Greenfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SCHEID VINEYARDS AND MANAGEMENT COMPANY, Respondent , and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 92-CE-49-SAL 19 ALRB No. 1 (February 11, 1993)

DECISION AND ORDER

This is a technical refusal to bargain case which comes before the Agricultural Labor Relations Board (ALRB or Board) with a Stipulation and Statement of Facts under which the parties agreed to waive their right to a hearing pursuant to Labor Code section 1160.2.[1] The parties have stipulated that the pleadings and other relevant documents contained in the record of the underlying representation proceeding (Case No. 92-RC-l-SAL) , as well as the unfair labor practice charge, the unfair labor practice Complaint, the Answer to the Complaint, the Stipulation, and briefs to the Board in Case No. 92-CE-49-SAL, will constitute the entire record in this case.

On December 1, 1992,[2] the Executive Secretary of the Board issued an order transferring this matter to the Board for decision. The Board has considered the record, including the

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

[2]All dates herein refer to 1992 unless otherwise stated.

stipulation of the parties and their briefs and, on the basis thereof, issues the following findings of fact, conclusions of law, and remedial Order.

Background

On February 19, 1992, the United Farm Workers of America, AFL-CIO (UFW or Union) filed a Petition for Certification seeking to represent all the agricultural employees of Scheid Vineyards and Management Company (Scheid, Employer or Respondent). The petition alleged that the approximate number of employees in the unit sought was 120. On February 21, the Employer filed a response to the petition. The response states that the number of employees employed in the pre-petition payroll period was 121, that the Employer expected its peak period to be October 11 with a payroll of 250 employees, and that the number of employees employed during the pre-petition payroll period was at least 50 percent of its peak employment for the calendar year.

An election was held on February 26. The Tally of Ballots showed a Union victory of 87 to 44, with 25 unresolved challenged ballots.

On March 4, the Employer filed an election objection alleging that the election was not conducted when the Employer was at 50 percent of peak employment and that the Board agent in charge of the election failed to conduct an independent investigation concerning whether peak was established. On March 26, the Acting Executive Secretary dismissed the Employer's objection for failure to establish a prima facie case that the

Regional Director's prospective peak determination was unreasonable. The Employer filed a request for review of the dismissal on April 2. On April 30, the Board denied the Employer's request for review, dismissed the election objection, and issued a Certification of the UFW as the exclusive representative of the agricultural employees of Scheid.

On May 7, Scheid informed the Union by letter that it would be testing the certification by judicial review. In the same letter, Scheid told the Union that it would be utilizing South Monterey County workers in its Greenfield-San Lucas vineyards and workers in the Hollister area to work at the San Benito County vineyards. The Union replied by letter on May 8, requesting a meeting to negotiate the Employer's "intent to displace bargaining unit workers in the Hollister area." Scheid's reply of May 11 denied making any change in operations and stated that because it was contesting the Board's certification, it was precluded from recognizing and bargaining with the UFW. On July 15, the Union sent a letter to Scheid requesting a meeting for the purpose of negotiating a full collective bargaining agreement. Scheid replied on July 21, reiterating its position that it was precluded from bargaining while contesting the ALRB's certification by judicial review.

A complaint was filed on June 29 by General Counsel alleging that since May 11 Respondent had refused to recognize or bargain with the UFW, and seeking a cease and desist order as well as a makewhole remedy to make Respondent's employees whole

for economic losses suffered as a result of Respondent's refusal to bargain.

Respondent filed an answer to the complaint on July 10. In its answer, Respondent denies that the Board lawfully certified the Union or that the Union requested full bargaining on May 8, but admits that it refused to bargain because it wished to challenge the Board's certification. Respondent also asserts various affirmative defenses, including claims that the Board agent who investigated peak employment failed to conduct a complete investigation, that Respondent had been denied due process as a result of the Board's refusal to order a hearing on the election objection, and that Respondent's legal position was based on a reasonable and good faith belief that the ALRB had improperly certified the Union.

Respondent's Brief to the Board

Respondent notes that under J.R. Norton Co. v. ALRB (1979) 26 Cal.3d 1, the Board may not award the makewhole remedy in a technical refusal to bargain case without first determining from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. However, Respondent argues that because the parties herein have stipulated that they will not argue the issue of whether Scheid tested the

UFW's certification in bad faith, the issue of bad faith is not before the Board. Thus, Respondent asserts, the only issue before the Board is whether Scheid's litigation posture is reasonable.

Respondent argues that this is a close case that raises important issues.

First, Respondent asserts, the Regional Director failed to comply with the requirement in California Labor Code section 1156.4 that in determining peak,

> . . . the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon all other relevant data.

Respondent claims that the Regional Director did not take into consideration Scheid's acreage or crop statistics, and that if he had done so he would have determined that Scheid was not at 50 percent of peak employment at the time of the election.

Secondly, Respondent argues that the Regional Director failed to make a full and complete investigation into peak once the issue was raised. Respondent cites Tepusquet Vineyards (1984) 10 ALRB No. 29, in which the Board held that once discrepancies surfaced during a peak investigation, the Regional Director had a duty to investigate all relevant data, including information not provided by the employer, if reasonably apparent or accessible to the Board agents. Respondent also cites Kamimoto Farms (1981) 7 ALRB No. 45, in which the Board set aside an election where the employer had provided peak figures

containing an obvious discrepancy which would have been readily clarified if the Board agent had made inquiries of the employer or its attorney. Respondent alleges that the facts herein are similar to those in Tepusquet and Kamimoto, in that Scheid inadvertently admitted it was at peak although it estimated its prospective peak would be 250 and stated that the number of employees during the pre-petition eligibility period was 121 (less than 50 percent of the prospective peak figure). Because the facts are similar to those in cases where elections have been overturned, Respondent asserts, its litigation posture is not unreasonable.

Respondent also argues that it has raised two novel issues that have not been addressed previously by the Board or the courts, and that this provides further grounds under J.R. Norton to defeat the imposition of the makewhole remedy. First, Respondent states, it is arguing that a party cannot waive the Board's lack of jurisdiction over a representation petition filed when the employer is below 50 percent of peak employment. Second, Respondent claims that a hearing has never been denied in a case involving facts similar to the facts in this case. Respondent asserts that it established a prima facie showing that the Regional Director did not conduct a sufficient investigation into peak employment, and that it therefore was entitled to a hearing on its election objection.

General Counsel's Brief to the Board

General Counsel asserts that Scheid's election objection does not present a close case raising important issues concerning whether the election was conducted in a manner that truly protected employees' rights of free choice, and do not raise any novel issues or unique legal theories. Therefore, General Counsel argues, the Employer's litigation posture was not reasonable under the standards of J.R. Norton, and makewhole should be awarded.

General Counsel argues that most of the legal issues involved herein were well settled by the Acting Executive Secretary's decision, which relied on uncontroverted factual determinations and a failure of proof on Respondent's part. The Acting Executive Secretary found that the Employer had admitted in its response to the petition that it was at peak during the eligibility payroll period. Respondent made no claim that it was not at peak at any time prior to the tally of ballots. Further, General Counsel states, Respondent submitted an eligibility period payroll list of 150 employees to the Regional Director and failed to challenge the accuracy of the list prior to the election; therefore, General Counsel asserts, Respondent waived the right to raise this issue in a post-election objection.

Respondent's contention that it submitted an erroneous prospective peak figure to the Regional Director is suspect, General Counsel argues. Respondent contends that it had not yet completed its planning when it submitted its response to the

petition, yet it determined just 10 days after that response that its labor requirements for its 1992 peak period would be not 250 but 358 employees. Respondent attempted to explain its "mistake" in calculating prospective peak by blaming its attorney at the time of the election and his paralegal, but General Counsel argues that the attorney is the senior partner in a prominent local labor law firm that has represented agricultural employers for decades.

Respondent's assertion that the Regional Director has an obligation to investigate the peak issue independently even if the employer admits that it is at peak is contrary to law, General Counsel argues. The information provided by Respondent to the Regional Director confirmed that it was at peak and, General Counsel contends, the burden is on the employer to assert a peak objection or waive the issue. (Ruline Nursery Co. v. ALRB (1985) 169 Cal.App.3d 247.) Further, Board agents are entitled to rely on the accuracy of statements or payroll records submitted to them by the employer. (Kubota Nurseries (1989) 15 ALRB No. 12; Tepusquet Vineyards, supra, 10 ALRB No. 29.) Moreover, a party cannot rely on its own failure as a basis for an election objection (Muranaka Farms (1983) 9 ALRB No. 20) and an employer's failure to provide relevant information may give rise to a presumption that the petition was timely filed with respect to the employer's peak season (Ruline Nursery Co. v. ALRB, supra, 169 Cal.App.3d 247, 257).

Respondent cited certain cases (such as Tepusquet and Charles Malovich (1979) 5 ALRB No. 33) to suggest that once the peak issue is raised, the Regional Director must conduct a more exhaustive review of the issue. General Counsel argues that Respondent's reliance on such cases is misplaced, since in all of those cases the employer contested the peak issue in its response to the petition and provided documentation that made at least a prima facie showing that the employer was not at peak.

General Counsel further asserts that Labor Code section 1156.4 does not require the Regional Director to investigate further in the circumstances present herein. One of the issues in J.R. Norton was whether, under section 1156.3(a), a hearing on all election objections was required. The court ruled that it was a permissible and reasonable exercise of the Board's powers to modify seemingly mandatory language of the statute by setting threshold standards that must be met before the right to a hearing could be invoked. Similarly here, General Counsel argues, the Board regulation which places the burden on the employer to raise the peak issue and to make a prima facie showing to support its contentions (Cal. 'Code Regs., tit. 8, § 20310) is a reasonable extension of Labor Code section 1156.4. For, General Counsel states,

> [I]t is presumed that the Legislature] did not intend the governmental agencies created by it to perform useless or unfruitful tasks. (J.R. Norton, supra, 26 Cal.3d 1, 14.)

General Counsel next argues that Respondent's alleged new documentation on its prospective peak is untimely, irrelevant

and of dubious validity. General Counsel notes that in prospective peak cases, the standard of review will be whether the Regional Director's peak determination was a reasonable one in light of the information available at the time of the investigation. (Citing Ruline Nursery Co. v. ALRB, supra, 169 Cal.App.3d 247; Charles Malovich, supra. 5 ALRB No. 33; and Domingo Farms (1979) 5 ALRB No. 35.) General Counsel observes that the court in Ruline affirmed the Board's reasoning in Malovich that to use postelection data as the basis for review of reasonableness in a prospective peak case would interfere with the Agricultural Labor Relations Act's (ALRA or Act) policy of favoring speed and finality in deciding election cases. Further, it might encourage employers to manipulate the size of their workforces after elections in order to defeat certification.

Even if the Board were to consider Respondent' s new figures, General Counsel argues, the information is suspect, since Respondent never suggested to the Union or the Regional Director that its increase in employment in 1992 would be due to the use of labor contractor employees, as it states in the parties' stipulation. Moreover, General Counsel asserts, the hiring of a labor contractor by Respondent on a one time basis, contrary to prior practice, is exactly the type of action which might encourage manipulation in the size of the workforce after elections if such a hindsight approach were allowed to defeat certification.

In summary, General Counsel asserts that Respondent's peak objection does not present a close case raising important issues under the J.R. Norton standard. General Counsel argues that there is nothing novel or unique in the objection since exactly such contentions have been rejected by the Board before and by the Court of Appeal in Ruling. Moreover, General Counsel states, an objection dismissed by the Executive Secretary based on the absence of adequate declaratory support constitutes a failure of proof and does not present a close case. Therefore, General Counsel argues, the makewhole remedy should be applied.

General Counsel contends that the UFW clearly requested bargaining in its May 8 letter to Respondent, and that the Employer refused in its May 11 response. Therefore, General Counsel asserts, the appropriate date to commence makewhole is May 11. General Counsel maintains that it would be erroneous to view the UFW's May 8 letter as a limited request for bargaining over a unilateral change, and thus insufficient to invoke the Employer's obligation to engage in overall bargaining. Such a contention would be spurious, General Counsel argues, since Respondent's letter to the UFW of May 7 constitutes a categorical refusal to bargain.

Analysis

Labor Code section 1160.3 provides, inter alia, that the Board has the authority to make "employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain." Bargaining

makewhole is the difference between what the employees were actually earning and what they would have received in wages and benefits had their employer bargained in good faith and agreed to a contract with their chosen bargaining representative.

In J.R. Norton Co. v. ALRB (1979) 26 Cal.3d 1, the California Supreme Court rejected the Board's previous practice of awarding makewhole in all technical refusal to bargain cases. The court found that such a per se approach improperly discouraged employers from exercising their right to judicial review in cases where the Board had rejected their meritorious challenges to the integrity of an election. (Id. at p. 34.) Moreover, the court found that the language of section 1160.3 requires that the Board evaluate each case before it and determine if the makewhole remedy would effectuate the policies of the Act. (Id. at pp. 39-40.) The court set out the following standard:

> [T]he Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. (Id. at p. 39.)

In George Arakelian Farms, Inc. v. ALRB (1985) 40 Cal.3d 654, 665, the court approved the Board's post-Norton approach to the awarding of makewhole in such cases, which requires consideration of both the merit of the employer's challenge to the Board's certification of the election and the

employer's motive for seeking judicial review. Thus, in determining whether the awarding of the makewhole remedy is appropriate in technical refusal to bargain cases, the Board will consider any available direct evidence of good or bad faith, together with an evaluation of the reasonableness of the employer's litigation posture, to determine if the employer "went through the motions of contesting the election results as an elaborate pretense to avoid bargaining." As outlined by the court in Arakelian, the reasonableness of the litigation posture is determined by:

> [A]n objective evaluation of the claims in the light of legal precedent, common sense, and standards of judicial review, and the Board must look to the nature of the objections, its own prior substantive rulings and appellate court decisions on the issues of substance. Pertinent too, are the size of the election, the extent of voter turnout, and the margin of victory. (Id. at pp. 664-665.)

Although the parties herein stipulated that they would limit their arguments to the reasonableness prong of the Norton test and would not raise the issue of bad faith, the parties cannot stipulate away the Board's legal obligation to apply the Norton test correctly. However, where, as here, there is no direct evidence of good or bad faith, the Board will focus on the reasonableness element of the Norton standard.

We will therefore examine the elements of Respondent's litigation posture under the reasonableness standard of Norton:

1) Whether the Regional Director failed to comply with the requirements of Labor Code section 1156.4 in examining peak;

2) Whether the Regional Director violated a duty to make a full and complete investigation into peak once the issue was raised;

3) Whether Respondent made a prima facie showing sufficient to require a hearing on its objection; and

4) Whether Respondent's argument that a hearing has never been denied in cases involving similar facts, or its argument that a party cannot waive the Board's lack of jurisdiction over a petition filed when the employer is not at peak, constitutes a novel legal issue.

Section 1156.4

In Charles Malovich, supra, 5 ALRB No. 33, the Board set forth its standard of review in all prospective peak cases: whether the Regional Director's peak determination was a reasonable one in light of the information available at the time of the election. The nature of the pre-election investigation into peak is controlled by Labor Code section 1156.4, which provides:

> Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of the rights included in this part, the board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.
>
> In this connection, the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout

the State of California and upon all other relevant data.

In this case, Respondent stated in its response to the petition for certification that its peak employment for 1992 would occur in October, when it would have 250 employees on the payroll. Board Regulations provide that if the employer contends that the petition is filed at a time when the number of employees is less than 50 percent of peak, the employer is required to provide evidence sufficient to support that contention. (Cal. Code Regs., tit. 8, § 20310(a).) In Malovich we found that it is more reasonable to require that the party with access to information concerning peak produce it in support of its claim rather than to require a Board agent to frame speculative questions about possibilities which might or might not affect employment at a particular ranch. The Regional Director's investigation begins with the issuance of a response form sent to the employer by the Board which contains a paragraph informing the employer that if it contends the payroll period of peak employment will occur later in the calendar year, the employer should attach payroll records from prior years, crop and acreage information, and any other information which supports that contention.

Where, as here, an employer has not contended prior to the election that its pre-petition payroll was at less than 50 percent of peak; has provided its own prospective peak figures and has had the opportunity to furnish its own crop and acreage data to support its projection; and where nothing in the

Employer's response would reasonably have alerted the Regional Director that the Employer's projection of its prospective peak was inaccurate—it is not reasonable to maintain that the Regional Director was required under section 1156.4 to conduct any further inquiry into the accuracy of the Employer's prospective peak projection. Rather, the Regional Director was entitled to rely on Respondent's own knowledge of its crop and acreage data and its ability accurately to project its prospective labor needs.

Regional Director's investigation

In Tepusquet, we held that while the Board may properly require an employer to provide the necessary peak information most accessible to it, the responsibility still rests with the Regional Director to determine whether the peak requirement has been met. In that case, the employment data provided by the employer contained discrepancies in its peak figures. We ruled that in ignoring the discrepancies, the Regional Director failed in his duty to investigate all relevant data, including information not provided by or accessible to an employer, if reasonably apparent or accessible to the Board agent. Similarly, in Kamimoto Farms, supra, 7 ALRB No. 45, the Board held that the Regional Director failed in his investigative duties when he did not ask the employer to clarify a seeming contradiction in its response although the employer had asked several times for the basis of the Board agent's determination that the petition was timely filed.

However, Scheid's reliance on Tepusquet and Kamimoto to demonstrate that the Regional Director's investigation herein was inadequate is misplaced. Unlike the employers in Tepusquet and Kamimoto, the Employer herein did not make any claim prior to the election that its workforce during the pre-petition eligibility period was not at least 50 percent of peak. Although the Employer's response to the petition indicated that there were 121 employees during the eligibility period, the Regional Director reasonably relied on the actual computer payroll data indicating that there were 132 employees on the payroll during the eligibility week. The Employer provided no other information that would have indicated that the payroll data was not authoritative.[3] Thus, since the Regional Director also had no reason to question the Employer's prospective peak figure of 250, he reasonably determined the Employer was at peak without conducting any further investigation. We find, therefore, that Respondent was not reasonable in claiming that the Regional Director violated any duty to engage in an additional investigation of peak.[4]

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[3]We note that 156 people voted in the election, of whom 25 were challenged by the UFW or the Board agent. Respondent did not challenge the eligibility of any voters. Subtracting all challenges from the total leaves a remainder of 131, a number which is still more than 50 percent of the Employer's projected peak figure of 250.

[4]The fact that Respondent's payroll in September 1992 may have had more employees than, its peak projection at the time of the election (see Stipulation and Statement of Facts) is irrelevant. As we stated in Malovich, to use postelection data as the basis for review of reasonableness in prospective peak

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Prima Facie Showing

In J.R. Norton, the California Supreme Court held that the Board has discretion under Labor Code section 1156.3 to dismiss election objections summarily without conducting a hearing. The Court stated:

> We hold that the Legislature did not intend section 1156.3, subdivision (c), to be construed so broadly that it requires the Board to hold a full evidentiary hearing in cases in which the objecting party has failed to establish a prima facie case for setting an election aside. (J.R. Norton, supra, 26 Cal.3d 1, 9.)

The Supreme Court specifically approved the Board's Regulation implementing section 1156.3(c) (Cal, Code Regs., tit. 8, § 20365) as a permissible exercise of the Board's rule-making authority set out in Labor Code section 1144. (J.R. Norton, supra, 26 Cal.3d at 12.) Regulation section 20365 sets forth the threshold prerequisites that must be met before an objecting party will be entitled to a formal evidentiary hearing. Essentially, declarations supporting a party's election objections must establish prima facie proof of that party's claims before a hearing is ordered. The regulation further empowers the Executive Secretary to dismiss objections in the

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[4](... continued)
cases would run contrary to the ALRA's policy of placing a premium on speed and finality in deciding the results of elections. Further, it might encourage employers to file groundless objections in order to preserve the possibility of ultimately showing that the peak determination, although reasonably made, was incorrect in light of subsequent events. Such an approach might also encourage employers to manipulate the size of their workforces after elections in order to defeat certification. This approach was approved by the Fourth District Court of Appeal in Ruline Nursery Co. v. ALRB, supra, 169 Cal.App.3d at 258-259.

absence of such proof, which dismissals are reviewable by the Board.

In his order dismissing Respondent's objection herein, the Acting Executive Secretary correctly stated the test to be utilized in evaluating prospective peak cases: whether the Regional Director acted reasonably based upon the information available or reasonably available to him at the time of his decision to conduct the election. He then reasonably found that because the Employer's response to the petition did not contend that the peak requirement was not met, and because the Declaration submitted by Respondent's General Manager Kurt J. Gollnick failed to assert that the Employer at any time during the investigation contended that the peak requirement was not met, the situation was clearly distinguishable from that in Tepusguet.

The Acting Executive Secretary also reasonably found that since the Employer's response did not contest peak and Gollnick's Declaration did not assert that the Employer advised the Board agent that the figure of 132 employees during the eligibility period was erroneous, the Employer did not show that the Regional Director abused his discretion or acted unreasonably in failing to investigate the discrepancy. Moreover, since the Employer never suggested at any time during the investigation that it had made a mistake when it asserted its peak for 1992 would be 250 employees, the Acting Executive Secretary reasonably

found that the Regional Director had no duty to make further inquiry about the Employer's prospective peak figure.

We find that Respondent clearly failed to produce declaratory support which was either legally or factually sufficient to establish a prima facie showing that its peak objection should be heard. Therefore, we hold that Respondent is not reasonable in now claiming that the Acting Executive Secretary's dismissal of its objection was erroneous.

Novel Issues

Respondent first claims that it has raised a novel issue by arguing that a party cannot waive the Board's lack of jurisdiction over a representation petition filed when an employer is below 50 percent of peak employment. However, Respondent's argument misstates the relevant issue herein. The issue is not one of waiver, but one of a failure of proof. It is well settled that the Board's review of the peak question is properly limited to the question of whether the Regional Director reasonably determined that the employer was at peak in light of the information available to him at the time of the election. (Malovich, supra, 5 ALRB No. 33; Ruline Nursery Co. v. ALRB, supra, 169 Cal.App.3d 247.)[5] Respondent did not contest peak at

[5]While the court in Ruline stated that the Board reviewed both pre-election and post-election data in making its decision to uphold the regional director in that case (169 Cal.App.3d at 259), that is not correct. The court's reference is to the decision of the Investigative Hearing Examiner (IHE) in that case, wherein the IHE, citing Holtville Farms, Inc. (1979) 5 ALRB No. 48, held that post-election data may be considered only to the extent that it explains or amplifies pre-election information

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that time, but argued lack of peak in its election objection. In dismissing the objection, the Acting Executive Secretary did not find that the Employer had waived its right to raise the peak issue, but rather that Respondent failed to make a prima facie showing that the Regional Director's prospective peak determination was unreasonable. Respondent had every right to raise its peak question again to this Board and ultimately to the courts. In doing so, however, Respondent has not raised any novel legal issue.

Respondent claims that it has presented a second novel issue in its argument that a hearing has never been denied in a case involving facts similar to those in this case. If Respondent intends to argue that no party objecting to a regional director's peak determination has ever been denied a hearing, it has cited no case authority for such a proposition. As noted above, it is also well-settled that the Board is under no legal obligation to hold a hearing where there is no prima facie showing that the election results should not be certified. (J.R. Norton, supra, 26 Cal.3d 1, 9.) Respondent does cite numerous cases holding that when a party establishes through declarations a prima facie showing that an election was improperly held, it is entitled to a hearing on the question. The Acting Executive Secretary in the instant case, however, found that Respondent had not presented such a prima facie showing. In arguing that the

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[5](...continued)
submitted to the Regional Director. (Ruline Nursery Co., supra, 6 ALRB No. 33, IHED at p. 25.)

Acting Executive Secretary erred in his determination, Respondent has not presented a novel legal issue.

Conclusion

We find that Respondent has not raised important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice. (J.R. Norton, supra, 26 Cal.3d 1, 39.) Nor has Respondent raised any novel legal issues that have not yet been considered or ruled on by the Board or the courts. (San Justo Ranch/Wyrick Farms (1988) 14 ALRB No. 1.) While Respondent's legal arguments might represent colorable claims in the abstract if raised for the first time, as detailed above, those claims are now contrary to well-settled principles of law. Thus, such claims cannot form the basis of a reasonable litigation posture within the meaning of J.R. Norton, and the imposition of makewhole relief is therefore warranted. We will impose makewhole from May 11, when the Employer first made clear that because it was contesting the Board's certification, it would not recognize or bargain with the UFW.

ORDER

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

1. Cease and desist from:

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

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

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

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

(b) Make whole its agricultural employees 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 with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with the Board's Decision and Order in E.W. Merritt Farms (1988) 14 ALRB No. 5. The makewhole period shall extend from May 11, 1992, until October 20, 1992, and from October 20, 1992, until the date on which Respondent commences good faith bargaining with the UFW;

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

(d) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all payroll and social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the amounts of makewhole and interest due under the terms of this Order;

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

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this Order to all agricultural employees in its employ at any time during the period from May 11, 1992, until May 10, 1993;

(g) To facilitate compliance with paragraphs (h) and (i) below, upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of Respondent's next peak season. Should the peak season have begun at the time the Regional Director requests peak season dates, inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to

informing the Regional Director of the anticipated dates of the next peak season;

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

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

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

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year commencing on the date on which Respondent commences to bargain in good faith with the UFW.

DATED: February 11, 1993

BRUCE J. JANIGIAN, Chairman[6]

IVONNE RAMOS RICHARDSON, Member

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

MEMBER FRICK, Concurring:

With one exception, I agree with the analysis contained in the lead opinion wherein it is concluded that Respondent's claims have little or no chance of succeeding on appeal, primarily because they are contrary to settled law. However, with respect to the claim that, due to the discrepancy on the face of Respondent's response form, the Regional Director had a duty to further investigate, I believe that Respondent's argument is at least reasonable in light of the Board's holdings in Tepusquet Vineyards (1984) 10 ALRB No. 29 and Kamimoto Farms (1981) 7 ALRB No. 45.

In both Tepusquet and Kamimoto, the Board stated that Board agents have a duty to investigate discrepancies in the information provided by the employer. Here, since Respondent answered yes to the question of whether it was at peak, but provided a pre-petition payroll figure on the form that did not

reflect peak, there was a discrepancy in the information provided to the Regional Director. Therefore, I believe that it is reasonable to argue that the Regional Director had a further duty to contact Respondent and ask for an explanation. Even though the accompanying payroll list appeared to show a sufficient number of agricultural employees to meet the peak requirement, with further inquiry the employer would have had the opportunity to explain why it indicated on the form that there were only 121 agricultural employees during the pre-petition payroll period.[1]

Although I would conclude that Respondent has a reasonable claim that the Regional Director had a duty to further investigate due to the discrepancy on the face of Respondent's response form, any error by the Regional Director was nonprejudicial and therefore could not be the basis for setting aside the election. On that basis, I agree with my colleagues that the makewhole remedy is appropriate.

The discrepancy in the information provided to the Regional Director went only to the correct figure for the pre-petition payroll period. Specifically, the form reflected a

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[1]Unlike my colleagues, I do not find that this case is distinguishable from Tepusguet and Kamimoto because here Respondent answered on the response form that it was at 50 percent of peak. Such an answer has no legal significance because it constitutes a legal conclusion that, in accordance with Labor Code section 1156.4, must be determined in the first instance by the Regional Director based upon the information before him. For the same reason, though I agree with my colleagues that the Regional Director had no duty to further inquire as to Respondent's prospective peak projection, I would not rely on the apparent admission of peak employment as a basis for that conclusion.

figure of 121, while the accompanying payroll list reflected at least 132 employees. There was no information before the Regional Director that would have raised any doubts about the 250 figure that Respondent had provided as its estimated prospective peak. In any event, that the Regional Director's peak determination was reasonable based on the information available at the time of election and that any failure to investigate further was nonprejudicial are unequivocally demonstrated by the present record.

First, we know that 156 employees voted in the election, none of whom were challenged by Respondent. Even if we subtracted the 25 voters challenged by the Union or a Board agent, the remainder reflects a total of 131 eligible voters, a number which is more than the projected prospective peak figure provided by Respondent prior to the election. In addition, Respondent has provided nothing but unsupported assertions that any of the employees on the pre-petition payroll list, on which the Regional Director relied, were not agricultural employees.

Perhaps most importantly, the declarations accompanying Respondent's objections to the election reflect that the 358 figure it now asserts to have been an accurate prospective peak projection was not determined until after the election. Not only is the consideration of post-election data improper (see lead opinion, footnotes 4 and 5), but this further demonstrates that the Regional Director had no reason prior to the election to question the 250 figure that Respondent had provided.

In sum, there is no reason to believe that further investigation by the Regional Director would have affected his determination that Respondent was at 50 percent of peak employment during the pre-petition payroll period. Therefore, the failure to conduct such further investigation, even if in error, provides no basis for setting aside the election. Since I believe the standard set out by the California Supreme Court in J.R. Norton Co. v. ALRB (1979) 26 Gal.3d 1 [160 Cal.Rptr. 710] seeks to protect not simply abstract legal principles that have no bearing on the outcome of the Board's decision to certify an election, but reasonable claims that the election should be set aside, I find the awarding of makewhole appropriate where, as here, any legal error by the Board or its agents could not constitute a sufficient basis for reversing the Board's decision. As the Court summarized in George Arakelian Farms, Inc. v. ALRB (1985) 40 Cal.3d 654, 665-666 [221 Cal.Rptr. 488]:

> We must determine whether the circumstances under which Arakelian sought review, including the quality or substantive merit of the case to be reviewed, supported a reasonable, good faith belief that the election would eventually be set aside. We examine the evidence in that light.

Dated: February 11, 1993

LINDA A. FRICK, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint that alleged that we, Scheid Vineyards and Management Company, had violated the law. The Board found that we did violate the law by refusing to bargain in good faith with the UFW regarding a collective bargaining agreement.

The Board has directed us to post and publish this Notice.

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

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

Because you have these rights, we promise that:

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

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

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW.

DATED: SCHEID VINEYARDS AND MANAGEMENT COMPANY

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One .office is located at 112 Boronda Road, Salinas, California 93907-1899. The telephone number is (408) 443-3161.

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

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CASE SUMMARY

Scheid Vineyards and Management Company (UFW)

19 ALRB No. 1
Case No. 92-CE-49-SAL

Background

Following an election in which the UFW was selected as the exclusive representative of the Employer's agricultural employees, the Employer filed an election objection alleging that the election was not conducted when the Employer was at 50 percent of peak employment. The Board dismissed the objection without a hearing, for failure to establish a prima facie case that the Regional Director's peak determination was unreasonable. After the Board issued a certification of the Union, the Employer refused to bargain in order to test the certification by judicial review. Thereafter, General Counsel filed a complaint alleging that the Employer had refused to recognize or bargain with the Union, and seeking a makewhole remedy to make the Employer's employees whole for economic losses suffered as a result of the Employer's refusal to bargain.

The case came before the Board by a Stipulation and Statement of Facts under which the parties agreed to waive their right to a hearing.

Board Decision

The Board found that the Regional Director had made an adequate investigation into the peak issue and had reasonably concluded that the Employer was at more than 50 percent of its peak employment at the time of the election. The Board also found that the Employer had failed to make a prima facie showing sufficient to require a hearing on its election objection, and concluded that the objection had properly been dismissed. The Board issued an Order requiring the Employer to meet and bargain in good faith with the Union.

After analyzing the parties' arguments in light of the relevant caselaw, the Board concluded that the Employer had not raised important issues concerning whether the election was conducted in a manner that truly protected employees' right of free choice, and had not raised any novel legal issues that had not been previously considered or ruled on by the Board. The Board concluded that the Employer's litigation posture was not reasonable within the meaning of J.R. Norton Co. v. ALRB (1979) 26 Cal.3d 1, and it therefore included a makewhole remedy in its Order.

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

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