Tracy, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TRIPLE E PRODUCE CORPORATION, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 92-CE-6-VI 19 ALRB No.2 (17 ALRB No. 15) (February 18, 1993)

DECISION AND ORDER

On September 10, 1992, the Board received a joint stipulation entered into by all parties to this matter, namely Triple E Produce Corporation (Respondent or Triple E), the United Farm Workers of America, AFL-CIO (Charging Party, UFW or Union) and General Counsel, requesting that the Board transfer this matter to itself for findings of fact, conclusions of law, and order pursuant to Title 8, California Code of Regulations (CCR) section 20260.

All parties have stipulated that the unfair labor practice charge, complaint, answer, "Stipulation of Facts," record and decisions of the Board in the underlying representation proceedings (i.e., Case No. 89-RC-3-VI as reported at 16 ALRB No. 5, 16 ALRB No. 14, and 17 ALRB No. 15) will constitute the entire record in this case, and that all parties waive their right to a hearing pursuant to Labor Code section

1160.2.[1]. Thereafter, pursuant to OCR section 20260, the parties requested and were granted leave to submit briefs setting forth their positions accompanied by legal arguments.[2]

On September 11, 1992, the Executive Secretary of the Board issued an order transferring the matter to the Board for a final decision and order within the meaning of section 1160.8. The Board has considered the record, including the stipulation of the parties and their briefs and, on the basis thereof, hereby issues the following findings of fact, conclusions of law, and remedial order.

Findings of Fact

1. Respondent is, and at all times material herein has been, engaged in agriculture within the meaning of section 1140.4(c);

2. Charging Party is now, and at all times material herein has been, a labor organization within the meaning of section 1140.4(f);

3. On August 4, 1989, pursuant to a Petition for Certification filed by the UFW in Case No. 89-RC-3-VI, the Board conducted an election among Respondent's agricultural employees. Following resolution of an outcome-determinative number of challenged ballots, the final official Tally of Ballots revealed

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

[2]As the Board finds the record and the briefs sufficient to apprise it of the questions at issue herein, Respondent's separate request for oral argument is denied.

the following results: UFW, 297; No Union, 61; additional unresolved challenged ballots insufficient in number to affect the outcome of the election, 141. Respondent timely filed objections to the election pursuant to section 1156.3(c). On June 26, 1990, the Executive Secretary issued his order dismissing certain of the objections for failure to set forth facts which, if proven, would constitute grounds for setting aside the election and setting the remaining objections for a full evidentiary hearing before an Investigative Hearing Examiner (IHE);

4. The hearing was conducted over a 10 day period between August and October, 1990 in Stockton, California. On June 21, 1991, IHE Thomas Sobel issued his decision in which he recommended to the Board that the election be set aside. Exceptions to the IHE's decision, briefs in support of exceptions, and response briefs were timely filed by the parties;

5. On November 22, 1991, the Board rejected the IHE's recommendation as well as Triple E's objections to the election and certified the UFW as the exclusive representative of Respondent's agricultural employees.

6. On December 11, 1991, the UFW requested that Respondent commence negotiations with intent to reach agreement concerning its employees' wages, hours, and other terms and conditions of employment as set forth in section 1155.2. On or about January 8, 1992, Respondent advised the Union in writing that it would refuse to negotiate inasmuch as Respondent believes

that the Board erred in certifying the results of the election and would seek to perfect a judicial challenge to the Board's action in that regard;[3]

7. On January 30, 1992, the UFW filed an unfair labor practice charge in which it alleged that since December 11, 1991, Respondent has failed or refused to bargain in good faith with its employees' certified bargaining representative in violation of section 1153(e). On May 4, 1992, following an investigation of the charge, the Regional Director for the Visalia Region issued a complaint alleging that Respondent had violated the bargaining obligation which flowed from the Board's certification of the Union. On May 14, 1992, Respondent timely filed an answer to the complaint.

Conclusions of Law

This Board has long applied the National Labor Relations Board's (NLRB or national board) proscription against relitigation of representation issues in related unfair labor practice proceedings in the absence of newly discovered or previously unavailable evidence or a claim of extraordinary circumstances. (D'Arrigo Bros, of California (1978) 4 ALRB No.

[3]The Board's decisions in representation matters are not final decisions and orders subject to direct judicial review. Accordingly, an aggrieved employer must refuse to bargain with a certified labor organization in order that the union may file an appropriate unfair labor practice charge so that the matter can then be adjudicated under Chapter 6 (unfair labor practices) provisions of the Act, resulting in an appealable section 1160.8 decision and order. Upon such review, the various California courts of appeal may examine the whole of the record in the underlying representation case.

45; Adamek & Dessert. Inc. (1985) 11 ALRB No. 8; Muranaka Farms (1986) 12 ALRB No. 9. See, also, Pittsburgh Plate Glass v. National Labor Relations Board (1941) 313 U.S. 146 C8 LRRM 425].) In our decision in Triple E Produce Corporation (1991) 17 ALRB No. 15, we considered and ruled on the issues raised by Respondent's objections to the election in Case No. 89-RC-3-VI.

Respondent here presents no newly discovered or previously unavailable evidence, but does suggest that the decision itself provides an extraordinary circumstance which might justify a reexamination, if not relitigation, of the certification of representative. In that regard, Respondent points to two factors which it believes make this a "close" case worthy of reevaluation: (1) the IHE who heard the case recommended that the election be set aside on the basis of Board Agent misconduct; and (2) one member of the three member Board did not join in the majority's result which reversed the IHE and upheld the election. We find that Respondent has not demonstrated circumstances justifying either relitigation of the representation issues or reconsideration of our decision. As discussed below, the contentions listed above do not provide a basis for concluding that the makewhole remedy is not appropriate. Thus, they must also fail as a basis for reconsideration of our decision certifying the Union.

Accordingly, we conclude that Respondent had a duty to bargain with the UFW based upon that Union's certification and that Respondent has, as it has conceded, failed and refused to

meet and bargain collectively in good faith with the UFW, in violation of sections 1153(e) and (a) of the Act.

The Remedy

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. Agricultural Labor Relations Board (1979) 26 Cal.3d 1 [160 Cal.Rptr. 710], 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. Agricultural Labor Relations Board (1985) 40 Cal.3d 654 [221 Cal.Rptr. 488], 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.)

In 17 ALRB No. 15, a two-member majority of the Board determined that the pre-election atmosphere of alleged threats,

violence, and picket-line misconduct did not render impossible the employees' freely determining whether or not to be represented by a union for purposes of collective bargaining. Since the violent conduct at issue in the case was attributed to striking employees and not to the petitioning Union, the appropriate standard by which to examine the evidence was found to be the so-called "third party" standard, under which election interference by a non-party warrants the setting aside of an election only upon a showing that the conduct was such that employee free choice was rendered impossible. Respondent believes that the more salient and well reasoned opinion in the case was that of a dissenting member who found a prevailing atmosphere of "violence and coercion" in the period immediately preceding the election and, on that basis, would have invalidated the election.

Respondent urges the present Board to follow the lead of the dissenting member in order to now set aside the election and certification, dismiss in its entirety the allegations in the instant complaint, obviating any consideration of the makewhole remedy. We decline to do so, thereby affirming in general the policy which forecloses relitigation of election issues in unfair labor practice proceedings and, in particular, because we believe that the findings in the dissenting opinion disregarded prevailing standards and case law precedent.[4]

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[4]For example, our former colleague in the minority found conduct by supporters of the Onion rather than the Union itself objectionable but failed completely to differentiate, as would be

In Lindeleaf v. Agricultural Labor Relations Board (1986) 41 Cal. 3d 861 [226 Cal. Rptr. 119], also a technical refusal to bargain matter, the California Supreme Court disabused the appellant in that case of the

> ...novel theory that make-whole relief is inappropriate after a lone dissenting hearing officer, Board member, or appellate judge finds merit in an employer's claim of election misconduct. [Employer] offers no authority for its position which would potentially eliminate any disincentive for employer's to pursue dilatory appeals by too easily immunizing them against make-whole demands. We affirm the standard we established in J. R. Norton, which looks to the substantiality of the objections raised and the good faith of the employer seeking judicial review of union certification. (Lindeleaf. supra. 41 Cal. 3d 861, 881, n.8.)

We find Lindeleaf. supra. dispositive to the extent that Respondent's litigation posture in this matter relies on the IHE's recommendation that the Board not certify the results of the underlying election as well as a less than unanimous Board decision to reject the IHE's recommendation.

required, the legal significance between the two sources of conduct. In finding further that such conduct was directed at employees who continued to work during a strike rather than at how employees might vote in the election, he also failed to recognize that the California Supreme Court distinguishes conduct directed at whether or how employees might vote in a representation election as opposed to their failure to honor the picket line. (Triple E Produce Corp. v. ALRB (1983) 35 Cal.3d 42 [196 Cal. Rptr.518]).

Were we to now elevate the dissenting position to a majority position, as Respondent believes we should, we would have to do so at the expense of disregarding established precedent for evaluating allegations of election misconduct as well as our statutory directive to set aside elections only upon a showing of conduct affecting the elections or the results of those elections.

Further, Respondent's litany of purported misconduct by strikers and/or UFW representatives is grossly exaggerated in light of the evidence presented in the underlying hearing. As the IHE and the Board properly found, the vast majority of Respondent's claims of misconduct were simply unsupported by the record. Yet, Respondent continues to make those claims in a manner wholly untempered by either the record itself or the factual findings of the Board. In light of the statutory prescription of Labor Code section 1160.8 that the Board's factual findings are not to be disturbed if supported by substantial evidence, Respondent's insistence on reiterating its litany of unsubstantiated claims borders on being a basis for concluding that its litigation posture is not maintained in good faith.

Nevertheless, a supportable basis exists for not awarding the bargaining makewhole remedy in this case, and that basis may be found in words of the Board, itself, in its decision certifying the election. At 17 ALRB No. 15, page 9, the Board states:

> The events complained of, although clearly indicative of harassment, and bordering on the level of violence that has caused this Board to set aside elections in the past (see, e.g., Ace Tomato Company. Inc./George B. Lagorio Farms (1989) 15 ALRB No. 7 and T,. Ito & Sons Farms [(1985) 11 ALRB No. 36] were not so tied to the Union's presence and activity that we would set aside the election.

Thus, the Board acknowledged that, even with the application of the third party standard, the amount of misconduct that it found

to have occurred presented a close case as to whether the election should be set aside. Though, as discussed above, the Board finds no basis for reconsidering its decision at 17 ALRB No. 15, in light, of the language of that decision quoted above, the Board cannot conclude that Respondent's decision to seek judicial review was not based on a reasonable good faith belief that the election would eventually be overturned. (J. R. Norton Company. supra)[5] In the absence of a showing of any other conduct by Respondent to support a finding that the purpose of this further litigation is to delay the bargaining process, we find that bargaining makewhole is not an appropriate remedy in this case.

ORDER

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

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW

[5] Close cases do not always provide reasonable litigation postures in that, given the substantial evidence standard of review prescribed by Labor Code section 1160.8, cases that involve close factual issues typically have little chance of being overturned on appeal. Therefore, as a practical matter, a reasonable litigation posture will usually be based on unsettled questions of law or on claims that the Board erred in applying the relevant legal standards to its factual findings.

or Union), as the certified collective bargaining representative of its agricultural employees;

(b) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of their rights guaranteed 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) 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;

(c) 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;

(d) 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 December 11, 1991 until December 11, 1992;

(e) To facilitate compliance with paragraphs (f) and (g) 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;

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

(g) Arrange for a representative or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and placed(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

(h) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has

taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive 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 18, 1993

BRUCE J. JANIGIAN, Chairman[6]

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

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

NOTICE TO AGRICULTURAL EMPLOYEES

A representation election was conducted by the Agricultural Labor Relations Board (ALRB or Board) among our employees on August 4, 1989. The majority of voters chose the United Farm Workers of America, AFL-CIO (UFW or Union) to be their union representative. The Board found that the election was proper and officially certified the UFW as the exclusive collective bargaining representative of our agricultural employees on November 22, 1991. When the UFW asJced us to begin to negotiate a contract, we refused to bargain so that we could ask the court to review the election. The Board has found that we have violated the Agricultural Labor Relations Act by refusing to bargain with the UFW.

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

The Agricultural Labor Relations Act is the law that gives you and all other farm workers in California 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.

Dated: TRIPLE E PRODUCE CORPORATION

By: _____
(Representative)

_____
(Title)

If you have any questions about your right as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at

711 North Court Street, #H
Visalia, California 93291

Telephone No.: (209) 627-0995

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Triple E Produce Corp.
(UFW)

19 ALRB No.
Case No. 92-CE-6-VI

Background

In its decision in Triple E Produce Corporation (1992) 18 ALRB No. 15, the Board overruled Respondent's objections to the election conducted by the Board among Respondent's agricultural employees, and certified the UFW as representative of Respondent's agricultural employees. On December 11, 1991, the UFW requested that Respondent recognize and bargain with the UFW pursuant to the Board's certification. The Employer declined to bargain, advising the UFW on January 8, 1992 that it was refusing to bargain to obtain a judicial review of the Board's certification. The Regional Director issued a complaint alleging the refusal to bargain pursuant to the Board's certification violated section 1153 (e) of the Act. The parties entered into a stipulation of facts and agreed to submit the legal issues to the Board.

The Board's Decision

The Board declined to reverse its earlier decision certifying the UFW as collective bargaining representative of Respondent's employees. That one member of the Board had dissented in 18 ALRB No. 15 did not make the case one presenting a close legal issue under J. R. Norton. Inc. v. ALRB (1980) 26 Cal.3d 1 [160 Cal.Rptr. 710], nor did the IHE's decision finding merit in one of Respondent's objections, a conclusion rejected by all Board members taking part in 17 ALRB No. 15.

The Board noted that in its decision in 17 ALRB No. 15, it had found incidents of gravel throwing and other misconduct bordering on the level of misconduct that would warrant setting aside an election to present a close question as to whether the UFW should be certified. The Board concluded that it could not find that Respondent's raising this issue to be an unreasonable litigation posture, and therefore found that under J.R. Norton, supra. an award of makewhple would be inappropriate. The Board noted that Respondent continued to press its contentions that the election was invalid relying on evidence that was clearly insufficient or discredited, and that such contentions bordered on being frivolous. The Board found that these arguments did not warrant an award of makewhole because Respondent had presented issues that did raise what it had viewed as a close legal question as to the validity of the election.

* * *