Manteca, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ACE TOMATO CO., INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 93-CE-37-VI 20 ALRB No. 7 (June 14, 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) for decision 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 Nos. 89-RC-5-VI & 89-RC-5-1-VI) , as well as the unfair labor practice charge, the unfair labor practice Complaint, the Answer to the Complaint, the Stipulation and exhibits attached thereto, and briefs to the Board in Case No. 93-CE-37-VI, will constitute the entire record in this case.[2]

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

[2] Respondent has also requested oral argument before the Board in this matter. As we find that Respondent's 93-page brief adequately addresses the issues it seeks to raise in this case, we hereby deny the request.

On January 20, 1994, 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 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 August 10, 1989, pursuant to a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union) , the Board conducted an election at Ace Tomato Co. , Inc. (Ace or Employer) in a bargaining unit designated as all the agricultural employees of Ace located in San Joaquin County, California. The final tally of ballots showed 160 votes for the Union, 49 against, and 103 challenged ballots.[3] Ace timely filed election objections, of which some were dismissed and some were scheduled by the Executive Secretary for an evidentiary hearing. After a 17-day hearing, the Investigative Hearing Officer (IHE) issued his decision on January 15, 1992, recommending that the election be certified. Ace timely filed exceptions, and on October 20, 1992, the Board issued its .decision in Ace Tomato Co., Inc. (1992) 18 ALRB No. 9, certifying the UFW as the exclusive bargaining representative of all of Ace's agricultural employees located in San Joaquin County, California.

[3] Since the challenges were insufficient in number to affect the outcome of the election, they were not resolved.

On July 19, 1993,[4] the UFW filed an unfair labor practice charge alleging that since June 25 Ace had been refusing to bargain with the Union. On September 23, General Counsel issued a complaint alleging Ace's refusal to bargain and seeking a makewhole remedy for Ace's employees for all economic losses resulting from the refusal. In its answer, dated September 29, Ace acknowledged that it had engaged in a technical refusal to bargain but asserted that the Board should not have certified the election because of alleged pre-election violence, threats and coercion committed by the UFW and its supporters.

Respondent's Brief to the Board

Ace's lengthy brief contains two primary arguments:

1) the Board should re-examine the underlying record of alleged pre-election violence, threats and coercion and revoke the certification and set aside the results of the election, and

2) in the alternative, the Board should find this a "close" case for which the makewhole remedy is inappropriate.

Ace argues that the election herein involved threats, violence, coercion and intimidation that exceeded the level of misconduct which caused the Board to set aside the elections in Ace Tomato Company/George B. Lagorio Farms (1989) 15 ALRB No. 7 (Ace I) and T. Ito & Sons Farms (1985) 11 ALRB No. 36 (Ito) . Citing Ito and Sub-Zero Freezer Co., Inc. (1984) 271 NLRB 47 [116 LRRM 1281], Ace urges the Board to reconsider its decision

[4] All dates herein refer to 1993 unless otherwise specified.

in Ace Tomato Co., Inc., supra. 18 ALRB No. 9, and set aside its certification of the August 10, 1989, election.

Arguing that the credibility resolutions of the IHE herein were "one-sided" and "result-oriented," Ace asks the Board to ignore the IHE's determinations of credibility and make its own finding, based on an independent review of the entire record, that incidents of violence, threats and intimidation interfered with the election process. Ace also asserts that the Board failed to follow the California Supreme Court's ruling in Triple E Produce Corp. v. Agricultural Labor Relations Bd. (1983) 35 Cal.3d 42 [196 Cal.Rptr. 518] (Triple El that statements made during election campaigns can reasonably be expected to be discussed and repeated among the electorate, so that their impact carries beyond the person to whom they are directed.

Ace further argues that the Board erred in upholding the IHE's exclusion of testimony regarding witnesses' subjective reaction to alleged misconduct. Ace contends that the Board's failure to consider such testimony is contrary to the California Supreme Court's decision in Triple E.

Citing National Labor Relations Board (NLRB) case law, Ace asserts that under a "mass action" theory of liability, the UFW must be held responsible for pre-election actions of its supporters because "large groups of individuals do not act collectively in the absence of leadership." (Vulcan Materials Co. v. United Steel Workers (5th Cir. 1970) 430 F.2d 446 [74 LRRM 2818, 2825].) Thus, Ace asks the Board to set aside the election

herein because of tlie UFW's failure to disavow its supporters' alleged acts of violence and intimidation.

Finally, Ace argues that in the event the Board does not set aside the election, this is a "close case" that raises important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice. Further, Ace maintains that it has proceeded in a good faith and timely manner in its technical refusal to bargain. Therefore, it contends, the makewhole remedy is unwarranted herein under the standard established in J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1 [160 Cal.Rptr. 710].

UFW's Brief to the Board

The UFW argues that since the Board found no preelection misconduct attributable to union organizers or agents, and no conduct by third parties (i.e., persons not acting as agents of the Union or the Employer) sufficient to make employee free choice in the election impossible, there is no reasonable basis for the Employer's litigation posture. The Union asserts that Ace's "mass action" theory is irrelevant, because a union cannot be held vicariously liable for the actions of employees or union supporters if the actions were not authorized or ratified by the union. (Citing United Mine Workers v. Gibbs (1966) 383 U.S. 715 [61 LRRM 2561].)

The Union contends that Ace was not reasonable in arguing that the election should be set aside under the authority

of cases such as T. I to & Sons Farms, supra. 11 ALRB No. 36 (Ito) , and Sub-Zero Freezer Co., Inc., supra, 271 NLRB 47, as the third-party threats in those cases were far more serious and widespread than the isolated and mostly minor incidents occurring in the instant case. The Board found the most unruly striker behavior to have occurred before the UFW took over the strike, 17 days prior to the election and 11 days before the Union's petition for certification was filed, the UFW states, and the Board concluded that the Union was relatively successful in discouraging violence, since the atmosphere was quelled in the days immediately before and during the election. Since the Employer's claim that the election should be invalidated is unsupported by law or the facts, the Union argues, its litigation posture is clearly unreasonable.

The Union further contends that the Employer has acted in bad faith in seeking judicial review. For example, although the evidence established that the UFW did not take over the strike among Ace employees until July 26, 1989, the Employer spent days at the hearing putting on "incredible" testimony in a "desperate" attempt to place the UFW at Ace's Turner Ranch on July 24, 1989. As another example of Ace's alleged bad faith, the Union cites the Employer's claims (which the Board found to be exaggerated) that the IHE discredited every Employer witness in every material respect and credited every UFW witness.

In conclusion, the UFW argues that Ace has gone through the motions of contesting the election results as a pretense to

avoid bargaining, and that a makewhole award is necessary in order to ensure that Ace does not avoid its bargaining obligations.

General Counsel's Brief to the Board

General Counsel notes that this Board, following the practice of the NLRB, does not permit relitigation of representation issues in unfair labor practice proceedings, absent a demonstration of extraordinary circumstances. (Citing, inter alia, Limoneira Company (1989) 15 ALRB No. 20 and Muranaka Farms (1986) 12 ALRB No. 9.) General Counsel argues that Ace has made no such showing, but merely is contending that the Board erred in its previous decision.

There are significant differences, General Counsel argues, between the pre-election conduct occurring in the instant case and the violence and threats surrounding the elections in Ace I and Ito. For example, in Ace I. violence occurred on the very day of the election, in the presence of large numbers of eligible voters. Three days before the election, union supporters bombarded a labor consultant's car with tomatoes and hard dirt clods and rocked the car as if to overturn it. On the same day, strikers bombarded workers with hard dirt clods and unripe tomatoes. In Ito, threats of job loss and threats to call the immigration authorities were made to employees during the course of a strike and were repeated on the day of the election to workers waiting in line to vote. In both Ace I and Ito, the

number of employees directly exposed to threats and violence approached a majority of the eligible voters.

In contrast, General Counsel argues, the evidence in this case does not indicate an atmosphere of fear or coercion such as existed in Ace I and Ito. Here, there were no widespread or repeated threats accompanied by acts of force, no threats made on or near election day, and the only tomato or dirt clod throwing incident occurred before the UFW assumed control of the strike. Workers were not physically forced from the fields, and there were no incidents of wholesale attacks on worker-filled vehicles or the brandishing of firearms. Further, none of the alleged misconduct was successfully attributed to the UFW or its agents. Thus, General Counsel submits, Ace has made no showing of any circumstances permitting an exception to the Board's general rule against relitigation.

On the question of makewhole, General Counsel argues that Ace's litigation posture is neither reasonable nor in good faith. Most of Ace's contentions involve issues of fact, and an administrative agency's findings of fact are accorded great deference by reviewing courts. (Citing Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal.3d 335 [156 Cal.Rptr. 1.) Under the third-party standard applicable herein, General Counsel asserts, it cannot reasonably be contended that the alleged conduct was so aggravated that it created an atmosphere of fear or reprisal making employee free choice impossible. Since the Employer has not raised any novel

issues and the Board's findings are clearly supported by substantial evidence, General Counsel concludes, Ace cannot be acting in the good faith belief that the election was not properly conducted, and an award of makewhole is appropriate.

Analysis

1. Relitication

This Board follows the practice of the NLRB in refusing to permit relitigation of representation issues in unfair labor practice proceedings, absent newly discovered or previously unavailable evidence, or a demonstration of extraordinary circumstances warranting such relitigation. (Limoneira Company, supra. 15 ALRB No. 20. The NLRB's decision in Sub-Zero Freezer-Co., Inc., supra. 271 NLRB 47, provides a limited exception to the general rule against relitigation for cases in which widespread threats accompanied by property damage created an atmosphere of fear and reprisal preventing a free and fair election. In Ito, a technical refusal to bargain case, the ALRB followed the Sub-Zero exception and set aside the underlying election where widespread threats and physical force against workers had made free choice in the election impossible.

Both this Board and the NLRB give less weight to misconduct committed by union supporters or workers in general than to misconduct attributable to a party (e.g., an employer representative or a union official, organizer or agent). Misconduct attributable to a party warrants setting aside an election if it may reasonably be said to have affected the

outcome of the election. (Baia's Place (1984) 268 NLRB 868 [115 LRRM 1122].) However, the test used to review nonparty conduct is whether it is so aggravated that it creates a general atmosphere of fear or reprisal rendering employee free choice in the election impossible. (T. Ito & Sons Farms, supra, 11 ALRB No. 36, at p. 10.)

Ace attempts to make the pre-July 26, 1989 conduct in this case attributable to the UFW under the "mass action" theory of liability. The "mass action" theory does not apply to the facts of this case, however. In the court of appeals case cited by Ace, Vulcan Materials Co. v. United Steel Workers (5th Cir. 1970) 430 F.2d 446 [74 LRRM 2818], the court ruled that acts of a union agent committed within the scope of his general authority were binding upon the union regardless of whether they were specifically authorized or ratified. The court also made a general statement that as long as a union is functioning as a union it must be held responsible for the mass action of its members. (74 LRRM at pp. 2825-2826.)

The conduct preceding the UFW's involvement herein cannot be held to constitute mass action of union members. Moreover, under the Agricultural Labor Relations Act (AURA or Act), there is no rule of strict liability for either employers or unions; rather, the Board looks to traditional agency principals to determine a party's responsibility for the acts of others. (Vista Verde Farms v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 307, 326 [172 Cal.Rptr. 720]; Furukawa Farms

(1991) 17 ALRB No. 4.) In the instant case, the Board affirmed the IHE's conclusion that the Employer failed to establish that the UFW expressly granted authority to any worker or striker to engage in misconduct, and failed to establish any apparent authority which would have required some type of ratification or acquiescence by the UFW. (Ace Tomato Co., Inc., supra. 18 ALRB No. 9, at pp. 12-13.)

Ace's contention that Triple E requires the Board to consider witnesses' subjective reaction to alleged coercion is incorrect. As the Board said in Ito, whether a statement is coercive does not turn on an employee's subjective reaction but depends upon whether the statement reasonably tends to coerce an employee. (T. Ito & Sons Farms, supra. 11 ALRB No. 36, at pp. 10-11.) This standard is consistent with the California Supreme Court's statement in Triple E that:

> [in] assessing the effect of [a] threat, we do not inquire into the subjective individual reactions of a particular employee but rather determine whether the statements, considering the circumstances surrounding their utterance, reasonably tended to create an atmosphere of fear and coercion. (Triple E Produce Corp. v. Agricultural Labor Relations Bd., supra. 35 Cal.3d 42, 55.)

Thus, the Board properly upheld the IHE's exclusion of subjective testimony, and such exclusion provides no grounds for relitigation.

Ace has also failed to demonstrate that the Board's refusal to invoke the NLRB's "small plant doctrine" herein was inconsistent with the Triple E decision. The IHE analyzed in some detail the NLRB cases cited by the California Supreme Court

in Triple E when it applied the doctrine, which presumes that threats made to workers may reasonably be expected to have been discussed and disseminated among all employees. The IHE, and subsequently the Board, found all of the NLRB cases distinguishable. The NLRB has generally applied the doctrine in discrimination cases to permit an inference of employer knowledge of union or other protected activity. As the court of appeals indicated in D & D Distribution Company v. National Labor Relations Board (3rd Cir. 1986) 801 F.2d 636 [123 LRRM 2464]:

> the essence of the small plant doctrine rests on the view that an employer at a small facility is likely to notice activities at the plant because of the closer working environment between management and labor. (801 F.2d 636, 641, fn. 1.)

In cases where the NLRB has applied the doctrine to infer broad dissemination of union threats, the facts have generally shown a small unit (or at least a very narrow margin of victory in the election) , and threats being made by union officials or union agents. (See, for example, United Broadcasting Company of New York (1980) 248 NLRB 403 [103 LRRM 1421]; Sav-On-Druas. Inc. (1977) 227 NLRB 1638 [95 LRRM 1127]; Steak House Meat Company. Inc. (1973) 206 NLRB 28 [84 LRRM 1200].) The cited cases have no application in the instant case, which shows a large margin of victory, a large unit covering a number of fields in San Joaquin County, and no finding that any union official or agent made any threats.

Ace's argument on this issue is further weakened by the fact that of the examples it cites of "threats" which should be

presumed to have been disseminated, all involve conduct which the IHE and the Board found not to have been established. For example, contrary to the Employer's claim that on August 7, 1989, a UFW representative told employees that tires would continue to be punctured if people did not join the Union, the IHE (affirmed by the Board) found that the testimony of the Employer's witness was too vague and unreliable to support a finding that anyone had made the alleged threat. Similarly, the IHE (affirmed by the Board) found that the testimony of an Employer's witness that workers were shoved or pushed at Dellaringa Ranch on August 8 or 9, 1989, was too vague to support a finding, and he concluded that the incident did not occur.

Thus, Ace has failed to show that the Board's refusal to apply the small plant doctrine herein requires relitigation, since National Labor Relations Act (NLRA) precedent does not indicate that the NLRB applies the doctrine in cases such as the instant case involving a large unit and a large margin of victory in the election. Further, even if the doctrine were applicable herein, the Employer could not be entitled to a presumption of dissemination of alleged threats which were found in fact not to have been established.

Ace has asked the Board to ignore the IHE's credibility resolutions and make its own independent review of the record and set aside the election results. Ace has repeated the same arguments it made in its exceptions brief to the IHE decision, i.e., that the IHE's credibility resolutions had no legitimate

basis and demonstrated bias on the part of the hearing examiner. However, the Board has already made an independent review of the underlying record and determined that the IHE's credibility resolutions should be upheld.

As the Board pointed out in footnote 4 of its decision in the representation case, the Employer's claim that the IHE discredited every Employer witness in every material respect and credited every UFW witness was exaggerated and incorrect. (Ace Tomato Co., Inc., supra. 18 ALRB No. 9, pp. 7-8, fn. 4.) Although the Board noted that it was somewhat uncomfortable with the IHE's frequent use of "stock" phrases to discredit witnesses (e.g., "vague," "rehearsed," or "coached"), it observed that such descriptions of testimony are exactly the kind of demeanor-based credibility findings which ordinarily should not be disturbed upon the Board's review of the cold record. Moreover, the Board found that in most cases such descriptions of testimony by the IHE were backed up with specific examples of testimony supporting the IHE's conclusions.

In repeating its arguments regarding credibility resolutions in its current brief to the Board, Ace fails to demonstrate that the IHE's resolutions were biased, result-oriented or inherently improbable. Since Ace has not shown that the clear preponderance of all the relevant evidence demonstrates that the credibility findings herein were incorrect, its claims

do not provide a basis for relitigation of the pre-election conduct. (Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].)

Ace asks the Board again to compare the pre-election conduct in this case to the conduct that occurred in Ace Tomato Company. Inc./Georae B. Laaorio Farms, supra. 15 ALRB No. 7 and T. Ito & Sons Farms, supra. 11 ALRB No. 36. Ace asserts that the instant case involves misconduct which "dwarfs" the conduct which caused the Board to set aside the elections in the two earlier cases. Again, however, Ace has relied on discredited testimony to support its claims.

For example, without specifying dates or locations, Ace asserts that "on multiple days" before the election, workers' vehicles were pelted with rocks and dirt clods, pounded on and rocked back and forth as if to turn them over, that non-striking workers were driven from the field under a hail of hard green tomatoes, and that on three separate days workers' car windows were shot out or otherwise broken. The credited testimony, however, does not support these assertions. The IHE found that on July 24, 1989, before the UFW was involved, some strikers entered a field after the majority of workers had already left and threw some tomatoes, and that one woman may have been hit. He found that there was some pushing of vans on one occasion, but never any danger of them being turned over. He did not credit any incidents of vehicles being pelted with rocks or dirt clods, found no evidence that workers left the fields because of

coercion rather than because they were supporting the strike, and concluded that the Employer failed to establish that any vehicle windows were broken by strikers or Union supporters.

The Employer also asserts that on unspecified occasions workers' vehicles were stopped from entering or exiting fields, non-striking workers were subjected to racial insults and threats of physical beatings if they failed to honor the strike, and tires were punctured in order to prevent workers from getting to work. The credited testimony does not support any of these assertions, either. The IHE found that the Employer failed to establish that workers were prevented from entering or exiting fields, or that strikers made serious threats rather than simply urging employees to stop working and join the effort to get more pay, or that any tires were punctured by Union supporters.

The Board's decision in 18 ALRB No. 9 carefully compared the conduct in this case to the conduct in Ito and Ace I and NLRB cases in which elections have been overturned on the basis of third-party misconduct. In Ace I and Ito, threats and violence occurred in the presence of large numbers of eligible voters and continued on the very day of the voting. In the instant case, the Board found that the most unruly striker behavior occurred on July 24, 1989, before the UFW was involved in the strike. The incident occurred 17 days prior to the election, and 11 days before the Union filed its petition for certification. The Board found that in contrast to cases in which the ALRB or the NLRB has set aside elections on the basis

of third-party misconduct, the evidence in this case demonstrated no dissemination of threats among employees, no threats or other misconduct tied to voting, some pushing of cars but no attempts to overturn them, no vandalism tied to Union agents or supporters, and no misconduct occurring on the day of the election. The Board properly concluded that the incidents that did occur were isolated in what was overall a peaceful atmosphere, and that they provided no basis for overturning the election results.

Ace has not demonstrated that the actual conduct occurring in this case provides any grounds for overturning the election. Ace's attempt to rely on unproven incidents of alleged misconduct, based on discredited testimony, does not provide a legitimate basis for relitigating the Board's representation decision. We therefore deny the Employer's request that we revoke the certification and set aside the results of the August 10, 1989 election.

2. Makewhole

In Georcre Arakelian Farms. Inc. v. Agricultural Labor Relations Bd. (1985) 40 Cal.3d 654 [221 Cal.Rptr. 488], the California Supreme Court approved the Board's post-J. R. Norton Co. v. Agricultural Labor Relations Bd. *f* supra. 26 Cal.3d 1, approach to determining the appropriateness of a makewhole remedy in technical refusal to bargain cases. The Board's approach requires consideration of both the merit of the employer's challenge to the certification of the election and the employer's

motive for seeking judicial review. Thus, 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:

> whether the employer 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. *(J.* R. Norton Co. v. Agricultural Labor Relations Bd., supra. 26 Cal.3d 1, 39.)

The reasonableness of an employer's litigation posture is determined by:

> an 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. (George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd., supra. 40 Cal.3d 654, 664-665.)

Most of the Employer's contentions herein involve issues of fact. Because of the Board's labor law expertise and its statutory role as fact finder, reviewing courts accord great deference to the agency's findings of fact, which are overturned only if not supported by substantial evidence. (Tex-Cal Land Management. Inc. v. Agricultural Labor Relations Bd., supra. 24 Cal.3d 335.)

We find that Ace has not provided any reasonable basis for overturning the factual findings and credibility determinations made by the IHE and upheld by the Board herein. In its brief to the Board, the Employer repeats its unfounded

assertion that the IHE discredited every Employer witness in every material respect and credited every UFW witness. In its decision, the Board properly found this claim to be exaggerated and untrue. The Employer has not even attempted to show that the IHE's demeanor-based credibility resolutions were incorrect under the "clear preponderance of all the relevant evidence" standard established in Standard Dry Wall Products, supra. 91 NLRB 544.

Ace's contention that the instant case involves threats, violence, coercion and intimidation that "dwarf" the conduct which led the Board to set aside the elections in Ace I and Ito is frivolous and lacking in good faith, since Ace relies on discredited testimony in describing the alleged incidents herein, which it attempts to compare to actual incidents in the earlier cases. Thus, Ace's argument that the authority of Ace I and Ito requires relitigation of the representation case herein is neither reasonable nor in good faith.

Ace's argument that the UFW was responsible for the conduct of strikers on July 24, 1989 under a "mass action" theory of liability is unreasonable, since the theory applies only to agents of a union. (Vulcan Materials Co. v. United Steel Workers. supra. 430 F.2d 446.) In the instant case, both Employer and Union witnesses testified that the UFW did not take over the strike until the afternoon of July 26, 1989. There was no showing that any of the participants in the July 24, 1989 incident were even Union members, much less Union agents.

Ace's claim that, under NLRB case law, the UFW should be held responsible for alleged misconduct occurring after July 24, 1989, is also unreasonable. A union is generally not responsible for an employee's acts unless the employee is an agent of the union, and the conduct of pro-union employees will be attributed to a union only where the union has "instigated, authorized, solicited, ratified, condoned or adopted" the conduct. (Kux Manufacturing Co. v. NLRB (6th Cir. 1989) 890 F.2d 804 [132 LRRM 2935, 2939].) The burden of proof in establishing agency is on the party asserting the agency relationship. (San Dieao Nursery (1979) 5 ALRB No.43.) Ace has not shown any error in the IHE's conclusion that Ace failed to meet its burden of establishing that the UFW granted express or apparent authority to any worker or striker to engage in misconduct. Ace's contention that the UFW had a duty to disavow the alleged misconduct herein is therefore frivolous.

Ace's argument that the Board should have admitted testimony regarding witnesses' subjective feelings and reactions is not a reasonable, good-faith argument, since both ALRB and NLRB precedent clearly hold that the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct. (Emerson Electric Company (1980) 247 NLRB 1365, 1370 [103 LRRM 1389]; Aari-Sun Nursery (1988) 13 ALRB No. 19.) Ace's assertion that Triple E requires the admission of such evidence is unreasonable, since the court specifically stated that in assessing the effect of a threat, it

does not inquire into the subjective individual reactions of employees, but rather determines whether the statement reasonably tended to create an atmosphere of fear and coercion. (Triple E Produce Corporation v. Agricultural Labor Relations Bd., supra. 35 Cal.3d 42, 55.)

Similarly, Ace's argument that the Board's refusal to apply the NLRB's "small plant" doctrine was inconsistent with Triple E does not indicate a reasonable, good-faith litigation posture. The IHE herein carefully analyzed the relevant NLRB cases applying the doctrine and found them all distinguishable. The doctrine is clearly not applicable in this case, which involved a large unit, a large margin of victory, and no finding that union agents or representatives made any threats. Further, the examples Ace cites as "threats" that should be presumed to have been disseminated all involve conduct which the IHE and the Board found not to have been established. To argue that the Board erred in refusing to presume dissemination of unsubstantiated "threats" does not indicate a reasonable, good-faith litigation posture.

We conclude that Respondent has advanced arguments that demonstrate it is not pursuing its objections in the reasonable good-faith belief that the Union was not freely selected by the employees as their bargaining representative, but is simply going through the motions of contesting the election results as an elaborate pretense to avoid bargaining. (J. R. Norton Co. v. Agricultural Labor Relations Bd., supra. 26 Cal.3d 1, 3.)

Therefore, we will impose a makewhole remedy for Ace's refusal to bargain with the UFW.[5]

ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board (Board) hereby orders that Respondent Ace Tomato Co., Inc., 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

[5] We disagree with our dissenting colleague's argument that the makewhole period should not commence until the date on which the California Supreme Court denied review of the Board's decision in Triple E Produce Corp. (1993) 19 ALRB No. 2. A party's litigation posture is determined at the time it initially refuses to bargain with the certified union. The decisions of this Board, the recognized expert body in determining issues of fact and interpreting the ALRA, are traditionally given deference by reviewing courts. The Board upheld the results of the election in Triple E in February 1993. Thus, Respondent was on notice when it refused to bargain herein on June 25, 1993, that there were no reasonable grounds to believe the election would be overturned in this case, where the level of alleged misconduct was less than that in Triple E. To allow a party to claim that its litigation posture is reasonable simply because the decision in another case has not yet been finally reviewed by the California Supreme Court would be to encourage unnecessary litigation.

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 June 14, 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 June 14, 1993, until June 13, 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: June 14, 1994

BRUCE J. JANIGIAN, CHAIRMAN.

IVONNE RAMOS RICHARDSON, Board Member.

MEMBER FRICK, Concurring in Part and Dissenting in Part:

I concur with my colleagues that Ace has not presented sufficient grounds to reexamine our earlier decision to certify the results of the August 10, 1989 election. While I also agree that an award of bargaining makewhole is appropriate in this case, for the reasons that follow, I believe that the beginning of the makewhole period should be January 26, 1994, the date on which the California Supreme Court denied review of the Board's decision in Triple *E Produce Corp.* (1993) 19 ALRB No. 2.

In Triple *E,* a case which involved strike and organizational activity in the same area and time period as the activity in the instant case, the Board reaffirmed its earlier certification of an election but did not award bargaining makewhole. The Board found that such an award was not appropriate in that case because, in the underlying decision certifying the election, the Board had acknowledged, in essence, that the matter presented a close question. Therefore, the Board

concluded that the employer in *Triple E* had a reasonable litigation posture and was not shown to have gone through the motions of contesting the election results as a pretense to avoid bargaining. (See J. *R. Norton Co.* v. Agricultural *Labor Relations Board* (1979) 26 Cal.3d 1 [160 Cal.Rptr. 710]; George *Arakelian Farms, Inc.* v. Agricultural *Labor Relations Board* (1985) 40 Cal.3d 654 [221 Cal.Rptr. 488].)

While in our decision certifying the election in the present case we found that the proven misconduct was less likely to have affected employee free choice that the conduct in *Triple E,* we did not provide any indication of the degree to which the circumstances differed from those in *Triple E.* Consequently, I believe it was reasonable to believe that if Triple *E* was a "close case," the present case could be also. I believe that if the employer in Triple *E* could reasonably believe that the certification would be overturned on appeal to the courts, then it was not unreasonable for the employer here to believe the same thing. As a result, I am unable to conclude that the prerequisites for the imposition of bargaining makewhole were met at the time that Ace began to technically refuse to bargain on June 25, 1993, at which time the *Triple E* case was still pending before the courts.[6]

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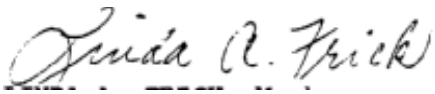
[6]I base this conclusion solely upon the arguable effect on employee free choice, relative to Triple *EEE,* of the misconduct found by the Board to have been proven. Because the Board's factual findings are amply supported by substantial evidence, I do not believe that Ace may base a reasonable litigation posture on the belief that the Board's findings will be disturbed in any significant way on appeal.

However, once the California Supreme Court denied Triple E's petition for review on January 26, 1994, any reasonable basis for pursuing the technical refusal to bargain in the present case was eliminated. Bargaining makewhole is therefore appropriate if it dates from when the only reasonable basis for challenge of the certification, the hope that the certification in the related case of Triple *E* would be overturned, was extinguished.

DATED: June 14, 1994



LINDA A. FRICK, Member

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, Ace Tomato Co., 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: ACE TOMATO CO. , 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.

CASE SUMMARY

Ace Tomato Co., Inc.
(UFW)

20 ALRB No. 7
Case No. 93-CE-37-VI

Background

In Ace Tomato Co., Inc. (1992) 18 ALRB No. 9, the Board upheld the results of an election conducted among the agricultural employees of the Employer on August 10, 1989, and certified the UFW as the exclusive collective bargaining representative of the Employer's agricultural employees located in San Joaquin County. The Employer subsequently 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 UFW, and seeking a makewhole remedy for the Employer's employees.

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

In its brief to the Board, the Employer argued that the Board should re-examine the underlying record of alleged pre-election violence, threats and coercion and revoke the certification and set aside the results of the election, or, in the alternative, the Board should find this a "close" case for which the makewhole remedy is inappropriate.

The Board found that the Employer had not demonstrated that the actual pre-election conduct in the case provided any grounds for overturning the election results. The Board further found that the Employer's attempt to rely on unproven incidents of alleged misconduct, based on discredited testimony, did not provide a legitimate basis for relitigating the Board's decision.

After analyzing the Employer's litigation posture, the Board concluded that the Employer had advanced unreasonable and frivolous arguments that indicated it was not pursuing its •objections in reasonable good faith, but was simply going through the motions of contesting the election results as an elaborate pretense to avoid bargaining. (J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1. The Board therefore included a makewhole remedy in its Order.

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