Hollister, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PAUL W. BERTUCCIO, Respondent, and UNITED FARM WORKERS OF OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 79-CE-140-SAL 79-CE-196-SAL 79-CE-380-SAL 80-CE-55-SAL 17 ALRB No.16 (9 ALRB No. 61) (8 ALRB No. 101) (November 27, 1991)

DECISION

This matter is before the Agricultural Labor Relations Board (ALRB or Board) on exceptions filed by the Respondent, Paul W. Bertuccio (Bertuccio), and by the General Counsel to a decision by Administrative Law Judge Thomas Sobel (ALJ) in which it was found that the Board's award of bargaining makewhole in Paul W. Bertuccio (1982) 8 ALRB No. 101, as modified in 9 ALRB No. 61 (Bertuccio I), was appropriate under the requirements set forth in William Pal Porto & Sons, Inc. v. ALRB (1987) 191 Cal.App.3d 1195 [237 Cal.Rptr. 206] (Dal Porto). The Pal Porto court held that the Board may not award bargaining makewhole without first providing the employer the opportunity to prove that the parties would not have reached agreement on a contract calling for higher pay even in the absence of the employer's bad faith bargaining.

The Board's decision in Bertuccio I found that Bertuccio bargained in bad faith from January, 1979 to September, 1980. In Paul W. Bertuccio (1984) 10 ALRB No. 16 (Bertuccio II), it was found that Bertuccio engaged in bad faith bargaining from March,

1981 to August, 1982. The cases were consolidated on review and, in 1988, the court upheld most of the Board's findings, including the findings that Bertuccio engaged in surface bargaining throughout the period in question.[1/] The court remanded the cases to the Board for consideration of the effect of Dal Porto on the propriety of makewhole. With regard to Bertuccio II, the court also ordered the Board to consider the effect of strike violence on the makewhole award. Later, Charging Party United Farm Workers of America, AFL-CIO (UFW or Union), by stipulation, waived the right to makewhole during the period covered by Bertuccio II. Therefore, only the makewhole award under Bertuccio I is the subject of the present "Dal Porto" proceeding. Consistent with the court's opinion, the Board, in its order setting this matter for hearing, defined the remedial period at issue as January, 1979 to April 1, 1981.

Pursuant to the provisions of Labor Code section 1146, the Board has delegated its authority in this matter to a three-member panel.[2/]

The Board has considered the entire record and the ALJ's decision in light of the exceptions and briefs filed by Bertuccio and the General Counsel,[3/] and affirms the rulings, findings, and conclusions of the ALJ insofar as they are consistent with the

[1/] Paul W. Bertuccio v. ALRB (1988), Sixth Appellate District, H000334 (certified for partial publication.)

[2/] All section references herein are to the California Labor Code unless otherwise specified.

[3/] The UFW filed no response to the exceptions and briefs filed by Bertuccio and the General Counsel.

decision herein, and declines to adopt his recommended order. As discussed infra, the Board finds that makewhole is not appropriate because Bertuccio has successfully established that the parties would not have reached agreement even if Bertuccio had bargained in good faith.

THE ALJ'S DECISION

Before discussing the exceptions to the ALJ's decision, it is helpful to briefly summarize those factual and legal conclusions which are critical to his analysis.

Dal Porto

The ALJ concluded that Dal Porto imposes a two-step test in determining whether an employer can show that the parties would hot have reached agreement even if the employer had not bargained in bad faith: 1) the parties must have had real differences; and 2) those differences must have been operative to impasse. In the ALJ's view, the court emphasized the showing of impasse on legitimate differences in order to avoid "speculative evidence about what might have happened."

In Dal Porto, the court held that it would be punitive to impose the makewhole remedy where the parties would not have reached agreement even if the employer had bargained in good faith. The court further held that the proper analytical approach to deciding that issue is the but-for test set out in Martori Brothers Distributors v. ALRB (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626] (Martori). In Martori, the California Supreme Court adopted the analysis used by the National Labor Relations Board (NLRB or national board) in Wright Line (1980) 250 NLRB 1083 [105 LRRM

1169]. That analysis was later approved by the U.S. Supreme Court in NLRB v. Transportation Management Corp. (1983) 462 U.S. 393 [113 LRRM 2857] (Transportation Management).

The ALJ found the language of Dal Porto to be problematic to the extent that the court stated that but-for causality results in identifying the "true reason" for the parties' failure to agree. As the ALJ points out, the U.S. Supreme Court's most recent discussion of but-for causality in Price Waterhouse v. Hopkins (1989) 490 U.S. 228 [109 S.Ct. 1775] confirms that, in mixed motive cases such as the present one, it makes no sense to speak of the "true" reason for the conduct at issue. That is because the Wright Line mixed motive analysis begins from the premise that both legal and illegal motivations were at work. But-for causality analysis seeks to determine whether the results would have been the same even in the absence of the unlawful motive. Because the Dal Porto court's language is not always consistent with its asserted adoption of but-for causality, the ALJ described his discussion as a reinterpretation of Dal Porto in light of Price Waterhouse.

Alleged Differences in Agriculture Between San Benito and Monterey Counties

The Board, in its order setting this matter for hearing, stated that:

> Respondent shall have the burden of demonstrating, pursuant to Dal Porto, supra, that due to conditions unique to San Benito County agriculture it would not, in good faith, have entered into a contract calling for wages higher than were economically feasible in San Benito County, even in the absence of its proved bad faith bargaining.

As a preliminary matter, the ALJ determined what is meant by

"economically feasible." Relying on the primary dictionary definition of "feasible," the ALJ concluded that the Board's order meant that Respondent must prove that it was not capable of paying the wages the UFW was asking for. The ALJ then proceeded to examine whether the differences between San Benito and Monterey County agriculture were such that the UFW's wage demands were not "feasible."

First, the ALJ stated that, to the extent that growers in San Benito County generally grow more perennial crops, which are normally not as profitable as annual crops, this distinction is of little relevance here because Bertuccio is a grower of multiple annual crops. Rejecting Bertuccio's claim that San Benito represents a different market, the ALJ focused on Bertuccio's admission that the majority of his lettuce was sold to Let-Us-Pak, a Salinas based grower-shipper, which marketed the lettuce nationwide. Thus, the ALJ concluded that Bertuccio's lettuce does compete with Monterey County lettuce. However, the ALJ acknowledged the evidence which showed that Bertuccio's summer lettuce was of inferior quality compared to Salinas area lettuce. He noted that this does support the claim that San Benito wages should be lower than Monterey wages, but again noted that Bertuccio disclaims reliance on inability to pay.

The ALJ found that expert witness Dr. Philip Martin's study of wage rates failed to explain why, other than as the result of collective bargaining, wages are generally higher in Monterey County than in San Benito County. The ALJ concluded that, to the extent wages are lower in San Benito, it is simply

because San Benito growers do not have to pay Monterey area wages. This, he observed, does not demonstrate whether San Benito growers could or should have paid Monterey wages.

Application of the But-For Test

Though the ALJ concluded that Bertuccio failed to prove that Sun Harvest[4/] wages were not "economically feasible," he recognized that Bertuccio nevertheless could have resisted paying Sun Harvest wages while bargaining in good faith. Therefore, he then turned to an examination of the parties' bargaining history to determine if Bertuccio's resistance to Sun Harvest wages would have led to deadlock even in the absence of Bertuccio's adjudicated lack of intent to reach agreement. As discussed above, the ALJ's reading of Dal Porto requires that, in order to prevail, Bertuccio must demonstrate that the parties were in fact at impasse.

While acknowledging the wide disparity between the parties' wage proposals, the ALJ concluded that the disparity was in part due to Bertuccio's bad faith bargaining, particularly Bertuccio's unilateral wage increases and his conflicting statements over whether he was claiming inability to pay. Moreover, the ALJ found that the history of negotiations reflected no indication of impasse. He noted that the parties both

---

[4/] Sun Harvest refers to an agricultural employer with whom the UFW had reached agreement in 1979. The UFW then attempted to use the contract with Sun Harvest as a model agreement. Though the UFW's wage proposals throughout the makewhole period at issue here were at least slightly above prevailing Sun Harvest rates, as the ALJ noted, it is clear from the records in the present proceeding and in Bertuccio I that the UFW was attempting to settle at Sun Harvest rates.

exhibited steady, if not dramatic, movement on wages. In addition, the ALJ noted that Bertuccio never claimed that impasse had occurred, even when the UFW asked Bertuccio in 1980 if his latest offer was his final one. Thus, the ALJ concluded that Bertuccio failed to show "as a matter of historical fact" that the parties were at impasse over wages. He further stated that Bertuccio's bad faith bargaining contributed to the parties' differences over wages, such that Bertuccio cannot claim that good faith differences would have led to impasse.

EXCEPTIONS TO THE ALJ'S DECISION

Bertuccio challenges several aspects of the ALJ's analytical framework, claiming that he exceeded his authority by deviating from the analysis set out by the court in Dal Porto and by the Board in Abatti Farms, Inc. (1988) 14 ALRB No. 8 and Mario Saikhon, Inc. (1989) 15 ALRB No. 3. The primary claim is that the ALJ erred by requiring Bertuccio to show that the parties were at an historical impasse on wages. Bertuccio claims that such a requirement does not appear in any of the three cases cited above. Instead, Bertuccio claims that the Dal Porto court merely used impasse as an example of the kind of showing an employer might make to show that no agreement would have been reached even in the absence of bad faith bargaining because Dal Porto itself sought to make that showing. Bertuccio also points out that the Board annulled the makewhole order in Saikhon without any showing that the parties were at impasse.

Though Bertuccio does not fully explain why the ALJ's "reinterpretation" of Dal Porto in light of Price Waterhouse

creates any prejudice, he nonetheless argues that Price Waterhouse, being a Title VII discrimination case, has no application to matters before this Board. In the alternative, Bertuccio argues that it has fully met the showing required by Price Waterhouse by proving that conditions in San Benito County prevented it from agreeing to Sun Harvest rates and that the UFW's unwavering insistence on Sun Harvest, rather than Bertuccio's unfair labor practices, prevented agreement.

Bertuccio also takes strong issue with the ALJ's interpretation that the Board's order in this matter requires a showing that Bertuccio could not afford to pay Sun Harvest wages. Bertuccio argues that the Board's use of the term "feasible" means "suitable" or "appropriate," rather than "possible." Bertuccio claims that the Board's order in Saikhon was similar, and there was no discussion of inability to pay in that case. Furthermore, argues Bertuccio, if the Board intended to focus on Bertuccio's ability to pay, it would have said so directly in its Order setting the issues for hearing and would not have included reference to conditions unique to San Benito County.

Bertuccio contests most of the ALJ's factual findings, particularly those surrounding the purported differences between agriculture in San Benito and Monterey Counties. Bertuccio contends that the ALJ had no authority, to reject the conclusions drawn by its expert Dr. Martin. In Bertuccio's view, the unrefuted testimony of an expert witness must be regarded as conclusive. In particular, Bertuccio argues that there was no basis on which to reject Martin's conclusions that: (1) lettuce

wages were generally higher than those for other crops, and (2) wages were historically higher in Monterey County. Martin's report reflecting wage bands and his testimony concerning the relative economic status of San Benito County (unemployment levels, per capita income, housing and land costs, etc.) are offered in support of the conclusion that conditions in San Benito County made Sun Harvest wage rates inappropriate.[5/] Bertuccio also emphasizes the testimony of its other witnesses that differences in crop mix and size of operations make San Benito agriculture less profitable. Further, Bertuccio argues that the ALJ's conclusion that San Benito wages were lower simply because the growers did not have to pay more ignores the evidence that San Benito had a different labor market and historically lower wage scales.

Bertuccio also takes issue with the ALJ's conclusion that Bertuccio's operation was more like the typical Salinas operation than the typical San Benito operation. Although, like the Salinas operations, Bertuccio grew multiple annual crops, Bertuccio notes that he also grew many perennial crops that generally are not as profitable and pay lower wages. Bertuccio also denies that he competes with Salinas lettuce growers, even in the spring and fall, because he does not harvest and market the lettuce himself.

Turning now to the application of the but-for test, Bertuccio first acknowledges that he has never asserted that the

---

[5/] Bertuccio also claims that the ALJ erred in refusing to consider wage trends in garlic because Bertuccio refused to bargain over the garlic harvest workers.

parties were at impasse or that he ever claimed an inability to pay, but reiterates his claim that neither need be shown. Instead, Bertuccio argues that, given the demonstrated inappropriateness of Sun Harvest wages in San Benito, it was not his bad faith bargaining that prevented agreement. In this regard, Bertuccio claims that he never asserted an inability to pay, as demonstrated by the court's statement that "for the most part Bertuccio insisted he was concerned only that he remain competitive with other growers in the area by keeping his labor costs in line with theirs." Bertuccio insists that this finding is binding on the Board and renders erroneous the ALJ' s conclusion that Bertuccio frustrated negotiations by not clearly providing a justification for its wage proposals. Moreover, Bertuccio argues that the UFW would have asked to see his books if he had ever claimed an inability to pay.

Bertuccio also disclaims that his unlawful unilateral wage increases prevented agreement in any way. Bertuccio asserts that the ALJ erred in stating that the first unilateral change took place before Bertuccio had submitted any proposal on wages, when in fact Bertuccio's initial wage proposal was made on February 21, 1979, months before the first unilateral change.[6/] Bertuccio also asserts that, since the court found the issue of the unilateral increases to be a close question, the unilateral

---

[6/] Bertuccio is apparently relying on the summary of proposals prepared by its counsel (exh. R-10), while the ALJ relied on the finding of the ALJ in the underlying proceeding that Bertuccio's first written economic proposal was submitted on August 29, 1979, which was after the July 1979 unilateral change.

changes could not have had any significant effect on negotiations.

In asserting that UFW intransigence on Sun Harvest rates would have prevented agreement even in the absence of Bertuccio's unfair labor practices, Bertuccio relies on the following. First, Bertuccio points to the UFW's admission that its objective was to obtain Sun Harvest rates and to the fact that the UFW's proposals never fell below Sun Harvest during the makewhole period. Bertuccio dismisses as self-serving and not credible the testimony of UFW witnesses Dolores Huerta and Paul Chavez that the UFW would have been willing to be flexible if Bertuccio had bargained in good faith. In addition, Bertuccio claims that the UFW's proposal of April 8, 1982, which Bertuccio later accepted and which contained rates well below Sun Harvest, demonstrates that agreement was prevented earlier only by the UFW's unreasonable insistence on Sun Harvest rates. The ALJ, relying on George Arakelian Farms v. ALRB (1989) 49 Cal.Sd 1279 [265 Cal.Rptr. 162], concluded that such evidence, being outside the makewhole period, was irrelevant. Bertuccio argues that, since Arakelian was a technical refusal to bargain case, the court's exclusion of evidence outside the makewhole period should be restricted to that context.

The General Counsel also filed exceptions, which for the most part mirror those filed by Bertuccio. First, the General Counsel argues that the ALJ erred in equating "economically feasible" with ability to pay. Instead, the General Counsel believes that the Board's order requires only that the UFW's wage demands be shown to be inappropriate or unsuitable for San Benito

County. Next, the General Counsel claims that Price Waterhouse is inapplicable and, in any event, Dal Porto is perfectly clear as written. In a related exception, the General Counsel asserts that the ALJ erred by shifting the focus away from the general question of whether Sun Harvest was appropriate for San Benito County as a whole and onto an examination of Bertuccio's particular situation. The General Counsel also agrees with Bertuccio that Dal Porto cannot be read to require a showing of impasse in all cases. Lastly, the General Counsel excepts to the ALJ's failure to find that the UFW was intransigent on Sun Harvest wages, arguing that the UFW's admitted goal of obtaining Sun Harvest rates requires the same finding of UFW intransigence found in Saikhon.

DISCUSSION

The Proper Analytical Framework

Before evaluating the evidence submitted in this case, it is necessary to resolve the threshold question of what Bertuccio must prove in order to prevail. Both Bertuccio and the General Counsel assert that the ALJ made fundamental errors in framing the issues in dispute. We begin with the ALJ's interpretation of the requirements of Dal Porto.

Though the Dal Porto court's occasional reference to the "true" reason for the conduct at issue is reflective of the "dominant motive" test rejected by the U.S. Supreme Court in Transportation Management, supra, it is clear that the Dal Porto court embraced the but-for analysis adopted in Martori Brothers and several times properly described that test. Therefore, though we believe the ALJ properly described but-for causation, in our

view this does not require that Dal Porto be "reinterpreted" in light of the recent discussion of but-for causation in Price Waterhouse.[7/]

We do not agree with the ALJ's conclusion that Dal Porto requires a showing of actual impasse. Rather, we believe that an employer must show that legitimate differences would have eventually led to impasse. We agree with Bertuccio and the General Counsel that the focus on impasse in Dal Porto was merely the result of the fact that Dal Porto sought to demonstrate that it had reached impasse. We do not read Dal Porto to require such a showing in all cases. In discussing the type of evidence that an employer may submit in order to show that no agreement would have been reached even if it had not bargained in bad faith, the court made two pertinent comments. First, the court stated that the Board need not entertain speculative evidence, for such evidence is properly deemed irrelevant. Second, the court observed that the evidence that Dal Porto sought to show, that the parties had indeed bargained to impasse, was not speculative and was instead based on "historical facts." (191 Cal.App.3d at pp. 1211-1212.) However, there is no indication that a showing of impasse is the only nonspeculative evidence that could be submitted.

As Bertuccio correctly argues, the Board has not

[7/] While Price Waterhouse arose under Title VII of the Civil Rights Act of 1964, it reflects nothing more than the application of the same but-for test previously applied by the Court in cases arising under the National Labor Relations Act. In turn, the analysis does not differ from that adopted by the California Supreme Court in Martori Brothers.

previously required a showing of impasse. In Saikhon, supra, the Board concluded that Saikhon had successfully made its Dal Porto showing by demonstrating that Imperial Valley growers who bargained in good faith uniformly rejected Sun Harvest rates and that the UFW was inflexible in those demands. Similarly, Bertuccio seeks to establish that he would never have paid Sun Harvest rates and that the UFW was intransigent in demanding those rates. Nowhere in Saikhon is there any hint that a showing of actual impasse was required.

Nor is the language of the Board's order setting this matter for hearing subject to a construction requiring a showing of actual impasse. Lastly, to require a showing of actual impasse would be inconsistent with the well established tenet that there can be no bona fide impasse if bad faith bargaining is a cause of the failure to agree. (Dal Porto, supra, 191 Cal.App.3d at 1212; see also United Contractors, Inc. (1979) 244 NLRB 72 [102 LRRM 1012]; Taft Broadcasting Co. (1967) 163 NLRB 475 [64 LRRM 1386].)

Though the Dal Porto court held that the Board could not award bargaining makewhole without a finding that but for the employer's bad faith bargaining the parties would have reached agreement on a contract calling for higher pay, the court created a rebuttable presumption which the employer bears the burden of overcoming. The court summarized its holding by stating:

> Thus, once the Board produces evidence showing the employer unlawfully refused to bargain, the burden of persuasion shifts to the employer to prove no agreement calling for higher pay would have been concluded in the absence of the illegality. (See Martori Brothers, supra, 29 Cal.3d at p. 730.) If the employer fails to carry its burden in this regard, the Board is entitled to find an agreement providing for higher pay would have

been concluded in the absence of the employer's refusal to bargain. (Dal Porto, at pp. 1208-1209.)

Bertuccio seeks to meet his burden of proof in this case by showing that 1) due to conditions in San Benito County, he would not have agreed to Sun Harvest rates even if he had bargained in good faith, and 2) during the makewhole period the UFW was unalterably inflexible in its demands for Sun Harvest rates. Since Bertuccio must demonstrate that his bad faith bargaining was not a but-for cause of the parties' failure to agree, he must also show that the chasm between the parties' positions was not the result of his bad faith bargaining.

The ALJ concluded that the Board's use of the term "economically feasible" in its order setting this matter for hearing (see p. 5 above) required Bertuccio to show that he could not afford to pay Sun Harvest wages. When read in harmony with Dal Porto, we do not believe that the order can be read so narrowly. In demonstrating that it would not have agreed to a particular demand on wages even if bargaining in good faith, an employer need not necessarily show that it was unable to afford the demand. This is because an employer may insist in good faith on wage rates that are less than it could afford to pay. (See generally, Morris, The Developing Labor Law (2d ed. 1983) pp. 583-588; NLRB v. Insurance Agents' International Union (1960) 361 U.S. 477 [45 LRRM 2704]; NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829].)[8/] Therefore, while Bertuccio

[8/] Section 1155.2 of the Agricultural Labor Relations Act, in defining the duty to bargain in good faith, provides that " . . . such obligation does not compel either party to agree to a proposal or require the making of a concession."

was required to show an inevitable chasm between the parties' positions on wages, we do not believe that he was restricted to showing that his position was based on an inability to pay. Rather, we believe that Bertuccio need show only a good faith basis for his refusal to agree to Sun Harvest rates.

The Proper Evidentiary Period

The admissibility of evidence concerning the parties' bargaining after the end of the Bertuccio I makewhole period is a matter of some contention. On July 25, 1982, Bertuccio accepted the UFW's last proposal, which was submitted on April 8, 1982. The Dal Porto court held, contrary to the Board, that Bertuccio's belated acceptance was valid, thus making wrongful the UFW's refusal to acknowledge the acceptance. The April 8, 1982 proposal included wage rates well below Sun Harvest and only slightly higher than Bertuccio had offered previously. Bertuccio sought to admit this evidence as proof that it was the UFW's earlier unreasonable insistence on Sun Harvest wages that prevented agreement. The ALJ admitted evidence surrounding the April 8, 1982 proposal, as well as evidence of the parties' proposals throughout the period represented by Bertuccio II, but in his decision he found the events in 1982 to be irrelevant to what happened during the makewhole period at issue here, 1979-1981. This was consistent with the Board's order setting this matter for hearing. Citing a comment by the California Supreme Court in Arakelian Farms, supra, 49 Cal.3d at 1293, fn. 10, the Board stated:

> . . . the Union's wrongful refusal, coming as it did after the commencement of good faith conduct by Respondent, and therefore lying outside the relevant makewhole period, is irrelevant and inadmissible to show the basis for the parties' failure to agree.

Moreover, this is consistent with the Board's view in Abatti, supra. In that case, at pages 32-33, the Board stated that evidence of a contract agreed to after the makewhole period does not settle the question of what the parties would have agreed to during an earlier period when the respondent was bargaining in bad faith because the refusal to bargain in good faith affects the parties' bargaining positions.

Evaluation of Bertuccio's Evidence

Though we do not fully agree with the ALJ's interpretation of the evidence, Bertuccio's claim that the ALJ and the Board must accept as conclusive the unrebutted testimony of Dr. Martin is not persuasive. The cases cited by Bertuccio stand for the proposition that unrebutted expert testimony is conclusive if the subject matter is peculiarly within the knowledge of the expert and not within the knowledge of laypeople. (See Starr v. Mooslin (1971) 14 Cal.App.3d 988 [92 Cal.Rptr. 583]; Lipscomb v. Krause (1971) 87 Cal.App.3d 970 [151 Cal.Rptr. 465].) Here, Dr. Martin's conclusions were questioned by the ALJ based upon review of the appendices to the report. The data contained in those appendices and the conclusions drawn from them are relatively straightforward in nature and are not beyond the understanding of the ALJ or the Board. Moreover, the ALJ's critique of Dr. Martin's conclusions is based primarily on Martin's admissions that the wage bands do not reflect where wages

were concentrated and that his inquiry was limited to reporting wage rates and did not include seeking explanations for any disparities.

We do not reject Dr. Martin's conclusion that lettuce wages were higher than other crops, though we agree with the ALJ to the extent that he concluded that Dr. Martin's report itself is inconclusive on that issue. Dr. Martin, along with several other witnesses, testified that their experience reflected that lettuce, like most multiple annual crops, tended to pay higher wages. Since Bertuccio's operations consisted of about 40% lettuce, this evidence lends support to Bertuccio's claims to the extent that, unlike most of the Salinas area growers, he also grew some perennial crops. The record does reflect that perennial crops tend to bring lower prices and pay lower wages. Unfortunately, we do not know what percentage of Bertuccio's operations consisted of such perennial crops. Nevertheless, to the extent that his crop mix did include perennial crops, Bertuccio was at an economic disadvantage vis-a-vis Salinas area growers of multiple annual crops. His relative economic position was also adversely affected by the inferior yield and quality of summer lettuce in San Benito.[9/]

With regard to Dr. Martin's conclusion that Monterey County wages were higher than San Benito wages, the ALJ did not reject that conclusion outright. Instead, he correctly observed

---

[9/] There was testimony that there was a $.50 per box difference in the price of Bud Antle's three grades of lettuce and that Bertuccio's summer lettuce would probably be of the lowest grade.

that for the period prior to the 1979 signing of numerous contracts in Salinas, the extent of the disparity between the two counties was not clear from the data provided.[10/] After 1979, the disparity widened considerably, most likely due for the most part to collective bargaining in the Salinas area. We conclude that, while the gap in wages between the two counties is difficult to accurately quantify from the record, it is clear that there was some disparity.

We agree with Bertuccio that the ALJ failed to acknowledge the significance of the evidence that Bertuccio operated in a different labor market from that of the Salinas-based growers who paid Sun Harvest wages. This conclusion is supported by evidence that San Benito growers drew their workforce primarily from within the county and by demographic characteristics that reflect that San Benito is relatively lower on the economic scale. Those growers who paid Sun Harvest or above in San Benito were Salinas-based growers who merely kept their wages consistent regardless of which county they operated in. This "spillover" effect apparently did not cause any significant general upward pressure on wages among San Benito-based growers.

[10/] We do not follow the logic of the ALJ's statement that Bertuccio cannot rely on evidence regarding garlic wages because Bertuccio refused to bargain over garlic harvest workers. Since this evidence is offered only on the general question of differences between the two counties, we do not see the connection. In any event, the evidence on garlic wages is consistent with the ALJ's observation that prior to 1979 Monterey wages appeared to drag up San Benito wages in some crops but not in others.

While the ALJ was correct in observing that the record does not fully explain why wages should have been lower in San Benito, that does not preclude finding that Bertuccio resisted Sun Harvest rates in good faith. While it is not clear to what extent Bertuccio stood at an economic disadvantage vis-a-vis Salinas-based growers, a disadvantage of some level was clearly shown. Moreover, the record is replete with evidence that existing wage rates amongst San Benito-based growers were well below Sun Harvest rates. It is unlikely that Bertuccio would have agreed to an immediate increase in labor costs of that magnitude, especially given his often expressed and legitimate concerns about remaining competitive with his neighbors in San Benito County. Therefore, regardless of Bertuccio's adjudicated bad faith bargaining conduct, we find that the evidence is sufficient to conclude that Bertuccio took a good faith position that he would not pay Sun Harvest rates. This conclusion is also strongly supported by the fact that the Board in Bertuccio I rejected that ALJ' s conclusions that Bertuccio made predictably unacceptable wage offers and that Bertuccio's rejection of the Sun Harvest contract was evidence of an uncompromising spirit.

Having found that Bertuccio would in good faith have resisted paying Sun Harvest wages, it is now necessary to examine Bertuccio's concurrent claim that the UFW would not have agreed to anything but Sun Harvest rates during the makewhole period, even if Bertuccio had not bargained in bad faith. The most important evidence relied on by Bertuccio is the UFW proposals, which were above Sun Harvest levels throughout the makewhole period at issue

here. This, coupled with the UFW's admitted goal of establishing Sun Harvest as an industry-wide model contract, strongly reflects inflexibility by the UFW on Sun Harvest rates. Moreover, it reflects that the fervent pursuit of Sun Harvest wage rates was an organizational goal, rather than something caused by Bertuccio's bargaining conduct.

The UFW argues that it would have settled for less than Sun Harvest had Bertuccio bargained in good faith and adequately explained the basis for his refusal to pay Sun Harvest. Both Paul Chavez and Dolores Huerta testified that, though the UFW's goal was to obtain Sun Harvest rates, thereby helping to establish an industry-wide standard, they were willing to settle for less than Sun Harvest where an employer demonstrated that those rates would create economic hardship. Chavez also stated that the UFW signed contracts in the period of 1979-1981 that provided for less than Sun Harvest, citing H & M Farms, UCG, and Hiji Brothers as examples.

Chavez and Huerta claimed that they never received the information necessary to cost out proposals or to determine if there was a legitimate reason why Sun Harvest rates could or should not be paid in San Benito. The UFW witnesses also claimed repeatedly that it would have been foolish to make wage concessions when an employer was not bargaining in good faith because the union would be receiving nothing in return. Huerta also testified that unilateral changes undermine and anger a union, thereby poisoning the bargaining relationship and making concessions from the union less likely.

The testimony of UFW witnesses that it would have been flexible on Sun Harvest if Bertuccio had exhibited good faith in negotiations is belied by the indisputable fact that its proposals were above Sun Harvest throughout the makewhole period, a period of over two years. Nor do we find convincing the UFW's claim that it had insufficient information to formulate wage proposals. The record reflects that the UFW did make wage proposals with regularity and that those proposals reflected gradual reductions in its demands. Moreover, Bertuccio was found to have unlawfully refused to provide information only as to hours worked and the use of labor contractors and custom harvesters.

In light of the fact that the UFW's wage proposals were above Sun Harvest levels throughout the makewhole period, along with the UFW's admitted goal of attaining an industry-wide standard based on the Sun Harvest contract, we find that Bertuccio has successfully proven that the UFW's insistence on Sun Harvest was not the result of Bertuccio's adjudicated bad faith bargaining. While surface bargaining certainly has a disruptive effect on the progress of negotiations, here we do not believe that it was a but-for cause of the failure to agree. Despite some movement by both parties, their wage proposals at the end of the makewhole period were still $1.75 apart in the general labor category and much farther apart in some other classifications. Therefore, we must conclude that on this record an insurmountable gap would have separated the parties even in the absence of bad faith bargaining.

CONCLUSION AND ORDER

In sum, we find that Bertuccio has successfully shown that he would not have agreed to Sun Harvest wages even if he had bargained in good faith and that the UFW would have remained inflexible on Sun Harvest throughout the makewhole period even had Bertuccio bargained in good faith.[11/] Consequently, makewhole is inappropriate because the parties would not have reached agreement on a contract calling for higher wages even in the absence of Bertuccio's bad faith bargaining conduct. The Board's order in Paul W. Bertuccio (1982) 8 ALRB No. 101, as modified in Paul W. Bertuccio (1983) 9 ALRB No. 61 and Paul W. Bertuccio v. ALRB (1988) 202 Cal.App.3d 1369 [249 Cal.Rptr. 473], shall in all other respects remain in full force and effect.

DATED: November 27, 1991

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

[11/] We would reach the same result even if we were to entertain evidence of negotiations history after April 1, 1981. In our view, the UFW's willingness during that period to propose rates well below Sun Harvest, coupled with the testimony of UFW negotiator Paul Chavez that drastic reductions in wage demands were the only hope of attaining a contract, support Bertuccio's claim that it was the UFW's earlier insistence on Sun Harvest rates, rather than Bertuccio's bad faith conduct, that made agreement impossible during the makewhole period.

CASE SUMMARY

PAUL W. BERTUCCIO
(UFW)

17 ALRB No. 16
Case Nos. 79-CE-140-SAL
79-CE-196-SAL
79-CE-380-SAL
80-CE-55-SAL
(9 ALRB No. 61)
(8 ALRB No. 101)

Background

Pursuant to a remand order of the Sixth District Court of Appeal, a "Dal Porto" hearing was held to determine the propriety of the Board's award of bargaining makewhole in Paul W. Bertuccio (1982) 8 ALRB No. 101, as modified in 9 ALRB No. 61 (Bertuccio I). Specifically, the court ordered that Bertuccio be given the opportunity to demonstrate that makewhole was inappropriate because the parties would not have reached agreement even if Bertuccio had bargained in good faith. The remand order from the court also included the related Board decision in Paul W. Bertuccio (1984) 10 ALRB No. 16 (Bertuccio II), in which it was found that Bertuccio continued to bargain in bad faith after the period covered by Bertuccio I. However, the UFW waived by stipulation the right to makewhole during this latter period. Therefore, only the period represented by Bertuccio I, January 1979 to April 1, 1981, is at issue here.

Bertuccio sought to meet its burden of proof in this case by showing that 1) due to conditions unique to San Benito County, he would not have agreed to Sun Harvest rates even if he had bargained in good faith, and 2) during the makewhole period the UFW was unalterably inflexible in its demands for Sun Harvest rates.

ALJ's Decision

The ALJ concluded that Dal Porto required Bertuccio to show that the parties had real differences that were operative to impasse. Moreover, the ALJ determined that the Board's use of the term "economically feasible" in its order setting the matter for hearing meant that Bertuccio was required to show that he could not afford to meet the UFW's wage demands. The ALJ found that while Bertuccio demonstrated that wages were generally higher in Monterey County than San Benito County, it was not shown that San Benito growers could not or should not pay Monterey rates, but only that San Benito growers did not pay those rates because they did not have to. Recognizing that even if Bertuccio failed to prove that he could not afford Sun Harvest wage rates he could still resist paying them while bargaining in good faith, the ALJ then examined the parties' bargaining history. Because he found no evidence that the parties had ever reached an actual impasse in negotiations, the ALJ concluded that Bertuccio had failed to meet his burden of proof. The ALJ also found that Bertuccio's

bad faith bargaining contributed to the parties' differences over wages, such that Bertuccio could not claim that good faith differences would have led to impasse.

The Board's Decision

The Board found that makewhole was not appropriate because Bertuccio successfully established that the parties would not have reached agreement even if Bertuccio had bargained in good faith. The Board concluded that Dal Porto does not require a showing of actual impasse, but only that legitimate differences would have eventually led to impasse. The Board agreed with Bertuccio and the General Counsel that the Dal Porto court focussed on impasse because the employer there sought to show an actual impasse, but that such a showing is not required in all cases. The Board also disagreed with the ALJ's interpretation of its order setting this matter for hearing. The Board found that Bertuccio did not have to show that he could not afford Sun Harvest rates, but only that he had a good faith basis for refusing to pay such rates.

The Board found that, based on differences in crop mix, in the yield and quality of summer lettuce and in relevant labor markets, Bertuccio successfully demonstrated that he had a good faith basis for resisting Sun Harvest wages. The Board determined that Bertuccio, in order to meet his burden of proof, also had to show that an insurmountable gap in the parties' positions was created by the UFW's inflexibility on Sun Harvest rates. In light of the fact that the UFW's wage proposals were above Sun Harvest levels throughout the makewhole period, along with the UFW's admitted goal of attaining an industry-wide standard based on the Sun Harvest contract, the Board concluded that Bertuccio successfully demonstrated that the UFW was inflexible. The Board also found that, while surface bargaining certainly has a disruptive effect on the progress of negotiations, it did not believe that Bertuccio's bad faith conduct was a but-for cause of the parties' failure to agree.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
PAUL W. BERTUCCIO,	)	Case Nos. 79-CE-140-SAL
	)	79-CE-196-SAL
Respondent,	)	79-CE-380-SAL
	)	80-CE-55-SAL
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	

Appearances:

Lewis P. Janowsky
Rynn & Janowsky
Newport Beach, California
for the Respondent

James W. Bogart
Grower-Shipper Vegetable Associaton
of Central California
Salinas, California
for the Respondent

William J. Lenkeit
Agricultural Labor Relations Board
Salinas, California
for the General Counsel

Dianna Lyons
Attorney at Law
Sacramento, California
for the Charging Party

DECISION OF THE ADMINSTRATIVE LAW JUDGE

THOMAS SOBEL, Administrative Law Judge:

INTRODUCTION

This case was heard by me in Hollister, California in July and August, 1990. Briefs were due December 15, 1990. The matter had its genesis in 1979 when the United Farm Workers of America, AFL-CIO, the certified bargaining representative of Respondent's employees, charged Respondent Paul W. Bertuccio with refusing to bargain in good faith. The charges went to complaint and thence to hearing and, while the case was making its way before the Board, the parties resumed bargaining, which led to new charges of bad faith against Respondent, a new complaint and another hearing.

In time, the Board issued two decisions. The first decision covered bargaining from January 1979 until September 1980, Paul W. Bertuccio (1982) 8 ALRB No. 101, as modified, 9 ALRB No. 61 (Bertuccio I) and in it the Board found Respondent had breached its obligation to bargain in a variety of ways which I shall shortly detail. For remedy, Respondent was ordered to make whole its agricultural employees for loss of pay resulting from its refusal to bargain.

Two years later, the Board issued its decision in the second case. Finding that Respondent had again bargained in bad faith from March 1981 until August 1982, it ordered makewhole for this period of unlawful activity too. Paul W. Bertuccio (1984) 10 ALRB No. 16 (Bertuccio II) Bertuccio timely sought review of both decisions.

In 1988, the Court of Appeal issued its decision in the two cases.[1] It upheld the Board's findings that from the inception of bargaining until September 1980:

> 1. Bertuccio refused to bargain over a large number of unit employees based upon his bad faith assertion that they were not part of the unit;
>
> 2. Bertuccio failed to supply the Union with the number of hours worked by his employees and with incomplete and inaccurate information about his use of labor contractors;
>
> 3. Bertuccio unilaterally raised wages in July 1979 and in July 1980;
>
> 4. Bertuccio engaged in surface bargaining as exemplified not only by the conduct described above but also by
>
> > (a) Being primarily responsible for the infrequency of meetings;
> >
> > (b) Failing to have an adequately informed and prepared negotiator;
> >
> > (c) The failure of its negotiator to adequately communicate proposals to and from the union;
> >
> > (d) Creating confusion about whether its wage proposals were based upon its asserted inability to pay or on maintaining parity with other growers;
> >
> > (e) Failing to discuss the impact of proposals;
> >
> > (f) Tendering of regressive proposals; and,

[1]A third case was also consolidated for review; it is not a refusal to bargain case and plays no part in the present proceedings.

(g) Intransigence on union security.

Bertuccio I.

For the period from September 1980 through July 1982, the Court upheld the Board's findings that Bertuccio violated the Act by:

1. Unlawfully persisting in refusing to bargain over the same employees it had previously refused to bargain about;

2. Unlawfully raising wages in January 1982;

3. Continuing to use a negotiator who was unavailable;

4. Making predictably unacceptable wage, union security and seniority proposals in connection with its use of contractor crews; and

5. Surface bargaining.

Bertuccio II.

In Respondent's view, one finding which the Court of Appeal did not uphold is as important as those which it did: the Court held, contrary to the Board, that the parties had reached agreement when Respondent accepted a still-outstanding Union offer on July 25, 1982.

The occasion for the present proceeding was the Court's additional conclusion that it was error for the Board to have imposed makewhole without having given Respondent the opportunity to prove that it would not have reached agreement with the Union prior to July 25, 1982 in the absence of the bad faith conduct which survived review. In so holding, the Court of Appeal both approved, and relied upon, the decision of another Court of Appeal in William Dal Porto & Sons, Inc., v. Agricultural Labor

Relations Bd. (1987) 191 Cal. App. 3d 1195.

Upon remand, Respondent moved the Board either to strike makewhole in its entirety or to permit it to present additional evidence on the question whether the parties would not have reached agreement in the absence of Respondent's bad faith. The Board ordered a hearing to give Respondent the opportunity to demonstrate that "due to conditions unique to San Benito County agriculture, [Respondent] would not in good faith, have entered into a contract calling for wages higher than were economically feasible in San Benito County even if it had bargained in good faith". Before considering what Respondent has proved, I would like to undertake a more detailed examination of what Dal Porto requires it to prove.[2]

1.

It might be thought that there is no need for such an inquiry, that Dal Porto itself is clear and the Board has given sufficient guidance about how to apply it in Mario Saikhon (1989) 15 ALRB No.3. Indeed, Respondent takes this position and argues that the Board's Saikhon decision controls this case.

[2]One other preliminary point: The Board has defined the liability period at issue here as running from January 1979 through April 1, 1981 (the Union having waived makewhole after April 2, 1981.) This is consistent with the Court of Appeal's finding that Respondent waived any argument as to the duration of the liability period in Bertuccio I, See Paul W. Bertuccio v Agricultural Labor Relations Bd, Sixth Appellate District, H000334, July 21, 1988. At the beginning of this hearing, Respondent argued that makewhole should not be imposed between September 1980 and March 1981. Although it appears to have abandoned this argument in its Post-Hearing brief, I believe the Court of Appeal decision is res judicata on this point.

Matters are not as simple as that. While the Board's Saikhon decision was premised on the absence of any genuine issues of material fact, the Board's Order in this case requires me to determine two factual questions: one about the differences, if any, between San Benito and Monterey agriculture, which was not addressed at all in Mario Saikhon, and the other about this particular Respondent's state of mind with respect to the Union's wage offers, which could never be decided by reference to another's state of mind.

For his part, General Counsel appears to take the position that Respondent's burden of proof is satisfied by the showing that there were differences between San Benito County and Monterey County agriculture. However, as I shall show, even if such differences exist, that would not satisfy Respondent's entire burden of proof; rather, the 'but-for' test in general, and the Dal Porto case in particular, requires more than proof that a wrongdoer had mixed motives.

Indeed, as the most recent Supreme Court decision to interpret the concept of 'but-for' causality makes clear, it is the presence of legitimate motives which requires the factfinder to take the next step and to determine if the same result would have occurred in the absence of the unlawful motive. Price Waterhouse v. Hopkins (1989) _US_, 109 S Ct.Rptr. 1775 Accordingly, the mere identification of good faith differences could never satisfy the requirements of the 'but-for' test. But if the Supreme Court decision clarifies certain aspects of 'but-

for' causality, it also complicates my task in this case because it casts doubt upon the Court of Appeal's interpretation of the concept in Dal Porto. Indeed, I believe Dal Porto must be reinterpreted in light of Price Waterhouse.

Accordingly, in this decision I will (1) explain Dal Porto; (2) show how Dal Porto must be interpreted in light of the Supreme Court's interpretation of 'but-for' causality; (3) consider whether San Benito agriculture is distinct from Monterey agriculture; and, finally, (4) consider whether Respondent would not in good faith have agreed to a contract containing Sun Harvest wages in the absence of its unlawful conduct by determining whether Respondent had bargained to impasse over wages.[3]

---

[3]Before leaving the question of what this case is about, let me add that the Board's Order also raises questions. Taken literally, the Board's order requiring Respondent to show that the wages demanded by the Union were not "economically feasible" in San Benito County means that Respondent could not afford to pay them. The Random House Dictionary defines "feasible" as "(1) capable of being done, effected or accomplished... (2) suitable." Its synonyms are "workable, practicable." Black's Law Dictionary confines the meaning to "capable of being done, executed, affected or accomplished, reasonable assurance of success." Special Deluxe Fifth Edition, 1979. The American Heritage Dictionary retains the primary meaning of "practicable, possible" and offers "capable of being utilized or dealt with successfully, suitable" as a secondary meaning, and "logical or likely," as a third meaning. Finally, Fowler, Dictionary of Modern English Usage, 1937 says the proper sense of feasible "is practicable, capable of being done, accomplished or carried on. That is, it means the same as possible...."

Under the primary definition of "feasible," then, Respondent must prove that the Union was seeking wages higher than Respondent was "capable" of paying, or higher wages than it was "practicable" or "possible" for Respondent to pay. To the extent the order does mean this, Respondent admits it has not met its burden of proof since it contends (1) that it has never argued "inability to pay," and (2) that proof of inability to pay

In William Dal Porto & Sons, Inc. v. Agricultural Labor Relations Bd. (1987) 191 Cal App 3d 1195, the Court of Appeal determined that the language of Labor Code Section 1160.3, which authorizes the Board to impose make-whole for "loss of pay resulting from the employer's refusal to bargain", means that the employer's refusal to bargain must be "the cause of the parties' failure to consummate an agreement." (Emphasis added) From this premise the Court drew two further conclusions:

> (1) It follows that if an employer's refusal to bargain as to certain issues plays no part in the failure of the parties to reach agreement, then there is no loss of pay, resulting from the refusal and make-whole relief is inappropriate.
>
> and
>
> (2) It also follows that where ... both innocent and wrongful bargaining conduct by the employer are alleged to cause the failure to reach agreement, the 'but-for' test should be applied.
>
> ***

---

is irrelevant to the proceedings. (See e.g., II:89; Post-Hearing Brief, p 33.)

Neither of Respondent's arguments is correct. First of all, Respondent has at the very least appeared to argue inability to pay. Indeed, the Court of Appeal affirmed the Board's findings that Respondent deliberately confused the Union about whether it was claiming inability to pay. Such confusion could only have arisen if Respondent appeared to be claiming inability to pay. More important than the "appearance" of such a claim, is the fact that, in this hearing, Paul Bertuccio actually claimed "inability to pay."

Moreover, despite Respondent's contention that "inability to pay" is irrelevant, it sought to introduce evidence that companies which agreed to the Union's wage demands went out of business. If the proffered evidence does not imply that Respondent also would have gone out of business if it paid them, it has a significance I do not understand.

> The test is applied to ascertain the true reason for the failure of parties to reach an agreement. The test is whether, but for the employer's unlawful refusal to bargain, the parties would have concluded a collective bargaining agreement. (Emphasis added) Ibid., at 1206-7

The Dal Porto case presented the need to disentangle the effect of potentially sufficient causes for the failure to agree when the parties' differences on two of three issues which, in the Board's view "doomed" negotiations were determined to be held in good faith.[4] Accordingly, the Court remanded the matter to the Board to determine whether the good faith disagreements of the parties would have divided them independent of Dal Porto's bad faith.

Dal Porto had argued that remand was unnecessary because the conclusion that good faith differences separated the parties meant that those differences by themselves would have doomed negotiations. The court rejected the argument for two reasons. First, the Court held that a finding that disagreements over three subjects contributed to failure is not the same as a

---

[4]The ALJ determined (1) that "three main areas of disagreement continually doomed [negotiations] to ultimate failure - wages, successorship and union security", William Dal Porto & Sons Inc (1983) 9 ALRB No.4, ALJD, pg 28, and (2) that Dal Porto was in bad faith on all three issues. The Board rejected the ALJ's finding that Respondent was in bad faith on wages, but did not reject his conclusion that wages was among the subjects holding up agreement. When the Court's turn came, it rejected the Board's conclusion that Dal Porto was in bad faith on successorship. The net effect of this series of decisions was that Dal Porto's positions on two issues declared to have separated the parties were held to have been maintained in good faith. Thus, both the Board and the Court (and the Board, in the Court's view,) essentially concluded that both good and bad faith separated the parties.

finding that disagreements over any one, or even two of them, would also have led to failure; second, and of greater importance to the present proceedings because it speaks directly to the scope of Respondent's burden of proof in this case, the Court held that its own finding of Dal Porto's good faith on the issue of successorship was not equivalent to a finding that the "parties had bargained to impasse or that further negotiations were pointless." Id. at 1213.[5]

As the Court emphasized, by focusing on whether the parties had bargained to impasse, one avoids "speculative evidence about what might have happened" in order to concentrate solely upon "historical facts." Thus, Dal Porto imposes a two-step test: (1) The parties must have had real differences; and (2) Those differences must have been operative to impasse, for if some undefined amount of "good faith" short of impasse were all that Dal Porto required, the twin conclusions that Dal Porto was in good faith on wages and on successorship would have ended the inquiry, as Dal Porto unsuccessfully argued.[6] I should add that

---

[5]The Court reasoned as follows:

> Nor can we conclude the second finding ... that Dal Porto's conduct with respect to successorship stood in the way of agreement--meant the parties had bargained to impasse because of good faith differences on the issue of successorship. This is particularly so since the ALJ (and the Board) did not specifically find that further negotiations were fruitless." Id, at 1213

[6]Despite Dal Porto's emphasis upon proof of impasse, the test of 'but-for' causality is sometimes construed as requiring a factfinder to determine what would have happened had the parties been concerned only about their differences. Respondent and

it is not incoherent to seek to determine in this case whether the parties were at impasse on wages against a background of Respondent's bad faith: "The fact that the parties have become deadlocked as to their negotiations on a particular issue does not necessarily mean that continued negotiation concerning other open issues would prove fruitless. Therefore bargaining on those other issues must continue." Gorman, Basic Text on Labor Law, 1976 p. 448 And if bargaining has to continue, it could be undertaken in either good or bad faith.

2.

Dal Porto issued in 1987; the test of `but-for' causality which it applied to surface bargaining cases was derived from Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal 3d 721, which in turn applied the test of 'but-for' causality drawn from Mt Healthy Board of Education v. Doyle (1977) 4249 US 274, a First Amendment case which has been progressively applied to a wide range of contexts, including discriminatory discharges under the NLRA, see Wright Line (1980) 281 NLRB 1053, NLRB v. Transportation Management Corp. (1983) 462 US 393

This genealogy means that one must turn to the Mt. Healthy line of cases in order to understand the concept of `but-

---

General Counsel essentially take this approach, isolating the wage issue from the matrix of bargaining and overlooking the question of impasse. Such an approach is not only inconsistent with the Dal Porto's explicit emphasis on impasse, but also incompatible with the concept of 'but-for' causality because it overlooks the presence of a bad motive.

for causality. And when one does turn to the latest Supreme Court case to explicate that concept, it appears that Dal Porto has misconstrued its nature.

It will be recalled that Dal Porto repeatedly emphasizes that 'but-for' causality is necessary to determine a wrongdoer's "true" motive in a mixed-motive case. However, in Price Waterhouse v. Hopkins (1989) _US_, 109 S Ct. Rptr. 1775[7], a majority of the Supreme Court, elaborating upon a distinction the Court had earlier made in NLRB v. Transportation Management, supra, specifically rejected such an analysis. The plurality writes: "Where a decision was the product of a mixture of legitimate and illegitimate motives...it simply makes no sense to ask whether the legitimate reason was the 'true' reason for the decision." (Emphasis added) 109 S. Ct. Rptr. at 1788 And Mr Justice White, writing separately, put it this way: "The Court has made it clear that 'mixed motive' cases.... are different from pretext cases. In pretext cases, 'the issue is whether illegal or legal motives, but not both, were the "true" motives behind the decision.' [Cite] In mixed motive cases, however, there is no one "true" motive behind the decision." (Emphasis added) 109 S Ct. Rptr. at 1795-96

[7]Although a Title VII case, the Court majority in Price Waterhouse (consisting of the four-justice plurality and Justice White on this point) took great pains to demonstrate that in deploying 'but-for' causality in the Title VII context it was doing nothing more than what it had already done in connection with "dual-motive" discharges under the NLRA. Thus, while not strictly speaking NLRA precedent, Price Waterhouse is authoritative on the meaning of 'but-for' causality under our Act.

It follows that when our Board describes the relevant question under Dal Porto as: "Did the employer's bad faith conduct prevent the parties from reaching agreement?" 15 ALRB No 3, n.14 it, too, appears to misconstrue 'but-for' causality since, according to Price Waterhouse, the question asked by the Board must always be answered in the affirmative. The open question, and the one the 'but-for' test is designed to answer is a different one: would the employer's legal motive standing alone have led to the same result.[8]

Although the question is hypothetical, in the sense that it refers to a non-existent state of affairs, a majority of the Court (again consisting of the plurality and Justice White on this point) agree that determination of the consequences of the true motive is not to become a hypothetical exercise. Rather, the wrongdoer must show that the legitimate reason was untainted by the illegitimate reason so that if it had possessed only the legitimate reason the results would have been the same. Thus the plurality:

> As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to

[8]Incidently, the Price Waterhouse decision casts doubt upon the reasoning behind the Pal Porto court's imposition of 'but-for' causality in the first place. Dal Porto reads the language "loss of pay resulting from the employer's refusal to bargain" to mean "loss of pay resulting solely from the employer's bad faith", a reading which, the Supreme Court majority makes clear, makes no sense in a mixed motive case. Put another way, in a dual motive case, a bad motive is also by definition present so that the casual connection is always logically satisfied. That 'but-for' causality is not necessarily required by the language of the statute does not mean it cannot be required as a matter of policy. That is a matter for the Courts at this point.

> its probable decision in the absence of an impermissible motive. Moreover, proving "that the same decision would have been justified... is not the same as proving that the same decision would have been made." (Cite) An employer may not, in other words, prevail in a mixed motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet the burden in such a case by merely showing at the time of the decision it was motivated only in part by the legitimate reason. The very premise of a mixed motives case is that a legitimate reason was present .... The employer instead, must show that its legitimate reason, standing alone, would have induced it to make the same decision.
>
> 109 S. Ct at 1791-2

Justice White, too, holds that a wrongdoer must prove that he had (1) a legitimate, (2) operative motive:

> In a mixed motive case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof.
>
> 109 S. Ct at 1795

That Justice White is willing to be persuaded by the wrongdoer about what motivated him, and that the plurality is not, should not distract us from observing that his version of ' but-for' causality calls for proof on the same two points upon which the plurality required proof.

Indeed, in Transportation Management Corporation supra, Justice White earlier demonstrated how 'but-for' causality is not satisfied by merely considering the strength of a wrongdoer's motive in isolation from the wrongdoer's actions which are at issue. The national Board had concluded that the discriminatee in Transportation Management Corp. had given grounds for

discharge, but that the employer had not proven that the "good cause" it had was operative and therefore, would have led to the same decision if the "bad cause" were absent. Justice White wrote:

> The Board was justified in this case in concluding that Santillo would not have been discharged had the employer not considered his efforts to establish a union. At least two of the transgressions that purportedly would have in any event prompted Santillo's discharge were commonplace, and yet no transgressor had ever before received any kind of discipline. Moreover, the employer departed from its usual practice in dealing with rules infractions; indeed, not only did the employer not warn Santillo that his actions would result in being subjected to discipline, it never even expressed its disapproval of his conduct. In addition, Patterson, the person who made the initial decision to discharge Santillo was obviously upset with Santillo for engaging in such protected activity. It is thus clear that the Board's finding that Santillo would not have been fired even if the employer had not had an anti-union animus was "supported by substantial evidence on the record considered as a whole." NLRB v. Transportation Management Corp, supra, 462 US at 402

What this means for the present inquiry is that under 'but-for' causality, I am not to view Bertuccio's asserted legitimate reason in isolation, but rather to determine if and how, it actually operated in the circumstances under consideration. In this sense, therefore, Dal Porto's two-step test of (1) legitimate differences (2) leading to impasse is actually strengthened by Price Waterhouse, even if the court's analysis is shown to proceed from an erroneous premise.

With a clearer understanding of 'but-for' causality, I now turn to consider the parties' factual contentions. Although Dal Porto test and the Board's Order are not framed in the same way, both initially require identification of legitimate areas of disagreement between the parties, that is, both require as a threshold matter that there be a showing that Respondent had mixed motives. Respondent has identified "economically feasible" wages as the area of legitimate disagreement.

The thrust of Respondent's defense is that San Benito County agriculture is so different from Monterey County agriculture that wages in San Benito are, and predictably should be, lower than wages in Monterey County. To bring the argument home, it follows that Respondent's resistance to paying "Sun Harvest"[9] wage levels was reasonable and would have caused the parties' failure to reach agreement in the absence of Respondent's otherwise demonstrated intent not to reach agreement. Further proof of this, according to Respondent, lies in the fact that when the Union "came down" from Sun Harvest wages in 1982, the parties did reach agreement. As a preliminary matter, I reject any argument based upon what happened in 1982 as at all relevant to the question of impasse during 1979-81. See

[9]In describing Respondent as resisting "Sun Harvest" wages levels, I am not ignoring the fact that the Union's wage demands were generally higher than Sun Harvest wages. However, as I shall show, it is clear that the Union was aiming at Sun Harvest wage levels and Respondent understood that. See 8 ALRB No 101, ALJD p 37

George Arakelian Farms Inc v. Agricultural Labor Relations Bd (1989) 49 Cal 3d, 1279, 1293, n 10 (Parties bargaining positions outside the makewhole period are irrelevant.)

In the section which follows, IconsiderRespondent's proof that San Benito agriculture is so different from Monterey agriculture that the Union's wage demands were "not economically feasible." I will conclude that Respondent has failed to prove that San Benito agriculture is so different from Monterey agriculture that Sun Harvest wages were not "economically feasible."

However, this still will not end our inquiry, since no matter the grounds for Respondent's disagreement over wages, it is clear (1) that wages did separate the parties and (2) so long as it was in good faith, Respondent was privileged to resist the Union's wage demands. I will consider the latter question in the final part of this opinion, in connection with application of the Dal Porto impasse test because that test does seek to determine whether Bertuccio's legitimate disagreements were unmixed with bad faith and would have led to impasse in their absence.

a.

San Benito sits like a pack on the back of Monterey County, separated by the natural border of the Gabilan Range.[10]

[10]I should point out that Respondent also presented evidence about Santa Clara and Santa Cruz counties. Since Respondent only farms in San Benito County, I don't find it necessary to probe the existence of differences between Santa Cruz or Santa Clara counties and Monterey County. Put another way, if the differences Respondent asserts between San Benito and Monterey do not exist, or cannot be shown to operate in the way Respondent

It is this range which, cutting San Benito off from the ocean, accounts for the climatic difference between the two counties. Exposed to the ocean, Monterey tends to be cooler year-round than San Benito which is not subject to the draining effect of the ocean air.

The relatively cooler weather in Monterey makes for a long growing season and permits Monterey to more or less continuously supply annual crops. As a result, a multiple crop grower has the opportunity to make up for periods of soft demand by hitting a "strong market." By way of contrast, growers of perennial crops which bear once a year, such as tree fruits or nuts, are at the mercy of a single market.

While San Benito devotes a greater percentage of its acreage to perennial crops than does Monterey, a great variety of perennial crops are grown in Monterey, such as grapes, sugar beets, hay, barley and garlic. See RX 14A,B,C Presumably, any Monterey grower of exclusively perennial crops would be at the same disadvantage as any San Benito grower of perennial crops, so that the Monterey/San Benito distinction is less a distinction between counties than it is between growers of particular crops.

To the extent Monterey's climate can be said to encourage the growing of annual crops one could treat the annual/perennial distinction as climate-dependent, but it is not clear

---

contends they operated, then either their occurrence or their effect in other counties is meaningless. On the other hand, if Respondent proves that San Benito and Monterey are different in the way it contends, then it has made its case without reference to the other counties.

what difference that distinction would make for Bertuccio since Bertuccio himself was a grower of multiple annual crops. Indeed, lettuce was by far his biggest crop. He started planting it in December, and continued planting it every week thereafter until September. Harvest ran from May through December, and according to the ALJ, Bertuccio might get as many as three lettuce crops in a single year.[11] See ALJD, n.19 Whatever general differences existed between Monterey and San Benito, then, Bertuccio would appear to be in position to hit a "hot" market.[12]

If the meaning of the annual/perennial crop distinction gets blurred for Bertuccio, it is clear is that by almost any measure - - total acreage under cultivation, total volume of production, total value of agricultural commodities - - Monterey County agriculture dwarfs that of San Benito, but Monterey County dwarfs San Benito County. To the extent that size alone accounts for these differences, it would be difficult to say what Respondent has proved by them and Mark Tognazzini, San Benito Agricultural Commissioner, did testify that his county's relatively small size (compared to Monterey) was at least to some

---

[11]The ALJ's findings contradict the testimony of Mark Tognazzini, Agricultural Commissioner of San Benito County, who testified that during the pertinent time period San Benito growers tended to avoid raising lettuce in the mid-summer months. I:14. Tognazzini's testimony is further contradicted by the EDD wage reports summarized in Respondent's Exhibit 13 which record lettuce wages for San Benito for the summer months in every year reported. I am relying on the ALJ's findings.

[12]In concluding this I am only considering the annual/perennial distinction. I will later consider the "quality" argument.

extent responsible for San Benito's "low" standing relative to Monterey.

But Tognazzini also testified that San Benito's "crop mix" contributed to these lower values, because San Benito growers generally grow "lower end crops" as opposed to those which "create more revenue." Yet even this generalization becomes less straightforward in light of testimony about specific crops. Thus, in Tognazzini's use, "low end" has two distinct meanings. One refers to market stability. In this sense, barley, for example, is a low end crop because it can be stored and thus tends to command lower prices. I:133. It also follows that any crop facing "soft demand", even lettuce, can be a low-end crop.

Moreover, "low-end" is used in another way to refer to crops that are not labor intensive because as a general rule, the "more labor you have in a crop...(the) more money it brings into the county." I:34 Under this definition, fresh market tomatoes, cucumbers, hand-picked tree fruits, and even garlic are "high-end" crops, see I:137-38, and San Benito has plenty of these.

To add to the confusion about the relationship between crop-mix and "agricultural standing", Richard Nutter, Agricultural Commissioner of Monterey, treated all perennial crops as "low-end." To Nutter, then, any crop with a single harvest cycle and including therefore, grapes and tomatoes, are "weak" spots in an agricultural economy. Yet, 1978, the highest San Benito wages in grapes and tomatoes were higher than the

highest wages paid in Monterey County, including lettuce.[13] It seems anomalous to treat crops supporting such high wages as "low end" crops.

In addition to citing "geography" and "crop-mix" as favoring Monterey's agriculture over San Benito, Respondent also stresses that San Benito growers have different markets than Monterey growers. Indeed, in his declaration in support of the Offer of Proof which led to this hearing, Bertuccio averred that he has never competed with any of the Salinas based growers for distribution or sale of his crops, including lettuce, because his lettuce is not shipped out of the state. Declaration of Paul Bertuccio, dated July 17, 1989.

This turns out not to be the case. At the hearing, Bertuccio admitted that in 1979, he sold 70% of his lettuce to Let-Us-Pak, a Salinas based grower-shipper, which marketed his lettuce nationwide; and while Let-Us-Pak only handled 50% of his lettuce in 1980 and 1981, during those years, too, Let-Us-Pak sold his lettuce sold out-of-state.

Bertuccio did testify without contradiction that his summer lettuce was not of the same quality as Salinas lettuce and did not fetch the same price. Here is a concrete distinction between San Benito agriculture and Monterey County agriculture that would appear to make a difference. However, with the

[13]Thus, the highest wage paid in Monterey (grapes) in 1978 was $3.75/hr; the highest wage paid in San Benito was $5.00 in grapes followed by $4.50 in tomatoes. See RX13, Monthly Summaries

exception of the lower price for summer lettuce, I just don't see that any of the geographic and crop differences which Respondent has pointed to, tell me much about what I am to decide, which is whether wages "should be" lower in San Benito County than in Monterey County. And the piece of evidence that I do understand bears on the wage question because it tends to show that Bertuccio could not afford to pay what a Monterey grower paid (during summer, anyway). Respondent, however, denies it is contending that.

Far more focussed is the testimony of Dr. Philip Martin, Professor of Agriculture and Economics at the University of California at Davis. Martin's overall conclusion is that given the sorts of differences I have outlined, and others which I shall shortly advert to, San Benito County may be expected to generate lower wage levels then Monterey County. He explained:

> San Benito County has the lowest priced farmland and the largest field crop and livestock sector. San Benito County is the smallest and most rural of the [counties compared, i.e., Monterey, Santa Cruz, and Santa Clara.]; has the lowest per capita income and the cheapest housing; and had in the late 1970's a shrinking manufacturing work force and higher than average unemployment.
> RX 9 p17

It is not clear to me that some of the factors which Martin implies cause low wages can be considered "causes" as opposed to conditions associated with them (for example, it does not seem correct to say that low per capita income or cheaper housing cause low wages), but Martin did offer an "economic" explanation of the relationship between wages and certain kinds

of crops.[14] Thus, livestock and field crops tend to pay lower wages than "seasonal" operations because they offer employment for longer periods of time. Once again, the force of such a generalization is considerably undercut by the whole of Respondent's case which depends upon proving that Monterey agriculture was strong because its lettuce growing season was nearly year round.

In any event, Martin conducted a survey of the reported wages paid in Monterey, San Benito, Santa Clara, and Santa Cruz counties from which he drew certain conclusions relied upon by Respondent. For the reasons stated earlier, I will concentrate upon the results for Monterey and San Benito counties. To obtain his data, Martin relied upon two sources; (1) bi-weekly reports published by the California Department of Employment and Economics Development which contain employment, acreage and wage figures by commodity; and (2) the geographical Census of Agricultural published by the United States Chamber of Commerce which provide "county level data on farms, commodities and acreage."

To compare the reported data, Martin utilized "wage bands", which he defined as the range (from low to high) of the reported wages within a given geographical area. Such bands are

---

[14]He testified:

> "Economic theory would say... that if you're offered less than full-time work, you get paid a premium to compensate for the fact that it's less than full-time work. Historically, seasonal workers have earned a higher hourly wage rate than "year-round" workers at the same wage level. I:39

considered 80-90% accurate, that is, "if you randomly went out...and picked 8 out of 10 workers or 9 out of 10 they would be getting a wage within the band." I:45 According to Martin, analysis of the wage bands revealed two distinct trends prior to the signing of the Sun Harvest contract: (1) The highest wage commodities were vegetables, especially lettuce, and, (2) Wages in Monterey were higher than in surrounding counties both in the same commodity and across commodities. I will examine each of these conclusions in turn.

1. Vegetable, and especially lettuce wages were higher than wages in other commodities.

In his report, Martin explained:

> The highest wage commodities in [the counties surveyed] were vegetables, especially lettuce; lettuce wages in 1978 were 10 to 20 percent higher than wages in other commodities.
>
> RX9, p.1

A look at the actual wage data contained in the Appendices, however, does not support Dr. Martin's conclusion. Before demonstrating that to be the case, let me explain what I am relying on. There are two sets of charts contained as Appendices to Dr. Martin's report: one set consists of wage summaries for eight selected San Benito crops and for three selected Monterey crops for the third quarter of each year surveyed. I will call this set the "Summer" set. The other set consists of month-by-month summaries for seventeen San Benito crops and six Monterey crops for "each year" surveyed. I have put "each year" in quotes deliberately for it appears as if the last six months of 1979 simply duplicate the last six months of

1978. I am assuming that it is 1979 which duplicates 1978 (rather than the other way around) because the July-September lettuce wages in the 1979 Monthly summaries do not reflect the Teamster and the UFW contractual gains in 1979. However, at least for 1978, the reported monthly wage levels do not appear to support Dr. Martin's unconditional assertion that vegetable, and especially lettuce wages, were higher than wages in other commodities in San Benito.

For example, while lettuce wages in San Benito peaked at $3.70/hr. in 1978, as reported in both the monthly and summer chart, grapes peaked at $5.00/hr, tomatoes at $4.50/hr. and miscellaneous vegetables[15] at $4.00/hr in September 1978. In San Benito County, then, it is not clear that the highest wage was in either vegetables (since it was in grapes) or in lettuce (since it was in either grapes or tomatoes.)[16]

Does the generalization fare any better about wages in Monterey in 1978? Since the month-to-month breakdown of wages indicates that Monterey 1978 high wages were more or less uniform in all commodities, it makes no sense to speak of lettuce or vegetables as "higher than other commodities". To the extent that a "highest" wage is reported for Monterey, it is not in vegetables, but in viticulture when a high pruning rate of

[15]"Miscellaneous vegetables" is a term used to cover a variety of vegetables which are not grown in large enough quantities of each kind to be reported separately.

[16]Although the tomato is technically a fruit, it is considered a vegetable for reporting purposes.

$3.75/hr is reported in December 1978 (compared to the peak in "vegetables" and "lettuce" of $3.70/hr.) Accordingly, Martin's conclusion is no more true of Monterey in 1978 than it was true about San Benito in 1978.

Is it true for 1979?

In San Benito, it appears that the year's high in lettuce is $3.70/hr. (from September to December) However, wages in both miscellanous vegetables and in grape pruning were at highs of $4.00/hr and $3.85/hr respectively from January thru June 1979. Once again, at least through the first six months of 1979 the dominant Monterey trend is again toward wage uniformity as opposed to lettuce setting a "highest" wage although it is true that through the first six months, miscellanous vegetables reaches the initial Monterey high of $4.12 in March before it is matched in grapes in April. According to the "Summer" charts now, lettuce rates do jump in August 1979 to $5.00 apparently due to the signing of the Teamster contract, 1:29, but rates are again uniform by September, 1979.

Accordingly, at least prior to the signing of the lettuce contracts in the summer of 1979, it is not at all clear, that vegetable, and especially lettuce, drove wages in San Benito or in Monterey.

2. Monterey wages are higher than San Benito wages.

Dr. Martin's second conclusion is that Monterey wages were historically higher than San Benito wages. My own reading of the data contained in his report again indicates that the

picture is more complicated than his conclusion would have it[17] and that he may have failed to capture the dynamics of inter-county wage patterns. Let me illustrate this with the example of miscellaneous vegetable wages. For the first quarter of 1978, the San Benito wage band was $2.75-$3.40/hr. and the Monterey wage band was $3.40/hr to $3.50/hr. At this moment, Dr. Martin's conclusion is obviously true.

However, by April 1978, the high end of both wage bands had equalized, and while the low ends were far apart with San Benito's low end being lower than Monterey's ($2.75/hr. vs $3.40/hr), it seems significant that over time San Benito's high wage tended to match Monterey's high wage in the same crop especially since (1) a wage band does not tell us anything about the concentration of wages so that it is possible most San Benito growers were at the high end and few Monterey growers were and (2) the same pattern appears in other crops.

In July 1978, Monterey's lettuce wage band spans $3.50/hr.-$3.70/hr. while San Benito's spans $3.40/hr.-$3.55/hr. However, while Monterey's lettuce rate remains at $3.70 for the season, San Benito's catches up with it in September. One sees the same pattern in the 1978 pepper harvest rates which start relatively low ($2.75-$3.00/hr) in San Benito and rises to $3.00-

[17] The example he gives is:
"In June 1978, for example, hourly wages for general labor employed in miscellaneous vegetables were $2.75 to $3.55 in San Benito County and $3.40 to $3.55 in Monterey County, or 24 percent lower at the end of the wage band." RX9 p.1

$3.50/hr in September, matching Monterey's low end and constituting 95% of its high end. It seems to me that this data can be read to indicate that, over time, Monterey wages tended to drag San Benito wages upward,[18] at least in 1978.

That Monterey and San Benito wage levels tended to converge over time during 1978 in some commodities, does not mean that they converged in all commodities. Indeed, the fact that Monterey wages tended toward uniformity, and San Benito wages did not, indicates that Monterey did not exert uniform upward pressure on non-vegetable wages.[19] However, as we shall see, Martin's explanation for wage uniformity in Monterey has nothing to do with differences in agriculture between the two counties.

What about 1979? Once again, I have the same problem drawing year-round wage comparisons between the two counties as I did comparing wages within the counties because Dr. Martin's monthly summaries for July through December 1979 duplicate his 1978 summaries. However, 1979 begins with San Benito's highs in

---

[18]The exception is the garlic harvest: San Benito garlic wages were not "dragged" up by Monterey. However, even if garlic were immune to Monterey's influences, this Respondent cannot rely on such a trend since he refused to bargain over the garlic harvest workers.

[19]Since no Monterey garlic or onion wages are reported (both crops are grown in Monterey, see Annual Crop Reports) it may be that, over time, the wages in these crops were consistent with Monterey wages in the same crops. We just don't know. If the cross-county wages in these crops were at similar levels, the general testimony about crop-mix, cost of housing, unemployment levels, etc., as wage determinants would become almost meaningless. I am not postulating that the wages were similar; my point here is simply that there is not really enough information in this record to warrant drawing strong conclusions about some of these relationships.

miscellaneous vegetables and vineyards exceeding the same rates in Monterey. In March, 1979 Monterey's high in miscellanous vegetables exceeds San Benito's $4.12/hr vs $4.00/hr, but San Benito's vineyard high still exceeds that of Monterey ($3.85/hr vs $3.75/hr.) Whether 1979 San Benito wages over time would have drifted toward Monterey wages as they did in 1978 in the absence of the signing of the 1979 vegetable contracts will never be known; however, at least through June 1979, the wage markets appear to be responsive to each other, as opposed to totally distinct.

However, there is no question that the wage patterns in the two counties diverge after the signing of the vegetable contract in 1979 with Monterey wages clearly outstripping San Benito wages in all crops from then on. From the fact that no such wide disparity was apparent before the signing of the 1979 contracts, it seems to me that the explanation for this is not an inevitable San Benito tendency toward lower-than-Monterey-wages, but rather, as Martin himself testified, that the unionized growers in Monterey signed contracts with Sun Harvest wages. "As more contracts were signed, wages went up. And since most Monterey lettuce companies were either union or competed with union companies for labor," I:33, wages tended to go up across the board in Monterey.

Since San Benito County was predominantly non-union[20] and "employers typically do not raise wages until the have to",

[20]The UFW was certified only at Bertuccio.

I:35, San Benito wages remained relatively low. (See also I:38) When Martin was asked if he could separate out the effect of collective bargaining on wages from that of any of the other economic factors upon which Respondent is relying, he said he could not. "As to why [wages were different between Monterey and the other counties]...how to separate out supply and demand factors is difficult. That's not totally [sic] the analysis I do. What I was asked to do was to look at what actually happened..."

I conclude that Respondent has not shown that Monterey wages were "not economically feasible" in San Benito because of the nature of San Benito agriculture. What it has shown is that San Benito farmers did not pay them because they did not have to, which is not the same thing. That someone is not compelled to act in a certain way says nothing at all about whether they could act that way, whether they ought to act that way, or whether it is "suitable" to act that way.

b.

This does not end our inquiry for, under basic labor law principles, Respondent had the right to resist paying Sun Harvest wages so long as it bargained in good faith. One cannot look at the history of the parties' bargaining without acknowledging that the parties were far apart on wages. Since there is also no question that Respondent lacked any intention to enter into an agreement with the Union, I turn to the 'but-for' test to determine whether Respondent's position on wages was

another reflection of its bad faith or whether it would have led to deadlock in the absence of its bad faith. Accordingly, it is necessary to see how the wage issue played itself out against the background of Respondent's demonstrated bad faith. To do this, I will first summarize the ALJ's findings about the parties' bargaining over wages.

1.

Pursuant to certification, the Union requested negotiations in December 1978. The parties first met on January 22, 1979 without any exchange of proposals. A few days later, on January 25, 1979, the Union proffered the first proposal, entirely on language and Respondent's negotiator agreed to try to sort out all language issues before considering economics. On February 22nd, Respondent presented its first language proposal and the Union complained that it had not yet received the hours of work information it had previously requested. The parties met again on March 8th, March 20th, and April 12th and reached agreement on some language issues. Despite the earlier agreement to defer economics, Respondent requested the Union's economic proposal, which was not yet prepared.

The parties did not meet again until April 23rd, by which time Respondent had a new negotiator who was unprepared for substantive discussions, but who pressed the Union for its economic proposal. The Union's negotiator said that it was difficult to prepare one in the absence of the information which

had not yet been provided.

The parties next met on May 7th without exchanging further proposals. The ALJ characterized the parties as far apart on major items, but in agreement on slightly less than half of the original language proposals. In June 1979, the Union changed negotiators and the parties were not to meet again until August 2, 1979. In the meantime, on July 1, 1979, Respondent unilaterally raised wages $.25 an hour.

When the parties met again on August 2nd, the Union presented its first economic proposal. In doing so, the Union's negotiator specifically maintained that she was not waiving her right to additional information and "many [wage] items in the proposal had the designation, pending information, such as garlic, gourds, and cardoni.", ALJD p32. She also pressed for production information and for information about Respondent's use of labor contractors and custom harvesters. On wages, representative rates included:

General Labor		5.25
Irrigator		6.00
Tractor		7.50 to 8.25
Mechanic		8.50 to 12.50
Lettuce Harvest	24	.87
	30	1.0875

Respondent made its first economic proposal on August 29, 1979. Respondent offered no wage increase above current levels and included no harvesting rates for onions, gourds, garlic, sugar beets and ornamental corn on the grounds that these employees were outside the unit. On September 1, 1979

the Union signed the Sun Harvest contract. Representative rates included:

General Labor		5.00
Irrigator		5.10
Mechanic		6.90 to 8.25
Tractor		6.00 to 6.10
Lettuce Harvest	24	.75
	30	.82

Plainly the Union's proposals to Bertuccio exceeded these rates. When the parties next met, on October 12th, the Union suggested that Sun Harvest be used as a basis for a contract and that the "parties negotiate only over those crops not grown by Sun Harvest, local issues and retroactivity...." ALJD, at 37. At the remanded hearing, Union Vice-President Dolores Huerta and UFW negotiator Paul Chavez[21] testified that the Union sought to use Sun Harvest as a "master" agreement in the vegetable industry. As Chavez put it, the Union "felt strongly that lettuce cutters should receive the same wages in both areas [Salinas and San Benito] and so should general labor crews." V:85 Huerta testified, "There had been a wage rate established in the vegetable industry and ... we would attempt to get close to that rate as possible", V:106; and

> One of the goals that the Union has always had is to try to,... to get industry bargaining so that you have all of the industry that negotiates as a whole instead of having to go

[21]Chavez was chief negotiator for Bertuccio from March 1981; thus he did not participate in the formulation of the proposals discussed above. Huerta never negotiated at all with Bertuccio. Both are competent to testify about the UFW's contractual goals in the vegetable industry and about the Union's general policies toward negotiations.

> employer by employer by employer by employer [but] even then we try as negotiators... to have a company follow us in the same ball park, . . . if they have one particular crop, to keep the employers more or less on the same level...
>
> V:118-19

Huerta emphasized, that despite this goal, the Union was prepared to create, as she put it, "exceptions" for an operation which might be at an economic disadvantage if it had to pay the wages sought by the Union. These "exceptions" would be warranted upon proof that the wage levels sought by the Union would cause economic hardship.

Although the Union's wage proposals to Bertuccio were in excess of Sun Harvest, Respondent clearly understood that the Union was pursuing Sun Harvest "as a settlement" and specifically ruled it out.

The parties next met on November 1, 1979. The Union now proposed West Coast Farms as a settlement. West Coast was a mixed-vegetable grower based in Watsonville, but also operating in San Benito County. It seems to me this was simply Sun Harvest in another guise. Compare R16 with Sun Harvest rates, supra.

It was at this meeting that Respondent justified its refusal to accept Sun Harvest wages on the grounds that Respondent wanted to stay competitive with its neighbors. Since the Court of Appeals held that (1) Respondent "set about" to confuse the Union as to what it was claiming, and (2) that such a "tactic interfered with the bargaining process", after an entire

hearing has been devoted to what Respondent meant by such a claim, we ought to be in a better position to understand it.

At the remanded hearing, Bertuccio testified that he was not "in the same league" as the Salinas growers and, as a result, he should not be subjected to the same conditions. IV:160 "The wages that were being proposed were Sun Harvest wages. They were wages that were being paid in the Salinas area by the big conglomerates, and we are not in their league. We were trying to stay with wages that were being paid by our neighbors and the people here in San Benito County. We cannot compete with the wages of the other people." IV:161

To my mind, Bertuccio is not merely claiming he wanted to pay what his neighbors were paying; he is also claiming he cannot pay what "these other people" paid. This is not a fluke; he said the same thing in the original hearing. Thus, the ALJ quoted the following exchange:

> Q: Was it your position during negotiations that your financial ability prevented you from offering any higher wages than you were offering?
>
> A: Yes. Yes and no.
>
> Q: Yes and no?
>
> A: Well, it did.
>
> Q: Okay. Then why did you and Mr. Hempel take the position of saying, " We're not pleading poverty"?
> A: I don't know why really.
> ALJD, at 94 R.T. 23, pp 89-90

Bertuccio went on to explain that, while he understood his

negotiator was not pleading inability to pay, "that our financial status - - as it was, that it was just.... w had to foresee what was going to happen down the road another year from now." Ibid.

I conclude that despite what was said at the table, Bertuccio believed then, as he did a few months ago, that he could not afford to pay Sun Harvest wages. If so, had his claims been honest, Huerta testified that the Union was prepared to listen to them. However, Bertuccio continued to send mixed messages, offering on November 13, 1979 to pay only what the majority of non-union companies were offering, and then arguing a month later that "while not pleading poverty", he could not absorb total Sun Harvest costs, as though movement in parts of the package might lead to a contract.

Although the Union indicated the parties might be at impasse, based upon Bertuccio's comment about not being able to absorb the total Sun Harvest package, it sought a formula for movement. The Union's negotiator testified that "since Respondent had complained so much about money," she hoped movement in these areas would constitute a "breakthrough". Thus, at the parties' January 25th meeting, the Union came down a nickel in most categories and made movement on other cost items, such as retroactivity and benefits. Since the proposed rates were still above Sun Harvest, the strategy of having Sun Harvest be a "settlement" was obviously alive.

Bertuccio in fact responded by increasing all hourly wages in its January 31st proposal and "thank[ing] the Union ...

for exhibiting concern over [its] economic condition by reducing its wage proposal in the last offer," ALJD, at 51. On February 27, 1980, the Union came down another nickel, though some of its wage proposals were again contingent upon its not having certain information.

Apparently wages were not discussed again until April 2, 1980 when Respondent went up a nickel in most categories, and the Union came down a nickel: Respondent told the Union there was not much left to offer on wages, but did not claim impasse. In May, there was further movement on both sides. Respondent's piece rate now approximated Sun Harvest levels and the Union came down in some categories and in the piece rate.

I cannot find further discussion of wages at any of the meetings in June. A month later, and after telling the Union in April that there was not much left on wages, Respondent unilaterally raised its general labor wages $.25/hour and its piece rate $.035. On July 12th, the parties met again. The ALJ found that the Union had reduced wages to Sun Harvest levels in many categories, e.g., general labor was reduced to $5.00/hr; heavy equipment operator was reduced to $6.20; irrigators to $5.10. See ALJD p 67.[22] Respondent asserted that it could not absorb the high cost of wages and the high fund contributions in the same year, once again signaling that adjustment was possible.

[22]There is a discrepancy between the wage levels in the ALJD and those in RX 10, Charts 14A,15. In the absence of any explanation for this, I am relying on the ALJ's findings as conclusive.

On August 4, the parties had their next to last meeting. Respondent re-proposed its $3.75/hr general labor rate. The Union asked if this was Respondent's final offer and Respondent said "No", "[it] would have to examine the total economic impact." The parties met for the last time before the unfair labor practice proceedings on September 2, 1980 with no change in Respondent's position on wages.

2.

There is no rigid test for determining whether impasse exists. One takes into account, "the bargaining history, the good faith of the parties in negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations." Taft Broadcasting Co. (1967) 163 NLRB 475, 478, rev.den (D.C Cir 1968) 395 F7d 622. Finally, as pointed out by the Court of Appeals in Dal Porto, there can be no impasse where "a cause of the deadlock is the failure of one of the parties to bargain in good faith." While there is no question that the issue of wages was important, by every other measure of the Taft Broadcasting "test" it is hard for me to see impasse.

Certainly there could not have been impasse through August 2, 1979 because economic proposals had not even been exchanged. And when Respondent did submit its first economic proposal, it had already unilaterally raised wages, thus removing the Union from any role in their determination, and, moreover, refused to bargain over a large part of the unit. Though the

parties were clearly apart on wages at this point, I cannot conclude that Respondent's bad faith did not contribute to that disagreement.

Despite the parties' contuining disagreement over wages, Respondent did not even hint at the possibility of impasse until April 2, 1980 when it indicated that it did not have much left to offer. And then after making minor movement in May (as though there was not much left) in July it unilaterally raised wages in excess of any increase it had offered at the table. By August 1980 when the Union started to come down to Sun Harvest levels, Respondent declined to claim impasse when asked if it had made its final offer. Rather, it indicated that it needed to study the entire proposal to determine its economic impact, clearly indicating that further negotiations were still possible.

On top of this, Respondent never came out and said it couldn't afford to pay Sun Harvest wages, though Bertuccio apparently believed it. Instead, it repeatedly signalled to the Union that adjustments in the total package might lead to an accommodation. As late as January 1980, its negotiator "thanked" the Union for exhibiting concern over it's economic position which led to a series of adjustments in the parties' wage packages. Throughout these negotiations Respondent continually pitched its disagreement over wages on grounds that kept the Union's hopes alive at the same time as it frustrated them, which maintained the distance between them.

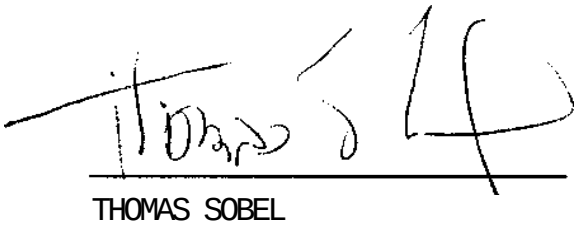
CONCLUSION

I conclude that Respondent has not met its burden of proving "as a matter of historical fact" that it was at impasse over wages. I find that its bad faith in other areas contributed to the parties differences on wages and that, as a result, it cannot claim that "good faith" differences would have led to deadlock.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Paul W. Bertuccio, its officers, agents, successors, and assigns shall makewhole all agricultural employees employed from the commencement of bargaining in January 1979 through April 1, 1981 for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with established Board precedents.

DATED: March 29, 1991



THOMAS SOBEL
Adminstrative Law Judge