El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ABATTI FARMS, INC., and ABATTI PRODUCE, INC., Respondent /Employer and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	)	Case Nos. 78-RD-2-E 78-CE-53-E 78-CE-53-1-E 78-CE-53-2-E 78-CE-55-E 78-CE-56-E 78-CE-58-E 78-CE-60-E 78-CE-60-1-E 78-CE-61-E 79-CE-5-E 16 ALRB No. 17 (14 ALRB No. 8) (7 ALRB No. 36)

SUPPLEMENTAL DECISION

On February 26, 1990, the California Court of Appeal for the Fourth Appellate District issued an order remanding this matter to the Agricultural Labor Relations Board (ALRB or Board) for reconsideration of the Board's decision in Abatti Farms, Inc., (1988) 14 ALRB No. 8 in light of the decision of the California Supreme Court in Arakelian v. Agricultural Labor Relations Board (1989) 49 Cal.3d 1279 [265 Cal.Rptr. 162] (Arakelian). The court's order of remand was in response to petitions for remand filed by the Board and Abatti Produce, Inc. (Abatti or Respondent). The petitions for remand were unopposed by the United Farm Workers of America, AFL-CIO (UFW or Union).

For reasons explained below, the Board affirms its earlier decision in this case. A bad faith absolute refusal to bargain in order to challenge the Board's decision to certify or not to certify election results may properly result in imposition

of a makewhole award consistent with Arakelian, supra, irrespective of the hypothesized outcome of good faith bargaining.

This case arose from a decertification election held among the employees of Respondent on December 27, 1978, that resulted in the Union retaining its status as the certified bargaining representative of Respondent's employees. When Abatti absolutely refused to bargain with the Union following the Board's decision to dismiss the decertification petition because of Abatti's unfair labor practices, the Board found that Abatti had pursued its litigation strategy in bad faith merely to delay bargaining. The makewhole remedy was imposed on Respondent in Abatti Farms, Inc. (1981) 7 ALRB No. 36. Petitions for review, hearing, and certiorari were denied by the Court of Appeal, California Supreme Court, and United States Supreme Court, respectively.

A compliance hearing was held between December 1983 and July 1985. The decision of the Administrative Law Judge (ALJ) issued March 18, 1986. Exceptions were taken to the decision of the ALJ, and the Board issued Abatti Farms, Inc., 14 ALRB No. 8, on July 26, 1988. Respondent timely filed a Petition for Review challenging, inter alia, the Board's refusal to allow it to present a "Dal Porto" defense to the makewhole remedy during the compliance proceedings. Specifically, Abatti sought to avoid the Board's makewhole award by proving that no contract would have been agreed to had Abatti bargained in good faith. Additionally, Abatti proposed that if the Board did not reconsider its award of makewhole, the Board should measure makewhole damages either by

the wages paid by other employers in the Imperial Valley who, unlike Respondent, had bargained with the Union to impasse, or by reference to the wages it paid under a contract which it entered into with the Union subsequent to the makewhole period. Utilizing either measure, no makewhole would be due.

On May 12, 1987, while the compliance case was still pending before the Board, the Third District Court of Appeal issued William Pal Porto & Sons, Inc. v. Agricultural Labor Relations Board (1987) 191 Cal.App.3d 1195 [237 Cal.Rptr. 206] (Dal Porto). The Court of Appeal held that in cases of bad faith surface bargaining, an employer must be given the opportunity prior to the imposition of the makewhole remedy to rebut the presumption that a contract calling for higher wages would have been agreed to by the parties absent the employer's refusal to bargain in good faith. In response to Dal Porto, on November 16, 1987, the Board issued an order establishing procedures for the parties to follow in seeking reconsideration of outstanding makewhole orders in appropriate cases. Since in the Board's opinion the approach mandated by Pal Porto applied only to cases in which bargaining had actually taken place, "technical refusal to bargain" cases and other cases wherein the employer absolutely refused to bargain were not permitted to present a Dal Porto defense under the guidelines of that order. Respondent's case was among those denied a Dal Porto hearing.

While this case was pending before the Court of Appeal, another Court of Appeal issued a decision, Arakelian Farms v. Agricultural Labor Relations Board, overruling the distinction

between "absolute" refusal to bargain cases and bad faith surface bargaining cases upon which we had relied in refusing to extend the Dal Porto analysis to Respondent. The California Supreme Court granted hearing and issued its own decision in Arakelian, supra. Aware of the pendency of the Supreme Court decision in Arakelian, the Fourth District Court of Appeal stayed briefing in this case. When the decision of the Supreme Court in Arakelian issued, Abatti and the Board petitioned for remand of our compliance decision in 14 ALRB No. 8 for further consideration by the Board in light of Arakelian. The UFW did not oppose the remand.

Upon review of the entire record in this case, we have determined that our prior decision and order, Abatti Farms, Inc., (1988) 14 ALRB No. 8, is in full accord with Arakelian, and we hereby reinstate our previous order. However, because we did not have the benefit of the Supreme Court's decision in Arakelian prior to our decision in 7 ALRB No. 36, we take this opportunity to fully set out our views on the important questions involved in the Dal Porto-Arakelian line of cases. As demonstrated below, both Dal Porto and Arakelian draw a critical and well-recognized distinction between the propriety of a makewhole award, i.e., damages caused by an employer's bad faith refusal to bargain, conventionally determined in liability proceedings under our bifurcated procedure, and the amount of that award, i.e., damages, determined in compliance proceedings such as the one under review in this case. Guided by that distinction, we again reject Respondent's proffered evidence as irrelevant to the question

whether makewhole should be imposed, but take it into account and again reject it as not persuasive on the question of the amount of the award.

Before turning to the specific questions raised by Respondent upon remand, however, it is first necessary to outline generally the state of the law of makewhole as it has gradually emerged. The first makewhole case considered by the California Supreme Court concerned so-called technical refusals to bargain.[1/] In J.R. Norton v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1 [160 Cal.Rptr. 710] (Norton), the Supreme Court faced the question whether it was an abuse of discretion for the Board to automatically impose makewhole in every case in which an employer refuses to bargain in order to challenge a Board certification. The court concluded that the Board could not impose makewhole without having determined that the employer's challenge to the certification was merely designed for delay. In reaching this conclusion, the court reviewed both the legislative history of the makewhole provision in our Act as well as the policies which led to consideration of such a remedy under the

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[1/] Under the Agricultural Labor Relations Act an employer may not obtain immediate judicial review of the Board's decision certifying a union as the employees' exclusive bargaining representative. Instead, an employer that doubts the validity of the union certification can seek judicial review only by refusing to bargain with the union. If the employer is subsequently charged with and found guilty of an unfair labor practice under Labor Code section 1153, it may challenge the Board's findings in court, arguing that but for violations in the conduct of the election the union would not have been selected as the employees' bargaining representative. (Arakelian, supra, at p. 1286, fn. 1.)

National Labor Relations Act (NLRA or national act).[2/] The court held that the policy of promoting the employees' free selection of a bargaining representative is actually enhanced by allowing makewhole to be imposed only when an employer uses the procedures of the Agricultural Labor Relations Act (ALRA or Act) to pursue a meritless or bad faith challenge to an election. The pursuit of valid claims of interference with the employees' exercise of free choice in an election should not be discouraged. When an employer pursues a challenge based on a reasonable good faith belief in the merits of its objections, the employees' lost opportunity to bargain is not compensable under the Act, even though, if the election challenge be ultimately rejected, the employees' monetary loss could be considered the same. (Norton, supra at pp. 28-29.)[3/]

In Arakelian, supra, the court considered whether the Dal Porto decision of the Court of Appeal, Third Appellate District, that dealt with the propriety of a makewhole award in a

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[2/] Critical to the court's conclusion was the identification of the nature of the wrong sought to be remedied by makewhole, namely, the loss of the opportunity to bargain. (Norton, supra at pp. 30-35.) It was this lost opportunity which was weighed against an employer's interest in being able to assert a challenge to the certification.

[3/] It is important to note that the employees' monetary loss was not taken into account in imposing the makewhole remedy. The question to be decided was only whether imposing the remedy best served the purposes of the Act:

> The critical inquiry, therefore, is not whether the employees have incurred losses during the period when collective bargaining did not take place as a result of the employer's pursuit of election challenges. Rather, the issue is in what circumstances the employees' losses are compensable under the Act. . . . (Id. at p. 36.)

surface bargaining case, should apply to a case involving a technical refusal to bargain in pursuit of an election challenge.[4/] The Supreme Court again defined the nature of the wrong that gives rise to the propriety of a makewhole award and distinguished between monetary losses suffered by employees and the loss of the employees' rights under the Act:

> In Norton, supra, 26 Cal.App.3d at page 9, we adopted a test that accommodates the interests of both parties, by providing for makewhole relief only if it serves an important compensatory objective in those cases in which the employer's election challenges are merely a stalling tactic designed to thwart union organization. Once the Board or a reviewing court determines that such bad faith challenges motivated the employer's conduct, make-whole relief does not punish the employer so much as compensate the employees for the actual loss of the opportunity to bargain. (Arakelian, supra at p. 1294.)

The makewhole remedy may, therefore, be imposed when it is determined that the employees have been deprived of their opportunity to bargain under circumstances that frustrate the purposes of the Act.

In a bad faith technical or absolute refusal to bargain case such as this then, the propriety of a makewhole award is established without more. Because of the employer's unlawful conduct, what might have occurred during the course of bargaining to legitimately prevent agreement cannot be determined. (See Dal Porto, supra at p. 1209.) Any evidence offered to prove that the parties would have reached impasse had they bargained in good

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[4/] Surface bargaining occurs when the parties attend bargaining sessions and engage in bargaining, but one or both of the parties does not intend to try to reach agreement or makes no real effort to that end. In a technical refusal to bargain, by way of contrast, absolutely no bargaining occurs.

faith is too speculative to be considered relevant and substantial evidence under the law. (Arakelian at pp. 1292-93.) It is only a bargaining history showing stalemate resulting from legitimate disagreements that can overcome the presumption that good faith bargaining would have led to agreement. (Id. at p. 1293.) Such a history, however, is obviously absent in an absolute refusal to bargain case such as this.[5/]

As noted above, in this case as in Arakelian, Respondent did not bargain at all. There is no history of bargaining upon which to base a determination that legitimate disputes between the parties precluded meaningful bargaining. The evidence Respondent introduced at compliance consisted of the results of bargaining by other parties during the makewhole period and its own bargaining conduct with the Union subsequent to the makewhole period. The evidence is not relevant to a determination of whether the parties would have agreed or disagreed on any specific provision or on a

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[5/]As the Supreme Court stated in Arakelian, this difference in the ability to produce legally cognizable evidence is the major distinction between technical and surface bargaining cases:

> In surface bargaining cases, the employer can produce evidence of the actual negotiations between the parties to prove that they would not have entered into a collective bargaining agreement despite the employer's wrongful conduct. In technical refusal cases, on the other hand, the evidence that the parties would not have entered into an agreement even if they had negotiated in good faith is necessarily speculative because there is no bargaining history between the parties. (Id. at p. 1293.)

complete contract.[6/] The evidence offered by Abatti is too speculative to be considered relevant to the question of the propriety of a makewhole award. Consequently, in 14 ALRB No. 8 we refused to consider Respondent's evidence with regard to the imposition of the makewhole remedy.

Respondent now argues that Arakelian mandates the Board to permit an employer who has engaged in a bad faith absolute refusal to bargain to attempt, during the compliance proceedings, to prove that no contract would have been entered into regardless of the employer's refusal to bargain.7/ Abatti misunderstands the court's reasoning. As discussed above, the Arakelian court found that the evidence offered by the employer to refute the propriety

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[6/] Indeed, such evidence of bargaining after the conclusion of the makewhole period was explicitly rejected by the Arakelian court. (See id. at p. 1293, fn. 10.)

[7/] Respondent's argument is based upon the following comment of the court:

> Finally, we see no injustice in upholding the Board's refusal to reopen this case, in light of the fact that any potentially relevant evidence Arakelian could introduce to show that no agreement would have been reached between the parties may best be offered in the compliance phase of thee proceedings. In cases involving a technical refusal to bargain any relevant evidence tending to show that no contract would have been consummated between the parties is more appropriately introduced in the compliance proceeding, because the question of what the parties might have agreed to concerns the amount of damages rather than the fact of damages. (See Great Chinese Am. Sewing Co. v. N.L.R.B. (9th Cir. 1978) 578 F.2d 251, 256.) Indeed, both the Board and the United Farm Workers concede as much, admitting that Arakelian is free to present evidence during the compliance stage that tends to mitigate any amount claimed to be owing as a result of the make-whole order we affirmed in Arakelian I. (Arakelian, supra at p. 1295.)

of an award of makewhole damages was too speculative to be considered relevant, substantial evidence in support of any specific finding regarding a course of bargaining that never occurred. The court pointed out, however, that the issue at the compliance phase of the proceedings is the proper amount of the makewhole damages. Evidence that tends to show no contract would have been entered into by the parties may be relevant to the question of the proper amount of makewhole damages to be imposed. (Id. at p. 1295.)

The task of the Board at the compliance stage of these proceedings, therefore, is to assess damages according to the reasonable gains to be expected from good faith bargaining. As stated by the courts in Dal Porto and Arakelian, the Board need not engage in evidentiary wheel spinning. Abatti's approach to the measure of damages would involve the same guesswork and speculation at the compliance phase as it would at the liability stage of the proceedings. The evidence Abatti introduced at compliance was, in fact, relevant to the question of the amount of makewhole damages. It was not accepted in evidence, however, for the speculative purpose of determining what might have been the course of bargaining that never occurred, i.e., on the question of the propriety of a makewhole award. Construction of an imaginary course of bargaining based upon speculation is not the task of the Board at either liability or compliance.

We agree that the wages and benefits paid by others who bargained in good faith are indicative of the gains to be expected from collective bargaining. The evidence, therefore, that Abatti

presented of the wages and benefits paid by others who bargained in good faith to impasse is thus relevant to the amount of makewhole damages as it proves the results of bargaining in some specific instances. But Abatti's evidence was not the only evidence before the Board. We were required to weigh Abatti's evidence against countervailing evidence of the wages others paid and within the context of the principle that any uncertainty as to the losses the employees incurred should be resolved against the wrongdoer. It was with this understanding that we fashioned an appropriate measure of makewhole damages. Because of the peculiar circumstances extant during the makewhole period in this case, it is necessary for us here to again refer to the history of the makewhole remedy.

The first decision of the Board to comprehensively address the subject of makewhole was Adam Dairy (1978) 4 ALRB No. 24 (Adam Dairy), a case which provided the background for the Supreme Court's discussions of makewhole in Norton and Arakelian. In Adam Dairy, we relied heavily upon the prior decision of the National Labor Relations Board (NLRB) in Ex-Cell-O Corporation, (1970) 185 NLRB 107 [74 LRRM 1740] (Ex-Cell-O) in formulating and explaining the rationale for the law and policies we adopted. In explaining the nature of the makewhole remedy we stated:

> Thus, the dissenters in Ex-Cell-O advocated a reimbursement order for violations of Section 8(a)(5) of the NLRA so that "employees would be compensated for the injury suffered as a result of their employer's unlawful refusal to bargain, and the employer would thereby be prohibited from enjoying the fruits of its forbidden conduct to the end, as embodied in the Act, that collective bargaining be encouraged and the rights of injured employees be protected." The concurrent

> purposes of compensating employees and encouraging the practice of collective bargaining form the framework for application of the makewhole remedy. Thus, we seek initially to make employees whole for a deprivation of their statutory rights, and in so doing we must assess the actual monetary value of their loss with reasonable accuracy. (Adam Dairy, supra at p. 9, emphasis added.)

In fashioning an appropriate measure of makewhole, we were also concerned that the Board not become involved in the bargaining of the parties or actually supplant bargaining through the use of the makewhole remedy:

> We note further that the Board's remedial powers were created not to redress private causes of action, but to implement public policy embodied in the Act. (NLRB v. Seven-up Bottling Co., supra; F.W. Woolworth Company v. NLRB (1981) 21 F.2d 658, [8 LRRM 515].) It does not serve the purposes of the Act for the state, in seeking to remedy unfair labor practices which undermine collective bargaining, to so intertwine itself in the details of bargaining that the dictates of the state are substituted for agreement of the parties. (Adam Dairy, supra at p. 10.)

With that foundation, the Board then considered the various suggestions that had been made for measuring the award. We considered the "wide range of data on which such an award might reasonably be based" as discussed in Ex-Cell-O, and rejected that approach as being too cumbersome and time consuming. (Adam Dairy, supra at p. 12.) We then considered the approach advocated by the General Counsel and Charging Party that involved costing out a hypothetical Union contract with provisions that employees could expect from good faith bargaining. Also considered was an article presented by the General Counsel and Charging Party describing methods devised by the federal Bureau of Labor Statistics for costing out collective bargaining agreements.

While acknowledging that the approach might be warranted in some cases, the Board rejected the method as being too time consuming and as providing too much potential for dispute over detailed components of the award. (Adam Dairy, supra at pp. 12-13.)

Legislation pending before Congress that provided a simple method of calculating the damages award with reference to the percentage of change during the makewhole period in the Bureau of Labor Statistics, Average Wage and Benefit Settlements, Quarterly Report of Major Collective Bargaining Settlements was also reviewed. We indicated that the proposed formula was appropriate and would serve the purposes of the Act. In connection with the proposed federal legislation, we discussed the uncertainty of any award and the rule that the consequences of such uncertainty should be resolved against the party whose wrongdoing created the uncertainty. We cited the following language from Fibreboard Paper Products Corp. (1969) 180 NLRB 142 [72 LRRM 1617], enf'd sub nom. Steelworkers v. NLRB (DC Cir. 1970) 436 F.2d 908 [75 LRRM 2609]:

> In the words of the Supreme Court, "it is not possible to say whether a satisfactory solution could [have been] reached...." Indeed, as the Respondent contends, the Union might not have been able to persuade the Respondent not to contract-out or retain the "Pabco formula". The fact that the Respondent did not give the Union an opportunity to attempt to reach such an agreement was found violative of the Act. Thus, any uncertainty with respect to what wage rates the backpay claimants would have received except for

termination was created by the Respondent, which bears the risk of that uncertainty.
(Id. at p. 144, emphasis added.)[8/]

Even though the Board was favorably impressed with the measure of makewhole damages proposed in the pending legislation, it was compelled to reject the approach because of an absence of data on California agricultural employment comparable to that contained in the Bureau of Labor Statistics report. (Adam Dairy, supra at p. 15.) In an attempt to approximate the approach set forth in the proposed federal legislation, the Board ordered a measure of damages in Adam Dairy based upon the contracts actually entered into by the UFW during the first year following certification of the Union as bargaining agent for the Adam Dairy employees.

It is important to note that in Adam Dairy we were not required to look to the contracts negotiated by the UFW in formulating the measure of damages. Nor did we necessarily consider that approach the optimum one that could be taken. It was simply the most expeditious and readily available "reasonable" method of calculating makewhole damages. The measure was a reasonable assessment of the wages and benefits to be expected from bargaining. The Board does not, and indeed cannot, determine that the parties would have agreed to the exact wage rates and benefits

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[8/]In the Fibreboard case the employer contested the backpay formula selected by the NLRB, and argued that it could not be assumed, and that it was in fact unlikely, that the employer would have agreed to the formula had the parties bargained.

the Board is imputing. The damages assessed are of necessity a reasonable estimate of the employees' losses.

As previously indicated, the measure of damages adopted by the Board in Adam Dairy is not the only permissible measure of damages. Differing measures must be adopted for differing circumstances. In Holtville Farms, Inc. v. ALRB (1985) 168 Cal.App.3d 388 [214 Cal.Rptr. 241], for example, we departed from the Adam Dairy approach. In that case the Board isolated one contract and determined that it was the appropriate measure of the employees' financial losses. The Court of Appeal upheld the Board's order as a reasonable assessment of damages. There have been other departures from the Adam Dairy approach as well. (See F&P Growers Assn. v. ALRB (1985) 168 Cal.App.3d 667 [214 Cal.Rptr. 355].)

In the present case, the ALJ found that there were no contracts negotiated by the Union with other growers having farming operations considered comparable to those of Respondent that could be used to approximate the employees' losses. Consequently, the ALJ and the Board were compelled to find a new measure of makewhole damages to compensate Respondent's employees for their losses. Rejecting Abatti's argument that the appropriate measure of makewhole damages is the wages and benefits paid by employers in the Imperial Valley who, unlike Respondent, bargained in good faith to impasse, we borrowed from Adam Dairy and adopted a measure that consisted of averaging wages paid for specific jobs in the industry under negotiated agreements. The percentage gain approach used by the ALJ and the Board was very

similar to the measure discussed in Adam Dairy and proposed in the Labor Law Reform Act of 1978 that measured makewhole by the percentage increase in wages and fringe benefits reflected in the Bureau of Labor Statistics Report. Applying the percentage gain approach resulted in the addition of a ten percent per annum factor to Respondent's wage rates during the period of makewhole. The totality of the evidence weighed heavily in support of such a factor. As stated in 14 ALRB No. 8:

> Indeed, like the ALJ and the General Counsel, we are impressed by the compatibility of a 10 percent formula with so much data; no matter whether we look at averages derived from Southern California contracts, or at averages from the Imperial Valley (Colace factored over three years), or at the averages contained in Dr. Martin's study, a 10 percent figure reasonably reflects the wage gains employees could expect to enjoy from the collective bargaining process. (Id. at p. 37, emphasis added.[9/]

We have taken into consideration all of the evidence in adopting a measure of makewhole damages. While Respondent's evidence is relevant to the appropriate measure of makewhole damages, we remain unpersuaded by it. We find the measure of makewhole damages adopted in 14 ALRB No. 8 to be the appropriate measure of such damages in this case. Accordingly, we affirm and reinstate our decision and order in Abatti Farms, Inc. and Abatti Produce, Inc. (1988) 14 ALRB No. 8. Respondent's motions to

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[9/] In addition, the ten percent formula was supported by the testimony of Ben Abatti who indicated that he was willing to pay ten percent in order to "stay competitive with what the rest of the farmers were paying in the valley." (See 14 ALRB No. 8 at p. 34, fn. 17, for a discussion of the relative weight afforded Ben Abatti's testimony.)

reopen the record for submission of additional evidence and to present oral argument are hereby denied.

Dated: December 20, 1990

BRUCE J. JANIGIAN, Chairman[10/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[10/] The signatures of Board Members in all Board decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board members in order of their seniority.

CASE SUMMARY

Abatti Farms, Inc., and
Abatti Produce, Inc.
(UFW/Toribio Cruz and Jose Donate)

16 ALRB No. 17

Case Nos. 78-RD-2-E
78-CE-53-E
78-CE-53-1-E
78-CE-53-2-E
78-CE-55-E
78-CE-56-E
78-CE-58-E
78-CE-60-E
78-CE-60-1-E
78-CE-61-E
79-CE-5-E

Background

The Board decision follows remand from the Court of Appeal for the Fourth Appellate District to enable the Board to reconsider its decision in Abatti Farms, Inc. (1988) 14 ALRB No. 8 in light of the California Supreme Court's decision in Arakelian v. Agricultural Labor Relations Board (1989) 49 Cal.3d 1279 [265 Cal.Rptr. 162] (Arakelian). The court's order of remand was in response to petitions for remand filed by Abatti Produce, Inc. and the Board. At the compliance hearing before the Board the Employer argued that it should be permitted to introduce evidence to prove that no contract would have been entered into by the parties had the parties bargained in good faith. The Board refused to consider such evidence for the purpose of setting aside the Board's earlier liability decision imposing the makewhole award, but considered the evidence in determining the appropriate measure of damages in 14 ALRB No. 8. In Arakelian the California Supreme Court affirmed the Board's position that employers who absolutely refuse to bargain may not attempt to prove that no contract would have been entered into by the parties had bargaining occurred, but indicated that evidence that may tend to prove no contract would have been agreed to may be introduced at the compliance hearing to the extent the evidence is relevant to the measure of damages. The evidence proffered by the employer in 14 ALRB No. 8 was the history of good faith bargaining by other agricultural employers in the same geographic area who bargained to impasse with the union.

Board Decision

The Board affirmed and further explained its decision in 14 ALRB No. 8. The Board again refused to consider the evidence offered by the Employer for the purpose of proving that no contract would have been entered into by the parties had bargaining occurred. The Board again determined that any evidence offered by an employer to prove no contract would have been reached had bargaining occurred is too speculative to be considered relevant, whether offered at the liability hearing or at the compliance phase. The Board further explained that the Employer's evidence was relevant to the measure of makewhole to be adopted and that it was considered by

the Board, but it was not found persuasive in light of all of the contrary evidence presented. The Board affirmed its decision in 14 ALRB No. 8 that the measure of makewhole imposed, which consisted of an averaging of wages paid under negotiated contracts, was the appropriate measure of damages in light of all the evidence.

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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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