Exeter, California

STATE OF CALIFORNIA AGRICULTURAL LABOR

RELATIONS BOARD

ROBERT H. HICKAM, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos . 78-CE-8-D (4 ALRB No. 73) (9 ALRB No. 6) (10 ALRB No. 25) 80-CE-105-D 80-CE-165-D 80-CE-195-D 80-CE-207-D (8 ALRB No. 102) 81-CE-96-D 81-CE-97-D 81-CE-122-D (10 ALRB No. 2) 17 ALRB No. 7

SUPPLEMENTAL DECISION CONCERNING PROPRIETY OF MAKEWHOLE AWARD

These cases are before the Agricultural Labor Relations Board (ALRB or Board) pursuant to procedures established in William Pal Porto & Sons, Inc. v. Agricultural Labor Relations Board (1987) 191 Cal.App.3d 1195 [237 Cal.Rptr. 206] (Dal Porto). Robert H. Hickam (Respondent or Hickam) urges the Board to allow it to present evidence, at either the liability or compliance stages of these proceedings, that the bargaining makewhole remedy previously ordered by the Board is inappropriate under Dal Porto, supra, 191 Cal.App.3d 1195, and George Arakelian Farms, Inc. v. Agricultural Labor Relations Board (1989) 49 Cal.3d 1279 [265 Cal.Rptr.. 162] (Arakelian). Since Respondent raises significant questions as to when Dal Porto may be raised in situations where bargaining has taken place, we now address these issues .

Background

The United Farm Workers of America, AFL-CIO (UFW or Union) was certified to represent the agricultural employees of Respondent on July 12, 1977. Hickam was found to have engaged in bad faith bargaining in three separate liability decisions and two supplemental compliance decisions. The initial liability and two supplemental decisions, i.e., 4 ALRB No. 73 (1978), 9 ALRB No. 6 (1983), and 10 ALRB No. 25 (1984) (herein collectively referred to as Hickam I) arose from the UFW's first request for bargaining on July 20, 1977. No bargaining took place. Hickam delayed bargaining by postponing or canceling meetings for nine months before it advised the UFW that it intended to test certification. The Board, finding the delay to be evidence of bad faith, ordered makewhole beginning on July 23, 1977. The Board modified the ALJ's makewhole methodology in its order in 9 ALRB No. 6 and remanded the case to hearing for modification of the makewhole calculations in accordance with that order. In the final Board decision in Hickam I, the Board approved the modified makewhole calculations submitted by the General Counsel. (10 ALRB No. 25 at p. 2.) Judicial review of Hickam I concluded when the California Supreme Court denied Hickam's petition for review of the final makewhole determination by order entered on September 11, 1985.

Hickam now seeks to have the Board set a Dal Porto hearing in Hickam I and in the two subsequent bad faith bargaining proceedings discussed below. However, because the last stage of compliance and judicial review of all the cases comprising Hickam I closed long before the Board's November 16, 1987 Interim

Order Respecting All Bargaining Makewhole Cases Potentially Affected by William Pal Porto and Sons v. Agricultural Labor Relations Board, Hickam I is not open to Dal Porto review.[1/] Respondent's request for Pal Porto review in Hickam I must therefore be denied.

In Hickam II, 8 ALRB No. 102, which issued on December 29, 1982, the Board found that Hickam had bargained in bad faith from March 2, 1980 until March 10, 1981. The bad faith conduct found included Hickam's failure to timely provide payroll, production, subcontracting and custom harvesting information requested by the Union, failure to provide an informed and available negotiator, and proposals made and positions taken for the purpose of preventing agreement. In Hickam II, the Board also found that Hickam's bad faith included making regressive wage proposals and unreasonably delaying and conditioning inspection of its books. This prevented the UFW from carrying out the inspection it was entitled to under NLRB v. Truitt Manufacturing (1956) 351 U.S. 149 [76 S.Ct. 753, 38 LRRM 2042] after Hickam claimed inability to pay. The Board ordered makewhole for the period of bargaining litigated in Hickam II, beginning March 2,

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[1/] in its November 16, 1987 Order, the Board decided to apply the Dal Porto doctrine to all cases then pending before the Board. Where a case has progressed to a final compliance order, it is no longer "pending," and thus not entitled to Dal Porto review. The Board concluded, for example, in its Administrative Order in Martori Brothers, Case Nos. 79-CE-187-EC, 80-CE-10-EC and 80-CE-91-EC (8 ALRB No. 23 and 11 ALRB No. 26) dated June 14, 1988, that it was without jurisdiction to reopen cases for Dal Porto review where the last stages of judicial review had been concluded.

1980. On February 24, 1984, the Court of Appeal summarily denied Hickam's petition for review of 8 ALRB No. 102. No compliance proceedings have been initiated in Hickam II.

In Hickam III, 10 ALRB No. 2, issued on January 23, 1984, the Board found that Hickam continued to engage in bad faith bargaining from January 1, 1981 through August 12, 1981. No break in negotiations occurred between Hickam II and Hickam III. General Counsel proceeded in Hickam III on the basis of the continuing bad faith conduct of Respondent in the ongoing negotiations. The bad faith found in Hickam III consisted of unilaterally granting wage increases to employees which were greater than Hickam had offered the Union in negotiations, and subcontracting bargaining unit work without notice to, or bargaining with, the UFW. The bad faith of these actions was judged on the totality of the circumstances surrounding them, including the findings of bad faith in Hickam II. On February 15, 1985, the Court of Appeal summarily denied Hickam's petition for review in Hickam III. No further judicial review was sought in Hickam III, and no compliance proceedings have been initiated in Hickam III.

At the liability hearing in Hickam III Respondent sought to present evidence that its financial condition was so weak that it could not have agreed to a contract with the UFW on the conditions the Union was then proposing. Hickam presented its 1979, 1980 and 1981 income tax returns and a summary income statement to support its position in Hickam III. The annual farming income shown on the income statements was the same as that

on its tax forms. The Administrative Law Judge (ALJ) in Hickam III permitted Hickam to present evidence that it could not have entered into a contract with the UFW or paid any higher wages than it did because of its financial condition, but found such evidence unpersuasive.2/ Hickam now offers the exhibits rejected in Hickam III as its Dal Porto offer of proof, i.e., income tax returns for 1979, 1980, and 1981 and the summary income statement.

It should be noted that the ALJ rejected the 1979, 1980 and 1981 tax returns based on the testimony of Daniel Irwin, a certified public accountant who testified on behalf of the General Counsel. (R.T. Vol. V at pp. 41-74.) Irwin testified that his examination of Hickam's income statements showed that labor costs incurred in the development of farm land had been treated as a current expense rather than having been capitalized. (Id. at pp. 50-52.) The accountant therefore concluded that Hickam's profitability and financial condition was not accurately represented and was greatly understated by its income tax returns and financial statement, both of which showed the same figures as net farming income. (Id. at pp. 49, 51-55.) The ALJ noted that Hickam's certified public accountant (CPA) was present at the hearing during Irwin's testimony, but was not called to explain or rebut it. (Hickam III, ALJ's Decision at p. 28.) Based on the foregoing, the ALJ credited General Counsel's accounting witness

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2/The ALJ in the Hickam I compliance hearing had refused to allow Hickam to present evidence that no contract could have been agreed to due to Hickam's poor financial condition.

and declined to receive into evidence Hickam's income statement and income tax returns showing a low adjusted gross income for Hickam during the 1979-1981 period. (Ibid.) The ALJ therefore did consider Hickam's economic defense, i.e., that it could not have afforded to enter into a contract with the UFW, but rejected the defense because the proof supporting it failed. Respondent's Pal Porto Arguments

Respondent filed its initial Dal Porto motion on February 12, 1988. On February 8, 1990, after General Counsel had filed in Tulare County Superior Court to enforce Hickam I, Respondent filed a motion with the Board asking that the Board remand Hickam I to an ALJ for a compliance hearing on its Pal Porto defenses. The motion for remand is, in effect, a reiteration of the positions taken in its February 12, 1988 motion for a Pal Porto hearing in the three cases.[3/]

For the reasons stated above, the motions must be denied as to Hickam I. The Superior Court confirmed the Board's order in Hickam I, and the Court of Appeal, by opinion dated February 14, 1991, affirmed the Superior Court's conclusion, consistent with the Board's position in Martori Brothers, that the Board no longer has jurisdiction over Hickam I. The Board observes that the

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[3/]Respondent's motion for remand of Hickam I was opposed by General Counsel and the UFW, who contended that the Board's procedures do not provide for Respondent's submission. The UFW's opposition was untimely and was accompanied by an Application for Relief from Default. Respondent argues that this Application is unsupported. In view of the disposition made here of Respondent's motion for remand, the oppositions, the Application for Relief from Default, and reply thereto need not be addressed.

motion for remand itself raises no arguments not already made in the original Dal Porto motion, except the argument that the California Supreme Court's decision in Arakelian, supra, requires a Dal Porto hearing in Hickam I. That argument is discussed below.

As to Hickam II and Hickam III, Respondent now argues that the Board has failed to consider the evidence Hickam presented to show that Respondent could not have entered into a contract with the UFW. To the extent that the evidence now offered by Respondent consists of the same financial statement and income tax returns presented in Hickam III, however, the Board has considered the evidence, and the defense it supports, and again rejects both.

Hickam, however, also argues that the issue in a Dal Porto hearing is whether it can establish that agreement was "impeded" by factors not related to Hickam's bad faith, and that the General Counsel must show Hickam's bad faith to be the "sole cause" of failure to reach agreement. Hickam contends the evidence it is offering would show that it could not have entered into a collective bargaining agreement on any terms the UFW would have accepted at the time of the bargaining. (Cf. Pal Porto, supra, at pp. 1207-1208.)

Hickam also places its reliance here on the makewhole evidence introduced by General Counsel in the compliance hearing in Hickam I. General Counsel introduced 23 collective bargaining agreements then in force between the UFW and growers in Tulare and Kern counties. The ALJ found the wage rates provided in the

contracts to be relatively uniform and applied those rates to the computation of makewhole in Hickam I. Respondent contends that the uniformity of wage rates in the UFW contracts in evidence shows that the UFW would have insisted on the same rates in order to reach a contract with Hickam. Hickam contends that when this proof of the Union's uniform wage demands is taken together with its proffered evidence of its poor financial condition, it has established a prima facie case under Dal Porto that it would not have reached an agreement with the UFW for reasons other than its own bad faith.

Hickam also contends that it has preserved these issues for consideration here by arguing them in the compliance stage of Hickam I (9 ALRB No. 6) and in Hickam III. It further contends that, since it was not permitted to litigate these matters fully, to do so now does not constitute repetitive litigation.[4/] The extent to which Hickam should be permitted to litigate Dal Porto

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[4/] Hickam's contention that Arakelian, supra, requires that it be allowed a Dal Porto hearing at the compliance stage in Hickam I is without merit. No bargaining between the Union and Respondent took place in Hickam I because Hickam refused to bargain for the asserted purpose of litigating the validity of the Board's certification of the Union. The Board found that the technical refusal to bargain was in bad faith because it was only communicated after Respondent delayed bargaining for nine months by a series of postponements of the initial meeting date. In Arakelian, the court held that where no bargaining has taken place because of a bad faith technical refusal to bargain, the employer cannot establish the Dal Porto defense that no contract would have been reached, since such a showing requires evidence of what took place in negotiations. (Arakelian, supra, at p. 1293.) While the employer may present evidence in the compliance stage that any makewhole award should have amounted to zero, or to smaller increases than shown in General Counsel's specification, it may not contend that the imposition of a makewhole award is improper. (Cf. Abatti Produce Co., Inc. (1990) 16 ALRB No. 17.) The Board, as noted previously, is precluded from reopening Hickam I at this time.

issues in Hickam II and Hickam III is discussed below. Positions of the Other Parties

General Counsel in his initial response contends that, as to Hickam I, no Dal Porto proceedings are possible because the case had become final before the Dal Porto decision issued. As to Hickam II and Hickam III, General Counsel states that he has examined Hickam's books and asserts that Hickam has presented sufficient evidence to establish that it is entitled to a Dal Porto hearing in these cases. General Counsel, however, offers no evidence or explanation of the basis for his position over and above what Hickam itself has presented. General Counsel also notes that the UFW contracts in effect in the southern San Joaquin Valley at the time of the bad faith bargaining are in evidence in the Hickam I compliance proceedings, and asserts that they exceed what Hickam would have been able to pay and still survive.

The UFW, on the other hand, argues that Hickam has previously presented its evidence of financial hardship, and that such evidence has been found totally deficient to establish Hickam's financial inability to enter into a contract. The UFW also argues that the conduct found to establish bad faith bargaining, particularly the granting of unilateral wage increases greater than offered the UFW at the table, as well as Hickam's regressive movement on wages and its failure to provide information to the Union in order to allow it to assess Hickam's claims of inability to pay, should preclude Hickam from raising the Dal Porto defense where, as here, its Dal Porto defense is

based on alleged inability to pay. The UFW further argues that the doctrines of res judicata and collateral estoppel should bar Hickam from relitigating these issues. The UFW additionally argues that Hickam, in Hickam II and Hickam III, was found to have misrepresented its income in the evidence that was rejected then and is being offered again now. The UFW contends that the new evidence offered by Hickam has no probative value because of the reservations of the CPA who prepared the relevant documents as to the methodology and documentation supporting them. The UFW concludes by contending that Dal Porto requires the employer to show that purely legitimate disagreements precluded agreement.

Decision

The Dal Porto court and the Board in decisions applying Dal Porto have stated that the burden of establishing a Dal Porto defense, i.e., that no contract would have been arrived at even if bargaining had been conducted solely in good faith, is on the employer found to have engaged in bad faith bargaining, and that the burden is a heavy one. (Dal Porto, supra; Mario Saikhon (1989) 15 ALRB No. 3; Abatti Produce, supra.) The court in Pal Porto analogized the defense to the employer's burden in Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169]. Under that analysis, once a prima facie case of unlawful motivation for a discharge or other adverse personnel action has been established, the employer must show that the discharge would have happened independently of the discriminatory motive shown. As the United States Supreme Court said in NLRB v. Transportation Management, Inc. (1983) 462 U.S. 393 [103 S.Ct. 2469, 113 LRRM

2857], once General Counsel has established a prima facie case, i.e., shown that the unlawful motives had something to do with the discharge, the burden shifts to the employer to show that the adverse action would have been taken even in the absence of the unlawful motive.

In Saikhon, supra, the Board held that a Dal Porto defense was established where other Imperial Valley vegetable growers situated similarly to Saikhon were unable to reach agreement with the UFW after two years of good faith bargaining, in part because the UFW insisted that both Saikhon and the other Imperial Valley growers adopt the pay and benefit rates the UFW had negotiated with a Salinas area grower, Sun Harvest. Saikhon itself bargained with the Union for two years but its bargaining included bad faith conduct. Saikhon presented evidence that other Imperial Valley growers had negotiated entirely in good faith during the same period that Saikhon engaged in bad faith bargaining with the UFW, and that the UFW had taken the same Sun Harvest wage position in its negotiations with the other growers as it had with Saikhon. (Saikhon, supra, at pp. 7-9.)

Saikhon also presented extensive evidence of the significant differences in labor market conditions between the Salinas and Imperial Valleys in support of its Dal Porto motion. (Id. at pp. 9-10.) Based on these differences and the experience of the Imperial Valley growers who were ultimately found to have bargained in good faith with the UFW but had been unable to reach agreement, the Board concluded that no contract would have been agreed to even if Saikhon had engaged in no bad faith bargaining.

(Id. at p. 10; p. 15, n. 15.)

In Dal Porto itself, the ALJ had noted that three areas, successorship, union security, and wages doomed negotiations from the start. When Dal Porto was remanded for hearing, the posture of the case was that Dal Porto had been found to have bargained in good faith as to successorship and union security, and therefore, a prima facie case could be established that areas of exclusively good faith bargaining would have prevented agreement, even if Dal Porto's bad faith bargaining in other areas had never taken place. The court therefore remanded the case to allow Dal Porto to show, as it claimed, that negotiations were at impasse, noting that the record indicated that it was entirely plausible that the totality of the parties' disagreement on successorship, union security and wages may have been substantial enough to have prevented agreement. (Dal Porto, supra, at p. 1213.)

Hickam's Dal Porto arguments, evidence, and offer of proof are limited compared to Saikhon's and Dal Porto's. The only issue Hickam identifies as preventing agreement is wages. Hickam supports its contention that the UFW would have insisted on a specific level of wages by citing the ALJ's decision in Hickam I's first compliance hearing, 9 ALRB No. 6. As previously noted, the General Counsel had there presented 23 collective bargaining agreements then in effect between the UFW and growers in the Tulare and Kern counties area, the location of Hickam's operations. The ALJ had found that several growers who had signed contracts with the UFW were comparable to Hickam in size and crops produced, and operated in the same labor market with Hickam.

(9 ALRB No. 6, ALJ Decision at pp. 6-7.) The ALJ further found a uniform level of wages in the UFW contracts, thus showing that the parties would have agreed to the same wages at Hickam. (Ibid.) The ALJ in the Hickam I compliance decision thus found that Hickam and the UFW would have agreed to the same standard wages. Hickam's contention that the UFW would have demanded its standard area wages may therefore be taken as established for the purpose of showing a prima facie case under Dal Porto.

Hickam's situation, however, is the reverse of Saikhon's. While the UFW insisted that Saikhon pay Salinas Valley wages that no similarly situated Imperial Valley growers had been able to accept after two years of good faith bargaining, dozens of other growers in Hickam's area had entered into contracts with wages Hickam says prevented any agreement between itself and the UFW. Hickam's agreement to the same wages therefore would assertedly have been impossible solely because of a problem internal to Hickam, i.e., its financial condition. To demonstrate this weak financial condition, Respondent relies primarily on the same exhibits presented in 10 ALRB No. 2 (Hickam III). These exhibits were rejected in that proceeding for the reasons stated above, i.e., the ALJ found that the adjusted gross income shown on them did not represent Hickam's true financial position because it was not clear what part or parts of Hickam's operations they represented, and because agricultural labor used to develop land had been treated as a current expense rather than being capitalized. The judge in Hickam III therefore rejected Hickam's defense that it could not have entered into a contract with the

UFW, finding instead that Hickam failed to present any reliable evidence of financial weakness. The ALJ also rejected the exhibits now offered in support of Hickam's Dal Porto motion.

Except as discussed below, Hickam has provided no evidence over and above that rejected in Hickam III to establish economic weakness. Neither its arguments nor its offer of proof explains why the proffered evidence is now valid. Nor does it assert that there is additional evidence or information concerning Hickam's financial condition or its operating problems that requires the Board to find that Respondent's financial condition would not permit it to enter into a contract with wages that the UFW would have accepted. Hickam does not contend or explain why the exhibits offered again here should be viewed or evaluated differently following Dal Porto.[5/] Hickam thus does nothing to address the problems of unreliability or the unrepresentative character of the sole evidence supporting its entitlement to a Pal Porto hearing.

Neither Dal Porto nor any of the cases applying it require the Board to accept evidence that has earlier in the same proceeding been shown to be unreliable without at least some explanation, rehabilitation or expansion of supporting documentation. Hickam, however, does not attempt to explain, rehabilitate, or expand its presentation of facts or law to show

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[5/]In Hickam III the ALJ emphasized that CPA Irwin explained the deficiencies of the exhibits and that Hickam did nothing to rebut this testimony, even though its own accountant was present in the hearing room during Irwin's testimony. (10 ALRB No. 2 at p. 28.)

why its offered evidence is now reliable, or should now be accepted because of Dal Porto. While Hickam's evidence might present a prima facie case had it not already been demonstrated to be nonprobative, Hickam has shown no reason why the Board should, or could, disregard the record of the same proceeding of which the Dal Porto motions are a part.[6/]

The only other exhibits now offered by Hickam and not previously rejected by the Board include a statement dated September 20, 1982, from an Internal Revenue Service (IRS) district director stating that Hickam's 1980 tax return was found to be acceptable as filed. While Hickam does not so argue, the IRS director's letter is at least some evidence that Hickam's 1980 return was in compliance with federal income tax laws. The director's letter does not establish, however, that the proffered exhibits accurately reflect Hickam's ability to pay the wages in effect in the UPW's contracts in the area. The IRS director's letter does not therefore give substantial grounds to allow the Board to disregard the Administrative Law Judge's rejection of the evidence due to its lack of probativeness.

Other proof supporting Hickam's Dal Porto arguments not previously rejected by the Board is provided by a compilation of

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[6/]The court in Pal Porto assumed that in most cases no evidence concerning the cause of the parties' failure to agree had been presented since, until Dal Porto, this was not a generally recognized defense. For that reason the Dal Porto court required the Board to allow respondents an opportunity to demonstrate prejudice as a result of prior inability to make a causation defense. (See id. at p. 1212.) Here, however, Hickam sought to prove exactly the same defense in Hickam III, was permitted to do so, and failed. Hickam therefore has suffered no prejudice requiring a further causation hearing before the Board. (Ibid.)

net farming income and total adjusted gross income prepared by the same accountant who prepared the rejected exhibits, and whom Hickam failed to call in rebuttal. That compilation, filed with Hickam's February 12, 1988, Dal Porto motion, shows Hickam's net farming income and total adjusted gross income for the years 1976 through 1986. Substantially the same document was filed in support of the 1990 Motion to Remand with the years 1987-1989 added. Respondent, however, does not make any showing that the 1982-1984 figures do not misrepresent capital expenses in the same way the 1979 through 1981 returns were found to. The 1982-1984 returns were prepared by the same accountant who prepared the 1979 through 1981 returns. That accountant presented the 1982-1984 figures in the same column of figures with the 1979-1981 figures rejected by the ALJ without any note or explanation that the 1982-1984 figures correct the deficiencies found by the ALJ in the 1979-1981 figures. Hickam's presentation clearly implies that the 1982-1984 figures are comparable to the 1979-1981 figures, and that therefore the same methods were used to compute the 1982-1984 income figures as the 1979-1981 figures. If adverse financial conditions in 1982, 1983 and 1984 would have precluded agreement on the UFW's terms in those years, the burden is on Hickam to show that the figures purporting to establish such adverse conditions are reliable. Hickam, however, by utilizing figures that rest upon the same defective calculations previously rejected, has failed to show any insurmountable barrier to a contract other than its own bad faith bargaining.

Finally, Respondent's argument based on wages as the only

issue preventing agreement is weakened by the finding in Hickam II that Hickam's bad faith bargaining included regressive wage proposals. (See id., ALJ Decision at pp. 101-102.) Hickam could have responded to such a finding that any regressive wage proposals were the result of its deteriorating economic position. Hickam, however, did not present this defense in Hickam II. When Hickam argued in negotiations that it was unable to meet the UFW's wage requests because of a weak financial condition, the UFW requested to see Hickam's records. In response, Hickam delayed production of the records, and would allow only a CPA or trust attorney to review them. The Board found these actions were designed to prevent the UFW from seeing the books. While Hickam might have been able to show itself unable to pay the requested rates, its bad faith refusal to do so casts additional doubt on its good faith in the one area that would support its Dal Porto motion. Since, as Respondent admitted in its Dal Porto motion, the reasons for failure to reach agreement must be unrelated to the bad faith bargaining found, Hickam's assertions of inability to pay are unpersuasive to the degree they appear entangled in its bad faith conduct. Its efforts to establish now that its difficult economic position then precluded any agreement rely upon the same conduct that was found to have been part of Respondent's bad faith bargaining.

Conclusions

Respondent's motions as to Hickam I should be denied. The Board has no jurisdiction since all compliance proceedings therein have been concluded. Respondent's motions to reopen or to remand to the compliance stage in Hickam II and Hickam III must

also be denied. Hickam has failed to show any prejudice arising from the unavailability of the Dal Porto decision in these cases, and has presented either irrelevant or inadmissible evidence, or the same evidence already found unreliable in Hickam III, without any offer of proof, explanation or expansion to show that the previously rejected evidence should be reconsidered.

ORDER

Hickam's Dal Porto motions and requests for remand are denied for the reasons set forth above. Hickam II and Hickam III should proceed to compliance as expeditiously as possible. Hickam, however, will not be permitted to present further evidence on the Dal Porto causation issue in such compliance proceedings. Rather, Hickam may introduce such probative, non-cumulative proof as has not been previously presented to the Board only on the issue of the amount of makewhole in any compliance proceeding held herein. (Abatti Produce, supra, at pp. 9-10.)

DATED: June 19, 1991

BRUCE J. JANIGIAN, Chairman [7/]

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

JIM NIELSEN, Member

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

CASE SUMMARY

Robert H. Hickam
(UFW)

17 ALRB No. 7

Case Nos.
78-CE-8-D
(4 ALRB No. 73)
(9 ALRB No. 6)
(10 ALRB No. 25)

80-CE-105-D
80-CE-165-D
80-CE-195-D
80-CE-207-D
(8 ALRB No. 102)

81-CE-96-D
81-CE-97-D
81-CE-122-D
(10 ALRB No. 2)

Background

Robert H. Hickam (Respondent) was found to have engaged in bad faith bargaining in three separate Board decisions. Respondent was found to have refused to bargain with the United Farm Workers of America, AFL-CIO (UFW or Union) in 4 ALRB No. 73. This finding resulted in compliance proceedings at 9 ALRB No. 6 and 10 ALRB No. 25. Appeal of these Board orders (herein referred to as Hickam I) ended when the California Supreme Court declined to act on Respondent's appeal of the order imposing makewhole. The Board thereafter initiated enforcement proceedings. Respondent was also found to have engaged in bad faith bargaining in 8 ALRB No. 102 (Hickam II). In 10 ALRB No. 2 (Hickam III) Respondent was found to have continued its course of bad faith bargaining. Judicial review of the Board's orders in Hickam II and Hickam III expired when the Court of Appeal denied Respondent's appeals, and no further hearing was sought by Respondent. Respondent filed a motion under the Board's Order Respecting All Bargaining Makewhole Cases Potentially Affected by William Pal Porto & Sons v. ALRB, seeking a Dal Porto hearing in Hickam I, Hickam II and Hickam III. On February 8, 1990, Respondent filed another motion, seeking the remand of Hickam I, to the compliance stage for a hearing on the Dal Porto issue, relying on the California Supreme Court's decision in George Arakelian Farms, Inc. v. ALRB (1989) 49 Cal.3d 1279.

Board Decision

Respondent contended that the only barrier to an agreement between itself and the UFW was Respondent's financial weakness, which would have precluded Respondent from agreeing to the wages that the UFW had been found in Hickam I to have insisted upon uniformly in the area of Respondent's operations during the makewhole period. In Hickam III, Respondent had contended that it could not have entered into an agreement with the UFW because of its weak financial condition and offered tax returns and income statements to support its arguments. The Administrative Law Judge (ALJ) in Hickam III rejected the evidence based on the unrebutted testimony of a certified public accountant that the income shown on the tax

returns and income statement did not accurately represent Respondent's financial position. Respondent offered the same exhibits here in support of its Dal Porto motions, together with tax returns and income statements for periods in Hickam II and Hickam III. Respondent offered no explanation as to why these exhibits should now be viewed as being reliable, other than a letter from an Internal Revenue Service district director to the effect that Respondent's 1980 tax return was accepted as filed.

The Board denied the motions. Hickam I closed when the Supreme Court declined to review the Board's order as enforced by the Court of Appeal. The Board therefore is without jurisdiction as to Hickam I. As to Hickam II and Hickam III, Respondent made no showing that the evidence it had offered in Hickam III in support of what amounted to a Dal Porto defense should now be received or that the reasons for its rejection by the ALJ in Hickam III no longer applied. Respondent therefore failed to show it had been prejudiced by the unavailability of the Dal Porto defense.

Finally, the Board concluded in reliance upon Arakelian, supra, that Respondent, having had the opportunity both in Hickam III and in its motions to establish a Dal Porto defense, should be precluded from presenting the same contention, i.e., that no makewhole is appropriate, in the compliance stage. It may, however, present evidence in compliance that the makewhole amount is zero, or should be less than the sum contended for by the General Counsel.

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