French Camp, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JOAQUIN TOMATO GROWERS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 93 -CE- 3 8 -VI 20 ALRB No. 13 (19 ALRB No. 4) (August 19, 1994)

DECISION AND ORDER

This is a technical refusal to bargain case which has been submitted directly to the Agricultural Labor Relations Board (ALRB or Board) on a stipulated record. The parties have agreed to waive their right to an evidentiary hearing pursuant to Labor Code section 1160. 2.[1] In *San Joaquin Tomato Growers, Inc./LCL Farms, Inc.* (1993) 19 ALRB No. 4, issued on May 3, 1993, the Board dismissed election objections filed by San Joaquin Tomato Growers, Inc. (SJTG) and LCL Farms, Inc. (LCL) . As a result, the Board found SJTG to be the employer[2], and certified the United Farm Workers of America, AFL-CIO (UFW) as the exclusive bargaining representative of all of SJTG's agricultural employees in San Joaquin and Stanislaus Counties.

[1]The Agricultural Labor Relations Act is codified at California Labor Code section 1140, et seq.

[2]LCL was found to be a farm labor contractor. By operation of Labor Code section 1140.4, subdivision (c), the entity engaging a labor contractor, in this case SJTG, is deemed to be the employer.

By letter dated June 14, 1993, the certified bargaining representative, the UFW, requested that SJTG commence negotiations. By letter dated July 12, 1993, SJTG informed the UFW that it was refusing to bargain in order to obtain judicial review of the Board's decision resulting in the certification. The UFW filed charge number 93-CE-38-VI on July 19, 1993, and the complaint issued on September 23, 1993. In its answer to the complaint, SJTG asserted that it would challenge the Board's decision in 19 ALRB No. 4 on both the finding that SJTG was the employer and the finding that it was not proven that violence and coercion surrounding the election interfered with employee free choice. However, in its brief to the Board in support of the technical refusal to bargain, SJTG asserts only that the Board erred in naming SJTG, rather than LCL, as the employer. The parties' stipulation was received by the Board on May 31, 1994, and briefs were filed simultaneously on July 8, 1994 by SJTG, the General Counsel, and the UFW.

The Board has considered the record, including the stipulation of the parties and their briefs, and issues the following findings of fact, conclusions of law, and remedial Order. Specifically, the Board finds no basis for disturbing its conclusion in *San Joaquin Tomato Growers, Inc./LCL Farms, Inc.* (1993) 19 ALRB No. 4, that SJTG is the employer and bears the obligation to bargain in good faith with its agricultural employees' chosen bargaining representative. Therefore, the Board finds that SJTG's admitted refusal to bargain is violative

of Labor Code section 1153, subdivisions (e) and (a). In addition, for the reasons set forth below, the Board finds that an award of bargaining makewhole is appropriate in this case.

DISCUSSION

Relitigation

The Board, like the National Labor Relations Board, generally does not permit relitigation of representation issues in unfair labor practice proceedings, absent newly discovered or previously unavailable evidence. (See, e.g., *Limoneira. Company* (1989) 15 ALRB No. 20.) A narrow exception has been recognized by both Boards where it is determined that the certification was manifestly in error because the election was held in an atmosphere of fear and coercion that prevented a free and fair election. *(Sub-Zero Freezer* Co., *Inc.* (1984) 271 NLRB 47; *T. Ito & Sons Farms* (1985) 11 ALRB No. 36.) As the Board's underlying representation decision suffers from no infirmity calling into question the integrity of the election process, the present case does not present circumstances warranting the invocation of this very narrow exception to the rule against relitigation of election matters.

SJTG asserts that the Board erred in finding SJTG to be the employer, claiming that LCL is clearly a custom harvester to which the bargaining obligation should attach. First, SJTG purports to measure LCL against the criteria set out in *Tony Lomanto* (1982) 8 ALRB No. 44. SJTG asserts that it is uncontroverted that LCL is solely responsible for the hiring,

compensation, and supervision of the workers, employs its own supervisors to protect LCL's interest in the quality and quantity of the harvest, has a substantial interest in the harvest because its payment is on a per ton basis, has a substantial risk of loss, has substantial and specialized equipment, carries its own liability insurance, hires its own labor contractors, and is responsible for having the tomatoes hauled to the packing shed.[3]

In the underlying decision, the Board explained that the responsibilities of labor contractors typically include hiring, compensation, and supervision and, thus, the existence of such responsibilities does not establish customer harvester status. Similarly, the Board noted that, while the classic labor contractor is paid a fixed percentage above labor costs, payment by the ton is not uncommon where the workers are paid a piece rate. Moreover, the Board has previously found entities paid by the ton to be labor contractors. (Joe Maggrio, Inc. (1979) 5 ALRB No. 26; *The Garin Co.* (1979) 5 ALRB No. 4; *Cardinal Distributing* Co. (1977) 3 ALRB No. 23.) Thus, while payment by the ton may be

[3]In addition, SJTG makes the following assertion, which is, at best, misleading: "It is beyond dispute that LCL plays an integral part in the tomato industry in the northern San Joaquin Valley." This is a rather puzzling statement given the fact that the record establishes that LCL's only involvement in the tomato industry is the harvesting it does for SJTG. Moreover, the record citations provided to support this statement simply involve testimony concerning LCL's longevity as SJTG's provider of harvesting services. As the Board explained in the underlying decision, the ALRA's exclusion of labor contractors from the definition of agricultural employer is absolute and does not simply apply to those labor contractors which are not stable or responsible.

some evidence of custom harvester status, it is neither determinative nor inconsistent with labor contractor status.

The Board took into account LCL's risk of loss during the harvest and concluded that the risk, which was attached only until the tomatoes were at roadside, was not great and was insufficient to establish customer harvester status. SJTG does not explain why the carrying of general liability insurance is of any significant weight in attempting to distinguish LCL from other labor contractors. Despite SJTG's claims to the contrary, the record reflected that the LCL owned equipment utilized in the tomato harvest was neither specialized nor particularly expensive.[4]

With regard to the hiring of other labor contractors by LCL, the Board explained that this was not logically inconsistent with labor contractor status and that it was aware of no authority that labor contractors cannot act essentially as general contractors. Lastly, SJTG's assertion that LCL is responsible for having the tomatoes hauled to the packing shed is not supported by the record. The record citations provided establish only that the trucking company (VPL Transport, Inc.) pays for the use of a truck owned by LCL. The record evidence

/

/

/

[4]Most of the equipment was generic in nature, in that it could be used in various agricultural and related operations, and the value was found to be considerably less than $263,000.

indicates that VPL is paid directly by SJTG for the hauling of the tomatoes from roadside to the packing shed.[5]

In addition to its discussion of criteria under the *Tony* Lomanto case, SJTG also makes several related arguments with regard to particular aspects of the Board's analysis. First, SJTG asserts that the Board erroneously concluded that the per ton rate paid to LCL was strongly tied to labor costs. Yet, SJTG then goes on to state that any method of compensation is necessarily tied to labor costs. This was exactly the point the Board was making in concluding that payment per ton harvested was not necessarily inconsistent with the basic definition of a labor contractor, which is one who provides labor for a fee. In a related argument, SJTG states that the Board erred by concluding that payment by the ton indicates labor contractor status. However, the Board came to no such conclusion. The Board instead made the very different point that, while the classic labor contractor is paid a percentage above labor costs, payment by the ton does not preclude labor contractor status. (19 ALRB No. 4, p. 9 .)

Next, SJTG claims that the present situation is analogous to Kotchevar *Brothers* (1976) 2 ALRB No. 45, where the Board found the supplier of labor to be a custom harvester. In reaching its conclusion in that case, the Board relied on the provision of costly equipment, the responsibility for delivering

[5]Sam Loduca, the general manager of SJTG during the times in question, testified to this arrangement and identified a SJTG check made out to VPL as payment for hauling tomatoes.

the wine grapes to the winery, and per ton charges that were found not to be tied to labor costs. Here, the Board found the equipment provided by LCL not to be particularly costly, concluded that payment was tied to labor costs, and that LCL's responsibility ended when the tomatoes were carried to roadside.[6] Thus, the two cases are readily distinguishable.

SJTG asserts that the Board erred in giving weight to the fact that SJTG determines the fields to be picked, the amounts, and the degree of ripeness desired. SJTG cites several Board cases where custom harvester status was found even though the grower or owner exerted similar control. (*Tony Lomanto,* supra, 8 ALRB No. 44; *Gourmet Harvesting and Packing* (1978) 4 ALRB No. 14; *Napa Valley Vineyards Co.* (1977) 3 ALRB No. 22; Kotchevar *Brothers, supra, 2* ALRB No. 45.) However, those cases do not undermine the Board's conclusion that such control is evidence militating against custom harvester status. They merely stand for the proposition that, unlike the present case, where there are other factors present which strongly indicate that the entity is a custom harvester, such control by the grower does not necessarily indicate that the harvesting entity is a labor contractor.

In addition, SJTG claims that the Board unfairly minimized LCL's risk of loss. The Board did not discount the

[6]SJTG again states that LCL was responsible for delivery to the packing shed and simply subcontracted that task to VPL Trucking, but, as explained above, the record does not support that conclusion.

fact that LCL would suffer a significant financial loss if a large number of tomatoes were damaged during the harvest. Instead, the Board simply pointed out that the likelihood of such an occurrence was slight and that LCL's responsibility ended once the tomatoes were moved to roadside.

Lastly, SJTG claims that the Board failed to consider LCL's strong interest in the quality and quantity of the harvest. SJTG claims that it is significant that LCL, by being paid by the ton, can increase its profit by motivating the workers to be more productive. Why this is significant is unclear, except to further differentiate the payment method from a fixed percentage above labor costs. In any event, since the workers are paid a piece rate, profit could be increased only if SJTG is willing to accept as many tons as LCL can harvest and at same rate per ton. While there may be some flexibility in the amount packed, it is limited by the capacity of the packing shed and the amount of orders received by SJTG. Moreover, any labor contractor who is responsible for supervision of the workers has the obligation to monitor the quality of the work.

In sum, there is no basis presented which warrants a reexamination of the Board's decision that LCL acts as a labor contractor in its dealings with SJTG. The Board carefully weighed the record evidence in light of established precedent and, balancing all relevant factors, came to a sound and reasoned conclusion.

Bargaining Makewhole

SJTG asserts that, should the Board not reconsider its decision finding SJTG to be the employer having the bargaining obligation, this case is a close one which does not warrant the imposition of the bargaining makewhole 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. ALRB (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. *ALRB* (1985) 40 Cal.3d 654, 665 [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.)

As explained below, an examination of SJTG's litigation posture reveals that its challenge of the Board's certification is without a reasonable good faith basis.

From its initial refusal to bargain communicated by letter dated July 12, 1993 until the filing of its brief on July 8, 1994, SJTG included among its stated grounds for challenge its assertion that the UFW, its agents, and supporters engaged in a campaign of violence and coercion that interfered with employee free choice and warrants the setting aside of the election. SJTG asserts that it reluctantly decided to abandon this claim as one of the grounds for its technical refusal to bargain after reviewing the California Supreme Court's January 26, 1994 denial of the petition for review in *Triple E Produce Corp.* (1993) 19 ALRB No. 2 and the Board's recent decision in Ace *Tomato Co., Inc.* (1994) 20 ALRB No. 7.[7]

As the Board pointed out when it certified the results of the election in 19 ALRB No. 4, the evidence in support of the election objections alleging violence and coercion was patently insufficient to carry the Respondents' burden of proof. First, the Board explained that, as all of the alleged misconduct was directed at those employees who refused to join the strike, the conduct was not related to the election itself or how employees

[7]*Triple E,* where the Board's certification of the election has been upheld by the courts, involved more serious misconduct than that found in the present case. In Ace *Tomato Co.,* which involved misconduct less serious than in Triple *E* but unquestionably more serious than that found in the present case, the Board concluded that Ace Tomato's litigation posture was not reasonable and awarded the makewhole remedy.

should vote. Second, most of the proffered evidence consisted of uncorroborated hearsay testimony that is legally insufficient to support a finding. (See Cal. Code Regs., tit. *3,* § 20370, subd. (d).) Indeed, in light of these deficiencies, the Board concluded that the evidence was insufficient to warrant setting aside the election even if accepted on its face without regard to credibility.

Upon review by the courts, the Board's findings of fact are conclusive if supported by substantial evidence. (Lab. Code § 1160.8.) In light of this narrow standard of review, it is highly unlikely that the Board's findings on violence and coercion would be disturbed by the courts. Thus, a challenge on this basis must be considered frivolous and, therefore, evidence of bad faith. Moreover, the baseless nature of such a challenge is apparent without reference to the recent decisions in *Triple E Produce Corp.* and *Ace Tomato* Co., Inc. While the Board certainly would like to encourage parties to abandon baseless claims that serve only to create unnecessary litigation, we cannot ignore the fact that SJTG's inclusion of the violence issue is evidence of bad faith at the time SJTG first refused to bargain.

While the claim that LCL was a custom harvester rather than a labor contractor is not as patently deficient as the violence claim, it too does not reflect a reasonable litigation posture.[8] As explained in detail above, the Board carefully

[8]While this a mixed question of law and fact, to which the substantial evidence standard of review does not fully apply, the

(continued...)

weighed all relevant factors in light of existing precedent. The Board observed that LCL, while it assumes some risk of loss and provides equipment, has none of the characteristics that have previously been found to be determinative of custom harvester status.[9] In addition to the soundness of the Board's conclusion that LCL was acting as a labor contractor for SJTG, there is yet a more fundamental reason why it is not reasonable to challenge the Board's conclusion that SJTG is the entity to which the bargaining obligation attaches.[10]

The Board, having found LCL to be a labor contractor, did not directly address the issue of whether, under the analysis approved in *Rivcom Corp.* v. *ALRB* (1983) 34 Cal.3d 743

---

[8] (...continued)
Board's conclusions as to questions of law arising under the ALRA are also given great deference by the courts. As stated by the court in San *Diego Nursery Co.* v. *Agricultural Labor Relations Board* (1979) 100 Cal.App.3d 128, 140 [160 Cal.Rptr. 822]:

> The ALRB is the agency entrusted with the enforcement of this Act and its interpretation of the Act is to be accorded great respect by the courts and will be followed if not clearly erroneous.

(Cf. *Ruline Nursery Co.* v. *Agricultural Labor Relations Board* (1985) 169 Cal.App.3d 247, 259 [216 Cal. Rptr. 162].)

[9]See, e.g., *Gourmet Harvesting and Packing Co.* (1978) 4 ALRB No. 14; *Jack* Stowells, *Jr.* (1977) 3 ALRB No. 93 [extensive management responsibility or packing and shipping]; *Tony Lomanto, supra,* 8 ALRB No. 44 [specialized equipment]; *Kotchevar Brothers, supra, 2* ALRB No. 45 [costly equipment and hauling].

[10]Member Frick believes that the issue of whether LCL is a custom harvester or a labor contractor arguably presents a close question. However, because of her concurrence with the discussion that follows, she agrees that SJTG's claim that LCL should be assigned the bargaining obligation does not constitute a reasonable litigation posture

[195 Cal.Rptr. 651], SJTG would properly bear the bargaining obligation even if LCL was found to be a custom harvester. However, as discussed below, the Board did make the very finding that is critical under the *Rivcom* analysis. SJTG is well aware of the applicability of *Rivcom,* as it anticipates this line of reasoning in its brief and argues that LCL has a more stable and long-standing relationship with the employees at issue. SJTG argues that this, coupled with the lack of indicia of a joint employer relationship between SJTG and LCL, requires that the bargaining obligation fall upon LCL.

Rivcom involved three pertinent entities. Rivcom Corporation ran the farming operation, Riverbend Farms, Inc. ran the packing and harvesting operation, and Triple M supplied labor for the harvest and hauling of the crop. Rivcom and Riverbend were found to be joint employers. The Board found that Triple M had some characteristics of a custom harvester. Nevertheless, the Board, affirmed by the court, went on to find that Rivcom and Riverbend should have the bargaining obligation because they had the "substantial long-term interest in the ongoing agricultural operation." This was based on the fact that Rivcom/Riverbend ran the day to day agricultural operations and therefore had involvement with the ongoing operations that was greater and more stable than Triple M's involvement solely in the harvest. The key passage from the court's opinion is as follows:

> The Board developed the "custom harvester" distinction in response to arguments by certain labor suppliers that they were entirely excluded from statutory

> responsibility as mere labor contractors. No decision holds, however, that a custom harvester is the *sole* employer of any workers it furnishes. Any such result would undermine the statutory goal of fixing labor relations responsibility directly on farm operators. Thus, any assumption that Triple M acted as a custom harvester at Rivcom Ranch and was therefore an employer of the workers there, does not preclude a finding that Rivcom and Riverbend, the ranch's operators, were also employers of those workers for purposes of the Act. The Board reached the correct conclusion.

(Rivcom, 34 Cal.3d at 768-769.)

Here, SJTG asserts that LCL has the most substantial long-term interest in the agricultural operation because it has harvested for SJTG for many years and hires a large percentage of the same people every year to do the harvesting, and is responsible for all hiring and supervision. In SJTG's view, this means that LCL is the entity that will mostly likely provide for a stable bargaining relationship. SJTG also asserts that, after Rivcom, the Board will examine the relationship between the custom harvester and the owner /lessor in light of joint employer criteria to determine if the owner/ lessor, rather than the custom harvester, should be assigned the bargaining obligation. Citing the lack of evidence to support the traditional indicia of joint

/

/

/

/

/

/

employers,[11] SJTG argues that this further supports the view that LCL should be the designated employer.

First of all, SJTG has misrepresented the Board and the court's discussion in *Rivcom.* The only discussion of joint employer/single employer criteria in that case was with regard to Rivcom and Riverbend. Such analysis was not discussed in determining whether Rivcom/Riverbend or Triple M should be assigned the bargaining obligation. The Board did note that Rivcom/Riverbend manager Larry Harris was involved in the selection and transfer of some harvest employees, but the focus of the discussion was on Rivcom/Riverbend's involvement and control over the agricultural operations in general. Conversely, the Board found that Triple M exerted no independent managerial control over the agricultural operations. Similarly, in 5 *& J Ranch, Inc.* (1984) 10 ALRB No. 26, the Board found that S & J, the land management company, rather than the custom harvester, Rio Del Mar, Inc., had the substantial long-term interest in the agricultural operations. This was based on S & J's broad responsibilities for running all aspects of the agricultural operations. There is no discussion in the decision of joint ,employer/single employer criteria.

---

[11]Though SJTG speaks of joint employer indicia, the indicia cited are actually those normally utilized in single employer analysis. The four basic criteria are interrelation of operations, centralized control of labor relations, common management, and common ownership. While the two terms are sometimes used interchangeably, joint employer analysis focusses on whether there is joint control of labor relations.

Turning back then to the issue at hand, the Board's findings in the underlying decision leave no doubt as to the outcome when the Rivcom analysis is applied. As the Board pointed out in its decision, the fact that LCL appears to be a stable and responsible entity does not remove it from the labor contractor exclusion of section 1140.4(c). More importantly, stability of the entity itself does not mean that it could provide a stable bargaining relationship. The proper focus under Rivcom is on the interest in the ongoing agricultural operations. In other words, the bargaining obligation should attach to the entity which exerts the greater control not only over the day to day operations, but also over their continued existence.

In the present case, there is no question but that SJTG is the entity with the most substantial long term interest in the agricultural operations. SJTG contracts with approximately fifteen tomato growers to produce the tomatoes SJTG packs in its shed. The contracts normally provide for SJTG to advance a percentage of the growing costs in exchange for a like percentage of the profit. SJTG has a field man who spends all of his time monitoring the farming practices of the growers, including planting schedules, irrigation, cultivation, fertilization, and pesticide application. As part of the agreements with the growers, SJTG is responsible for harvesting, hauling, packing, and marketing the tomatoes, and, thus, the hub of the overall

operation is SJTG itself.[12] Unlike SJTG, individual growers or the entities hired to harvest or haul could drop out or be replaced without significantly affecting the overall operation.

In the underlying election decision, the Board observed that LCL's continued existence as a tomato harvesting entity is subject to SJTG's continued willingness to select it to do the harvesting. LCL does no other tomato harvesting and the contract with SJTG represents approximately 75 percent of its overall business.[13] Thus, the Board expressly recognized what is critical to the inquiry under *Rivcom,* i.e., that while SJTG's substantial involvement and investment in all aspects of the agricultural operation make it an entity that could conduct stable labor relations, LCL could simply not be selected by SJTG for the next harvest and the bargaining unit would essentially disappear. In such circumstances, it would be patently contrary to the purposes of the Act to attach the bargaining obligation to the harvesting entity. Indeed, to do so would be an irresponsible act by this Board, and it is unreasonable to believe that the Board or the courts would follow such a course.

In conclusion, the Board finds that the bargaining makewhole remedy is appropriate in this case. As explained above, SJTG's technical refusal to bargain was initially based in

---

[12]As noted, SJTG hires LCL to do the harvesting and VPL to do the hauling to the shed.

[13]The remainder of the business consists of the planting and cultivation of other crops. This activity utilizes LCL's more specialized equipment and requires only a few workers in addition to Chavez himself.

part on a patently frivolous ground and is further based on arguments that also fall short of constituting a reasonable litigation posture.

ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board (ALRB) hereby orders that Respondent San Joaquin Tomato Growers, Inc., 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 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 matter 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.* IV. *Merritt Farms* (1988) 14 ALRB No. 5. The makewhole period shall extend from July 12, 1993, 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 July 12, 1993, until July 11, 1994;

(g) To facilitate compliance with paragraph (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: August 19, 1994

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Board Member

LINDA A FRINCK, BOARD MEMBER

CASE SUMMARY

San Joaquin Tomato Growers, Inc. (UFW)

20 ALRB No. 13
Case No. 93-CE-38-VI

Background

In *San Joaquin Tomato Growers, Inc./LCL Farms, Inc.* (1993) 19 ALRB No. 4, issued on May 3, 1993, the Board dismissed election objections filed by San Joaquin Tomato Growers, Inc. (SJTG) and LCL Farms, Inc. (LCL) , found SJTG, not LCL, to be the employer, and certified the UFW as the exclusive bargaining representative of all of SJTG's agricultural employees in San Joaquin and Stanislaus Counties. Thereafter, the UFW requested that SJTG commence negotiations and SJTG responded by stating that it was refusing to bargain in order to obtain judicial review of the Board's decision resulting in the certification. SJTG asserted that the Board erred by not setting aside the election due to an atmosphere of violence and coercion and in not finding LCL to be a custom harvester to which the duty to bargain should attach. The UFW then filed an unfair labor practice charge and a complaint issued. The matter was placed before the Board on a stipulated record. In its brief to the Board, SJTG abandoned its challenge based on violence and coercion.

Board Decision

Observing that relitigation of representation issues in unfair labor practice proceedings has been allowed only where it is determined that the certification was manifestly in error because the election was held in an atmosphere of fear and coercion, the Board found that this matter did not fall within that very narrow exception. The Board went on to explain that SJTG's various claims of error in the analysis the Board applied in finding LCL to be a labor contractor were without merit.

Finding that SJTG's litigation posture was not reasonable, the Board concluded that SJTG was simply going through the motions of contesting the election results as an elaborate pretense to avoid bargaining and, therefore, awarded the bargaining makewhole remedy. *(J.R. Norton Co.* v. ALRB (1979) 26 Cal.3d l.) Specifically, the Board concluded that the initial challenge on the basis of violence and coercion was frivolous, as the evidence in the underlying election proceeding was patently insufficient to carry the Respondents' burden of proof. The Board also found that its finding that LCL was a labor contractor was not subject to reasonable challenge. Moreover, the Board explained that, because SJTG unquestionably had the substantial long term interest in the agricultural operation, SJTG would be assigned the bargaining obligation even if LCL was found to be a custom harvester. *(Rivcom Corp.* v. ALRB (1983) 34 Cal.3d 743.)

* * *

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

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint that alleged that we, San Joaquin Tomato Growers, Inc., 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: SAN JOAQUIN TOMATO GROWERS, INC.

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 711 North Court Street, Suite H, Visalia, CA 93291-3636. The telephone number is (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.