered evidence to be insufficient to raise an issue that Respondent's bad faith refusal to furnish requested bargaining-related information was the actual reason for the Union's apparent inflexibility on Sun Harvest wages.[14/]

Conclusion

In compliance with the decision of the Court of Appeal in William Pal Porto & Sons, Inc. v. ALRB, supra, and the Board's Interim Order in this matter, the parties have presented legal argument and evidentiary proof in support of their respective positions. All parties, including the Union, agree that a further

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(fn. 13 cont.)

enclosed changes from the Union's previous proposal on the articles Grievance and Arbitration, Medical Plan, Pension Plan, Submitting Reports, Dues and Contributions, Cost of Living, Duration, and Wages. The remainder of our proposal is the same as that submitted February 16, 1982 which you have not responded to yet." (General Counsel's Exhibit No. 32 at p. 1.)

[14/] In so finding, we do not alter by implication our previous findings that Respondent's refusal to provide the requested information constituted a violation of its duty to bargain in good faith with the representative of its agricultural employees, and that the UFW did not engage in bad faith bargaining by insisting on Sun Harvest wages. Respondent was under an obligation to provide the requested information, and the UFW had every right to insist on the wage levels it thought appropriate for thd unit. The fact that the Union was in good faith in proposing Sun Harvest or higher wages, and that Respondent was in bad faith in refusing to provide requested information, does not, however, provide the answer to the relevant question under Dal Porto, supra: Did the employer's bad faith conduct prevent the parties from reaching agreement? The UFW's proof is insufficient to raise an issue that it did. For the same reason, the UFW's argument that res judicata prevents the Board from examining the Union's conduct as the source of the parties' failure to reach agreement is unavailing.

evidentiary hearing in this matter would be unnecessary, as the record developed to this point is sufficient for our determination of the ultimate cause of the parties' failure to reach a collective bargaining agreement.

Assuming, as we may, that the parties have made their best respective showings in favor of, and in opposition to, the granting of a summary disposition of this matter in Respondent's favor, we find that no genuine issue of material fact exists as to the reason for the parties' failure to reach agreement, and that under Dal Porto, supra, Respondent is entitled as a matter of law to an order vacating our prior imposition of the makewhole remedy.[15/] We will, therefore, modify our previous order in

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[15/] We have reached our conclusion in this matter within the context of the summary judgment procedure advanced by the parties. In so doing, we find no genuine issue raised by the Union's evidentiary presentation, and therefore have no occasion to resolve evidentiary conflicts; indeed under the procedure advocated by the parties, we are forbidden to do so. We note, however, that both parties have waived the opportunity to present further evidence, and that under the preponderance of the evidence standard which we or our hearing officers normally employ in resolving evidentiary conflicts when present, we reach the same conclusion. Under the preponderance of the evidence standard, we would conclude that the parties would have failed to reach agreement even in the absence of Respondent's bad faith bargaining conduct.

We cannot agree with Member Ramos Richardson's suggestion that California Code of Regulations, title 8, section 20260 is a more appropriate vehicle for handling the parties' request in this matter. Her reliance on section 20260 is misplaced as that section has meaning only in the event the Board were to formally reopen the underlying liability case, a step which would be inappropriate in this matter. Moreover, the procedural prerequisites for the invocation of that section are missing here: the Dal Porto inquiry is not an unfair labor practice liability proceeding, nor have the parties stipulated to a factual record or asked for oral argument. We believe that the correct approach is

(fn. 15 cont. on p. 16)

this matter as found in 13 ALRB No. 8 in accordance with our decision herein as reflected in the attached amended Order.

AMENDED ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board (Board) hereby orders that Respondent Mario Saikhon, Inc., its officers, agents/ successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to meet and to 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 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:

(a) Upon request meet and bargain collectively in good faith with the UFW, as the exclusive collective bargaining representative of its agricultural employees and, if agreement is

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(fn. 15 cont.)

the summary disposition procedure with which the parties have, through their briefs, indicated they are familiar, and to reserve California Code of Regulations, title 8, section 20260 for the situations for which it was clearly created. As Member Ramos Richardson has already declared that her decision on the merits would be the same as the majority's holding, whether reached under section 20250 or the Board's summary disposition procedure, her opposition would appear to go only to form.

reached, embody such agreement in a signed contract.

(b) Upon request of the UFW, rescind its unilateral wage increases from the 1980-81 and 1982-83 lettuce harvest season, and meet and bargain in good faith with the UFW concerning any proposed wage increases, or any other conditions of employment of its agricultural employees.

(c) Provide a copy of the attached Notice in the appropriate language(s) to each agricultural employee hired by Respondent during the 12-month period following the date of issuance of this Order.

(d) Sign the Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purposes set forth in this Order.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this Order, to all agricultural employees in its employ at any time during the period from October 30, 1980, until the date on which the said Notice is mailed.

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

(g) Arrange for a representative or a Board agent to distribute and read the attached Notice, in all appropriate

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

(h) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director until full compliance is achieved.

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year commencing

on the date on which Respondent commences to bargain in good faith with the UFW.

Dated: May 30, 1989

BEN DAVIDIAN, Chairman[16/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member[17/]

JIM ELLIS, Member

[16/] The signatures of the Board Members in all Board Decisions appear with the signature of the Chairman first, if particpating, followed by the signatures of the participating Board Members in order of their seniority.

[17/] Member Ramos Richardson finds it unnecessary to use this case to adopt summary judgment disposition procedures when it can be resolved under the established procedures set forth in title 8, California Code of Regulations, section 20260 as recommended by the court in William Dal Porto & Sons, Inc. v. Agricultural Labor Relations Bd. (1987) 191 Cal.App.3d 1195, 1214 [237 Cal.Rptr. 206] (hereafter Dal Porto). The parties in this case are in agreement as to the facts and have asked the Board to render a judgment without a further evidentiary hearing. This section does not require any formal procedure for stipulating to the facts, nor does it require the parties to request oral argument. Moreover, section 20260 was designed precisely to resolve issues raised by an unfair labor practice charge of bad faith bargaining such as in the instant case. Based on the evidence presented, Member Ramos Richardson would find that Respondent has met its burden of proof that the parties would not have reached an agreement even in the absence of Respondent's bad faith conduct and therefore under Dal Porto, supra, Respondent is entitled as a matter of law to an order vacating our prior imposition of the makewhole remedy.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we, Mario Saikhon, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by bargaining in bad faith with the UFW regarding a collective bargaining agreement. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farm workers these rights:

1. To organize yourselves;
2. To form, join or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above. In particular:

WE WILL NOT make any changes in your wages, hours, or conditions of employment without first notifying and negotiating with the UFW, the certified bargaining representative of our employees, about such changes.

WE WILL meet with your authorized representatives from the UFW, at their request, for the purpose of reaching a contract covering your wages, hours, and conditions of employment.

DATED: MARIO SAIKHON, INC.

By: _____
(Representative) (Title)

If you have any questions 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 319 Waterman Avenue, El Centro, California, 92243. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Mario Saikhon, Inc.
(UFW)

15 ALRB No. 3
Case No. 31-CE-5-EC
(13 ALRB No. 8)

BOARD DECISION

The Agricultural Labor Relations Board (ALRB or Board) had previously issued a decision and order finding that Respondent Mario Saikhon, Inc. (Respondent) had violated Labor Code section 1153(e) and imposing the makewhole remedy. On remand from the appellate court to determine the impact of William Dal Porto & Sons v. ALRB (1987) 191 Cal.App.3d 1195 [237 Cal.Rptr. 206], the Board directed Respondent and Charging Party United Farm Workers of America, AFL-CIO (UFW or Union) to present evidence and legal argument in support of their respective positions that they would not, or would, have reached contractual agreement even in the absence of Respondent's bad faith bargaining conduct.

Thereafter, in response to the parties' evidentiary showings and legal argument, the Board set for hearing the issues (1) whether it was impossible for the parties to reach agreement on the basis of Salinas Valley wage rates because of economic and other production-related differences between Salinas Valley-based mixed crop growers and Imperial Valley-based mixed crop growers such as Respondent and (2) whether it was impossible for the parties to reach agreement because of the Union's alleged insistence on an illegal contract term. Prior to the scheduling of the hearing for these issues, however, Respondent requested that the Board, in a manner corresponding with civil summary judgment procedure, summarily dispose of the question of contractual agreement in its favor. The Union filed an opposition to Respondent's motion in which it reiterated its previously expressed position that no additional hearing was necessary in order for the Board to uphold its prior imposition of the makewhole remedy. Accordingly, the Board treated the parties' moving and opposition papers as pleadings in the nature of a motion for summary disposition of pending matters and an opposition thereto. It found that Respondent's proof of the Union's consistent proposal of Salinas Valley-based wage levels that were economically unacceptable to similarly situated Imperial Valley growers who bargained in good faith was relevant, admissible, and highly probative on the question of the causation of the parties' failure to reach agreement. Finding further that the Union's proof was insufficient to raise a triable issue either that the Union was flexible on Salinas Valley-based wages, or that Respondent's bad faith refusal to furnish requested bargaining-related information to the Union caused the Union's insistence on Salinas Valley-based wages, the Board determined that no genuine issue of material fact existed on the question whether Respondent's bad faith bargaining conduct caused the parties' failure to reach contractual agreement, and that Respondent was entitled as a matter of law

under Dal Porto, supra, to an order vacating the Board's prior imposition of the makewhole remedy. The Board also observed that, had it weighed the parties' proof under a preponderance of the evidence standard, it would have reached the same result.

The Board, therefore, issued an amended order and notice deleting the makewhole remedy and reimposing the other relief previously determined.

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