Coachella, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

DOLE FRESH FRUIT COMPANY/ DOLE FARMING COMPANY, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party,	Case No. 94-CE-48-EC 22 ALRB No. 4 (May 29, 1996)

DECISION AND ORDER

On April 13, 1995, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Decision in this matter. Thereafter, Dole Fresh Fruit Company /Dole Farming Company, Inc. (Respondent or Employer) timely filed exceptions to the ALJ's Decision with a brief in support of exceptions. Response briefs have been submitted by General Counsel and the United Farm Workers of America, AFL-CIO (UFW or Union).

The Agricultural Labor Relations Board (ALRB or Board) has examined the ALJ's Decision in light of the record and the submissions of the parties and has decided to affirm his finding that Respondent succeeded to the whole of its predecessor's Coachella Valley operations and thereafter failed or refused to bargain in good faith with respect to a certain classification of unit employees when so requested by the incumbent Union, and to adopt his recommended remedial order, as modified herein.

Respondent interposes two defenses in the instant case; i.e., it contends that it is not a successor employer, but only

as to that portion of its predecessor's operations which involves the production of table grapes, and it claims that it was justified in withdrawing recognition and refusing to bargain with the certified Union with regard to grape employees because the Union had previously disclaimed or abandoned interest in representing them.

Respondent does not contest its duty to bargain with respect to the hours, wages and other terms and conditions of employment of employees engaged in the date operations which it acquired from its predecessor, and has in fact engaged in limited bargaining with the UFW as to them. Respondent believes, however, that the bargaining obligation cannot extend to the remainder of the employees because (1) the unit as initially certified no longer exists due to post-certification changes in the nature of overall agricultural operations (change in agricultural commodities produced), the size of those operations (number of crop-specific acres under cultivation) and the employee makeup of the unit (employee turnover) and (2) as noted previously, the UFW s alleged abandonment of the grape employees extinguished any bargaining obligations that might otherwise have extended to them.

PART I

Successorship: Change in Operations and Employee Turnover

Respondent would have the Board effectively modify the original certification so as to now exclude grape employees, but doing so would violate a clear statutory policy in that regard. Units appropriate for collective bargaining under the Agricultural

Labor Relations Act (ALRA or Act) "shall" be comprised of all of the agricultural employees of an employer in the State of California. (Labor Code section 1156.2)[1] The Board has no discretion to deem appropriate for purposes of collective bargaining a less than statewide unit unless it first determines that the employees of a particular employer are employed in two or more geographically noncontiguous production areas.[2] Even then, the Board may still find that a single unit is the most appropriate based on considerations generally characterized as demonstrating a "community of interest" among the employees and including, but not limited to, interchange of employees and supervision. The Act makes no provision for different units, or less than "wall-to-wall" units, based on such factors as job classifications, different employee skills, or crop divisions.[3]

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[1]A11 section references herein are to the California Labor Code, section 1140 et seq., unless otherwise specified.

[2]Section 1156.2 reads: "The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted."

[3]In Tenneco West. Inc. (1979) 5 ALRB No. 27, following a representation election, the Board certified the UFW as the exclusive bargaining representative of all of the agricultural employees in Tenneco's Coachella Valley operations which, at that time, included citrus, dates and grapes. Respondent herein is the purchaser of all Tenneco agricultural assets in Coachella as well as certain of Tenneco's farming operations in the San Joaquin Valley. The certified Coachella unit does not encompass Tenneco's San Joaquin Valley operations. (See, also, Tenneco West. Inc. (1977) 3 ALRB No., 92 wherein the Board found that the employer's Coachella Valley citrus, grape and date operations are located in a single definable agricultural production area.)

Assuming, for purpose of discussion only, that there are no statutory impediments to preclude the Board from excluding certain crop-specific workers from the presently certified unit, Respondent's two-fold basis for such exclusion (changes in crops produced, including the number of acres devoted to particular crops, and employee turnover) is not persuasive. Moreover, the factors cited by Respondent in support of its argument to sever grape employees from the certified unit are those which are inherent in the very nature of agricultural production.

Since 1980, the year following initial certification, both the types of crops produced and the amount have indeed been altered. As the record demonstrates, Tenneco had eliminated fresh vegetable production and severely curtailed citrus harvesting prior to the Dole takeover on January 1, 1988. More significantly, however, in view of Respondent's position on the table grape component of the enterprise, of the 1323 acres of table grapes in production during Tenneco's last year of ownership, Dole acquired 1317 acres, a change of just six acres.

With regard to employee turnover, Respondent's contention in that regard is just as unavailing. Professor Robert A. German observed that bargaining units are "comprised of jobs or job classifications and not of the particular persons working at those jobs at any given time, [therefore bargaining units don't] change simply because Machinist Jones retires and is replaced by Machinist Williams." (Gorman, Labor Law-Basic Text (1st ed. 1976) ch.5, sec. 1, p. 66.)

Moreover, the National Labor Relations Board (NLRB or national board) and its reviewing courts have long recognized that employment patterns in certain industries, namely construction and oil-drilling, often involve periods of relative inactivity and diminished employment with consequently heavy employee turnover. In that context, a decision of the Fifth Circuit Court of Appeal is particularly instructive. Although the issue in that case arose in a slightly different context, that of alleged loss of majority support for the incumbent union, the court observed that the nature of the oil-drilling business was such that there was a "wide dispersion of employees in the area [and therefore] what might seem like union inaction or indifference in a more compact industrial setting was not indicative of lack of union support in this setting." (NLRB v. A.W. Thompson. Inc. (5th Cir. 1981) 651 F. 2d 1141, 1143 [108 LRRM 2336].) Similarly, in NLRB v. Leatherwood Drilling Company (5th Cir. 1975) 513 F.2d 270, 273 [89 LRRM 270], the same circuit noted that although employee turnover since initial certification 15 years before had reached 900 percent and the Company employed less than four of the pre-certification workers, "such turnover was not uncommon among [oil drilling] companies." Employee turnover as an incident of a seasonal enterprise was acknowledged by a California court in F&P Growers Association v. ALRB (1985) 167 Cal.App.3d 667, 678 [214 Cal.Rptr. 355] in this manner: " [a]lthough some industries under the NLRB are also seasonal and have a rapid turnover of employees, the turnover in the agricultural industry is more extreme."

While loss of majority as a defense to a refusal to bargain is valid only under the National Labor Relations Act (NLRA or national act), and evidence of turnover is only a factor entitled to limited weight when asserting loss of majority, it is worth noting that in the absence of unusual circumstances, the NLRB presumes that new employees support the union in the same ratio as when majority support was first manifested. (E.g., Laystrom Mfg.(1965) 151 NLRB 1482 [58 LRRM 1624]; Pennco, Inc. (1980) 250 NLRB 716 [104 LRRM 1473]; W.A.D. Rentals Limited c/b/a/ Kelley's Private Car Service (1988) 289 NLRB 30 [120 LRRM 1462]; Spillman Co. (1993) 311 NLRB 95, 97 [143 LRRM 1107]). Indeed, to borrow again from Professor Gorman, whenever an exclusive agent is selected by employees (as in ALRB conducted representation elections), that representative "is empowered and obliged to bargain not only for the employees who voted for it or who are its members, but for all employees in the bargaining unit." (Gorman, at p. 66).

For the reasons set forth above, in addition to those stated by the ALJ, we affirm the ALJ's finding that Respondent was a successor employer to the whole of the Tenneco operations which it acquired and therefore the duty to bargain, of statutory necessity, extended to all employees in the certified unit, including those engaged in table grape operations. Neither the minimal change in acreage devoted to grape production nor employee turnover may serve to defeat the bargaining obligation under the circumstances herein.

PART II

Abandonment

Respondent's separately pleaded defense to its duty to bargain poses an alternative Challenge to the integrity of the unit as originally certified on the grounds that the Union had abandoned its status as bargaining representative of the grape employees.

The facts, briefly summarized, are these: Dole acquired Tenneco's Coachella operations in 1988. In May, 1990, Dole advised the UFW of its intent to increase wages for date workers. The UFW's response indicated an interest in bargaining with respect to the date workers as well as "vegetables, citrus and grapes." Dole did not respond. The UFW negotiator assigned to Dole testified that he neither pressed further for negotiations nor filed an unfair labor practice charge alleging Dole's failure or refusal to bargain because, at least in part, the Union "went [on] to other things, mainly the boycott [i.e., the UFW's nationwide consumer boycott of California table grapes]."

On August 8, 1990, the parties reached agreement on certain matters relative to the date workers. According to the credited testimony of Dole's negotiator, during a follow-up session with the UFW representative, he asked that the Union "leave my grapes alone for two years," a request the ALJ found was in reference to bargaining. Two years later, during the summer of 1992, a dispute arose with regard to date workers, followed by a strike. During strike settlement negotiations, the

Union sought to enlarge the discussions to include grape workers. Dole declined, asserting for the first time its belief that the Union had abandoned the grape workers, thereby extinguishing any bargaining obligation Dole might otherwise have had as to them. Pursuant to the ALRB's regulation governing work site access by union organizers, the UFW filed approximately six Notices of Intent to Take Access to fields in the Coachella and San Joaquin Valleys, including those farmed by Dole. The notices were filed in 1990, 1992 and 1993.[4] A spokesperson for the Union credibly testified that the Union utilized work site access to promote its newly developed "Associate Membership Program" among workers not covered by collective bargaining agreements in order to offer them certain Union-provided benefits (e.g., medical insurance, credit cards, tax and immigration advice and services). In the spring of 1992, the UFW held meetings and distributed leaflets among Coachella Valley grape employees, urging them to seek a general wage increase. Coachella Valley growers, including Dole, implemented an increase in wages for grape employees in

[4]The Notices were filed in accordance with 8 Cal. Admin. Code section 20900 et. seq. which, in the main, grants a limited number of union organizers preelection access at specified times to employees where they are working. The ALJ observed that the same regulation, at section 20900 (e)(1)(C), provides for post-election, even post-certification, access. That section, in pertinent part, reads as follows: "[t]he right to take access under this Section recommences 30 days prior to the expiration of the bars to the direction of an election set forth in Labor Code Sections 1156.5 and 1156.6, and 13 months prior to the expiration of a valid collective bargaining agreement that would otherwise bar the holding of an election but for the provision of Labor Code Section 1156.7(d)." Respondent suggests that by filing the notices, the Union impliedly admitted that it no longer represented grape employees and was seeking to organize them anew.

June, 1992.

In May, 1994, when the Union again requested grape negotiations, Respondent renewed its claim of abandonment, precipitating the Union's filing of the underlying unfair labor practice charge.

In Ventura County Fruit Growers (1984) 10 ALRB No. 45, the Board ruled that a certified bargaining representative may lose its representative status by its inability or unwillingness to continue to represent employees. In that case, however, we found that what may appear to an employer to be abandonment may be overcome by the union's demonstration that it is in fact able and willing to continue to represent employees. We said:

> Notwithstanding the relative inactivity of the union... [once] a union becomes active by virtue of its... requests to commence negotiations...it thereby affirmatively notified [the employer] of its desire and intent to actively represent the employees in the conduct of negotiations. At the critical time that Respondent [refused to bargain], its abandonment theory was a factual impossibility.

(Ventura County Fruit Growers (1984) 10 ALRB No. 45, sl. op. at pp. 7-8. See, also, O.E.Mayou & Sons (1985) 11 ALRB No. 25, sl. op. at p. 12, n.8, holding that abandonment is when a "union [is] either unwilling or unable to represent the bargaining unit;" Bruce Church (1991) 17 ALRB No. 1.) Church also established that the burden is on the party claiming abandonment.

While an employer under the national act may assert that its duty to bargain has been extinguished by demonstrating an actual loss of majority support for the incumbent union, or a good faith belief of such loss, research reveals that the question

rarely, if ever, turns on the concept of "abandonment." Rather, a claim of abandonment is but one possible factor to be considered in determining whether there has been a loss of majority support. For example, "[i]n supporting its assertions of good faith doubt...the Respondent contends that the Union's inactivity over a 7-month span constituted an abandonment of its employee-members." (Cobb Theaters. Inc. (1982) 260 NLRB 856, 859 [109 LRRM. 1267] .) Since a good faith belief in loss of majority support is not legally cognizable under the ALRA, it would follow that "abandonment," which is viewed by the NLRB as merely some evidence of loss of majority support, could not itself be a valid defense under the ALRA. (See, e.g., Bruce Church, supra. 17 ALRB No. 1, holding that, due to statutory differences in the two labor acts, the bargaining obligation under the ALRA does not cease upon a showing of a good faith belief of a loss of majority support; F&P Growers. supra, 167 Cal.App.3d 677.)

Accordingly, Respondent's abandonment defense must fail to the extent that it relies on principles underlying loss of majority support claims under the NLRA. Turning instead to the distinct law that has developed under the ALRA, the proper question before the Board is whether Respondent has carried its burden of establishing that its duty to bargain had been extinguished by the Union's inability or unwillingness to represent the grape employees, on either May 24, 1994, the date of the UFWs formal request to resume negotiations, or at times prior thereto. As found in the ALRB cases cited above, this represents

the extent to which, "abandonment" may be recognized under the ALRA as a defense to the duty to bargain.

Logically, it makes little sense for an employer to attempt to defend its refusal to bargain based on a union's alleged abandonment immediately after the union has come forward with an affirmative request to bargain, or after the union has filed an unfair labor practice charge alleging a refusal to bargain. Yet, it is in these very circumstances that Respondent asks us to accept its abandonment defense.

The record demonstrates that the Union engaged in negotiations over date workers during all times material herein, and that the Union's attempts to bring up grape negotiations on two separate occasions were rebuffed by Respondent. Though the record overall demonstrates that the Union made relatively few significant contacts with Respondent with regard to grape employees, as explained in Pennex Aluminum Corp. (1988) 288 NLRB 439, 442 [128 LRRM 1157], "[t]he issue is not the extent of union/management contact, which may have been lacking, but of union/employee contact, which continued to take place." (See, also, Flex Plastics. Inc. (1982) 262 NLRB 651 [110 LRRM 1365].)

Moreover, although there were periods in which there were no negotiations with regard to grapes, stalled negotiations or even a hiatus in negotiations cannot alone be the basis for refusing to bargain on the grounds that the union is unable or unwilling to represent the unit employees. This reasoning is consistent with that of the NLRB in "loss of majority" cases on

which we rely only insofar as those cases recognize that an absence of negotiations need not necessarily translate into a disclaimer of interest. (See, e.g., NLRB v. Hondo Drilling Co. (5th Cir. 1976) 525 F.2d 864 191 LRRM 2133], cert. den. (1976) 429 U.S. 818 [93 LRRM 2362]; Pennex, supra. 288 NLRB 439, 442 (when judging whether the union had abandoned the unit, the contacts between the union and the employees are "most meaningful;" NLRB v. Flex Plastics. Inc. (6th Cir. 1984) 726 F.2d 272 [115 LRRM 3036].)

Respondent believes that the Union expressed disinterest when it passed up at least three opportunities to file unfair labor practice charges alleging unlawful refusals to bargain and contends that its omission in that regard should now be construed by the Board as the Union's recognition that it lost its right to represent grape employees.[5] The ALJ properly disposed of the

[5]The first opportunity occurred when Dole, by its own admission, ignored the UFW's written request of June 18, 1990 to bargain over "vegetables, citrus and grapes." Another opportunity arose in 1992 when Dole refused to include the grape employees in date negotiations on the grounds that the Union had abandoned them. Dole points to yet another opportunity, following the unilateral increase in wages for grape workers in June, 1992 without having first given the incumbent union adequate notice and opportunity to bargain before implementing the increase. Dole's position in regard to the latter is disingenuous inasmuch as the Union had just embarked on a campaign urging Coachella grape workers to press for a general wage increase. Moreover, had the Board found that the unilateral action was unlawful, it would have been required to issue the standard remedy ordering the employer to rescind the change, but only if requested to do so by the union. Such a result would have been inconsistent with the Union's position favoring such an increase and, additionally, could have rendered the Union responsible for revoking the increase. In asserting the Union's failure to file unfair labor practice following three separate acts by Dole which the Company asserts were grounds for unfair labor practices, Dole cannot rely on its own misconduct in failing or refusing to bargain upon request.

same argument by reference to our decision in Cardinal Distributing Company (1993). 19 ALRB No. 10, wherein we held that "a failure to file a timely charge against an attempted withdrawal of recognition cannot make the withdrawal effective where the statutory scheme does not permit such actions by the employer."

Applying the criteria set forth above in light of the record evidence, it becomes clear that the very factors Respondent cites to support its claim that the UFW abandoned the grape employees only serve to demonstrate the Union's continued interest in representing those same employees. That interest was made evident to Respondent by means of the Union's formal requests to bargain over the grape employees in 1990 and 1992, the filing of the Notices of Intent to Take Access to Respondent's grape employees in order to offer benefits not available to workers not covered by a collective bargaining agreement, the Union's efforts to seek a general wage increase for all grape workers in the Coachella Valley, and, finally, its May, 1994 request to bargain which precipitated the unfair labor practice charge which gave rise to this proceeding. Thus, the Union, with Respondent's knowledge, actually remained active on behalf of the grape employees, albeit by various means other than direct negotiations, and therefore was not totally "absent from the scene." (Bruce Church. supra, 19 ALRB No. 1.)

Under these circumstances, which reflect interaction between the UFW and the grape employees during all times material herein, as well as periodic requests to bargain, Respondent failed

to sustain its legal burden in establishing that the duty to bargain was extinguished. Therefore, the ALJ's finding that Respondent's refusal to bargain was violative of section 1153(e) and (a) of the Act must be, and it hereby is, affirmed.

PART III

"Dormant" Certifications

Our conclusion in that regard, however, does not address what may be Respondent's central concern--the uncertainty which results from what have been characterized as "dormant" certifications, a situation in which the certified representative does not appear to be actively representing employees for an extended period of time. In such circumstances, employers are not free to act as if there is no such representative, as, for example, when implementing unilateral changes in working conditions. An employer who contemplates changes in employees' wages, hours or other terms and conditions of employment, but fails to notify and offer to bargain with the certified representative before implementing such changes risks being charged with having violated the duty to bargain.

As will be discussed in Part V below, Respondent urges the Board to reverse the ALJ's remedial provisions for the bargaining violation because it claims to have in good faith revived a matter which the Board itself has publicly acknowledged as one of concern for labor/management relations in California agriculture. Some historical background is warranted.

In a public hearing held in Sacramento on July 14, 1994,

the Board considered a number of proposed changes, amendments, or additions to its regulations. (Title 8, California Code of Regulations). Among them was a proposal that was prompted by the concern over dormant certifications that had been expressed to the Board. After reviewing the limitations of the statute, the Board concluded that it could not recognize the concept of "abandonment" beyond that already present in Board case law, i.e., where certified labor organizations become inactive by becoming defunct or by disclaiming interest in continuing to represent the bargaining unit.[6] In all other circumstances, certified bargaining representatives remain certified until decertified by the employees themselves in either a decertification or rival union election.[7] However, the Board did propose a process whereby an employer could initiate a procedure for testing a claim of defunctness or disclaimer of interest without exposing itself to an unfair labor practice finding if the claim were rejected.

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[6]The Board thereafter issued a memorandum detailing the reasons why it declined to pursue regulatory action on various proposals received from interested parties. In that memorandum, the Board explained that it was constrained by the Act from adopting a definition of abandonment any broader than that encompassed by the concepts of defunctness and disclaimer of interest. After receiving public comment, the Board voted, on August 2, 1995, not to adopt the proposed regulation (section 20367).

[7]The statutory scheme under the ALRA vests only employees themselves with the right to decide whether to select, oust, or change representatives and only by means of a Board conducted election and certification of the results of the election. As a result, representatives once certified remain certified until decertified by the Board. Despite this difference in the ALRA, the so-called "certified until decertified" rule actually had its genesis under the national act. (See, e.g., Dresser Industries, Inc. (1982) 264 NLRB 1088 [111 LRRM 1436].)

Since the Board, after receiving reaction from interested parties, decided not to adopt the proposed regulation, there presently is no vehicle, other than an unfair labor practice charge in response to a refusal to bargain, which would enable employers to determine whether, for example, during a hiatus in negotiations, they have a continuing duty to notify and bargain with what may appear to be a derelict or defunct incumbent union before implementing changes in working conditions.

In considering and acknowledging the situation confronting employers, it is clear that the Board cannot extend its present regulations or case law precedents in regard to initiating an abandonment procedure without distorting the express directives of the ALRA and invading the province of the Legislature. Since California is a code state, the power to enact and amend statutes is constitutionally entrusted to the Legislature and not to the judiciary or any quasi-judicial subdivision of the executive branch. Thus, the constitutionally mandated department of government charged with the responsibility for setting public policy is the Legislature and it is to that body that employers must look. The Board does not have authority to create a process which is inconsistent with the Act as it is now written.

Short of Legislative intervention, however, employers need not remain passive when it appears to them that a certified representative has forfeited its status as the representative of

its employees. As the duty to bargain is not unilateral,[8] neither are the Board's processes.

The Board is mindful that the Act creates a public rights statute which guarantees agricultural employees certain specified rights and that Chapter 5 of the Act, in particular, invests the Board with authority to hold and supervise elections and to certify a labor organization which receives a majority of the votes cast in the election. The legitimacy of the Board's continuing interest in units it has certified is guided by the fact that stability in labor/management relations continues to be a cornerstone of the Act. (See, e.g., NLRB v. Brooks (9th Cir. 1953) 204 F.2d 899 [32 LRRM 2118], enfg. (1952) 98 NLRB 976, affd. Ray Brooks v. NLRB (1954) 348 U.S. 96).

Because the Board has an obligation to further the purposes and policies of the Act, it must be alert to situations in which the certified labor organization rests on its bargaining rights, as such neglect serves to erode and undermine the right to be represented that is granted to employees. Since the Board may be called upon to examine conduct in bargaining, it follows that the absence of conduct should also fall within the Board's purview of holding accountable labor representatives it has authorized to represent employees.

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[8]Section 1155.2, in part, defines the duty to bargain in good faith as "the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment..."

Section 1154(c) expressly provides that it shall be an unfair labor practice for a certified labor organization "[t]o refuse to bargain collectively in good faith with an agricultural employer...", (section 1154 (c)). Failure of a union to respond within a reasonable time will constitute a waiver of the right to bargain over a proposed change in terms and conditions of employment. Moreover, in Bruce Church, supra. 17 ALRB No. 1, the Board adopted the principle set forth in AAA Motor Lines. Inc. (1974) 215 NLRB 793 [88 LRRM 1253] which stands for the proposition that dilatory or evasive conduct by a union is sufficient to excuse an employer's unilateral action.

PART IV

New Election

Respondent's final, but related, pleaded defense is of a distinct character. While Respondent concedes that the ALRA does not permit employers to petition for elections, Respondent believes there are no statutory constraints which would preclude the Board from utilizing the ballot box in order to test employee support for the UFW, if it did so under the guise of abandonment. In support of its assertion, Respondent asks us to follow Ingress-Plastene, Inc. v. NLRB (7th Cir. 1970) 430 F.2d 542 [74 LRRM 2658] , which stands for the proposition that when deciding whether to call for an election to measure support for the incumbent labor representative, the NLRB is required to consider the cumulative effect of the factors cited by the employer. However, in Pioneer Inn Associates v. NLRB (9th Cir. 1978) 578 F.2d 835, 840 [99 LRRM

2354], a different circuit eight years later added a caveat to the rule of Ingress-Plastene, supra, holding that in assessing the cumulative effect, "the Board may strike the balance more favorable toward the union when the union's status is challenged by the employer rather than the employees themselves."

We have previously discussed the statutory impediment to holding an election in a unit comprised of less than all the agricultural employees of an employer. More importantly, however, the statutory scheme which guides us places matters of representation solely in the hands of the employees themselves. Consequently, neither Respondent, nor the Board itself, may initiate an election for the purpose of determining whether the incumbent continues to retain majority status. As explained by the court in F&P Growers, supra, (1985) 167 Cal.App.3d 677, 678:

> [t]he clear purpose of the Legislature is to preclude the employer from active participation in choosing or decertifying a union, and this certainly overrides any paternalistic interest of the employer that the employees be represented by a union of the present employees' own choice.

And, in Montebello Rose Company v. ALRB (1981) 119 Cal.App.3d 1, 29 [173 Cal.Rptr. 856], a different state court observed that: "[s]o long as the employees can petition for a new election if they wish to remove the Union, the employer has no cause for concern about whether it is bargaining with the true representative of its employees."

The same reasoning, albeit with some limitations, applies in the industrial context of labor/management relations. For example, in NLRB v. A.W.Thompson, Inc., supra, 651 F.2d 1141,

1144, the Fifth. Circuit, agreed, stating that: "[i]t is for the employees alone to decide whether they wish to be represented by a union in the first instance and to decide whether they wish to oust an incumbent union and either replace it with another or forego union representation entirely. The national labor policy favors employee free choice in such matters. The employer, although an interested party, has a limited role in the representational choice of employees."

Given the clear Legislative policy underlying the Act, which provides that only employees may choose whether to be represented, whether to oust a previously chosen representative, or whether to change representatives, the Board is of the view that were it to somehow find authority for calling for the type of election Respondent urges upon us would effectively permit Respondent in this instance "to do indirectly, by relying on the NLRA loss of majority defense [or, in this instance, abandonment under the NLRA] what the Legislature has clearly shown it does not intend the employer to do directly." (F&P Growers, supra. 167 Cal.App.3d 677, 678.)

PART V

Remedy

As noted briefly in Part III, above, Respondent believes the ALJ failed to properly exercise the Board's remedial authority and challenges his award of bargaining makewhole under the auspices of section 1160.3 which permits the Board to require employers to make "employees whole [the makewhole remedy], when

the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain."[9] Respondent asserts that makewhole is not appropriate in this case because it has in good faith sought a determination from the Board as to whether the doctrine of abandonment as developed under the national act is equally applicable under the ALRA. Respondent believes it is and urges the Board to agree by means of a Board ordered election to determine as a matter of fact whether current employees support the UFW. Dole points out that it has "consistently expressed its willingness to allow an election to determine if the Dole Coachella Valley grape workers wish to be represented by the UFW" and contends that such an election, rather than makewhole, is the only appropriate remedy for its refusal to bargain on the grounds of abandonment.[10]

Respondent suggests we examine its conduct in light of the standard articulated by the California Supreme Court for technical refusal to bargain cases; that is, where an employer absolutely refuses to recognize and bargain with the union

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[9]The bargaining makewhole remedy for an employer's unlawful refusal to bargain presumes that had the employer bargained in good faith, the parties would have reached a comprehensive bargaining agreement covering employees hours, wages and other terms and conditions of employment. The monetary liability becomes the difference between what the employer actually paid employees and what they would have earned during the makewhole period had negotiations culminated in a contract.

[10]In Part IV of our decision herein, we point out that the ALRB provides only for elections in which employees themselves initiate the representation process by petitioning for an initial certification election, a decertification election, or a rival union election. There is no statutory authority for the type of election Respondent seeks.

certified by the Board on the grounds the election was not conducted properly. (J.R.Norton Co. (Norton) (1979) 26 Cal. 3d 1.) Under Norton, the Board may not award makewhole in technical refusal to bargain cases where the employer had in good faith demonstrated a reasonable basis for challenging the Board's decision to uphold an election won by a union. Thus, Norton has meaning only where, unlike here, there is no history of bargaining between the parties and the employer's refusal to bargain is for the sole purpose of perfecting a judicial challenge to the underlying election case. (See, e.g., Montebello Rose Company, supra. 8 ALRB No. 3, holding that the Norton test for remedying an employer's refusal to bargain is applicable only in technical refusal to bargain cases where employee free choice is in issue.)

In F & P Growers Association, supra, 9 ALRB No. 22, a case in which the Board rejected the employer's defenses to its failure or refusal to bargain in good faith on the dual grounds of the incumbent union's abandonment and/or loss of majority support, the Board stated that in nontechnical refusal to bargain cases, the makewhole remedy should be applied according to:

> ...the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the Act, the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than to bargain.

On review, the court of appeal affirmed both the award of makewhole and the standard applied. The court noted that the pivotal language of section 1160.3 which authorizes the Board to

award makewhole relief indicates that imposition of the remedy is discretionary. (F & P Growers Association v. Agricultural Labor Relations Board, supra, 168 Cal.App.3d 667, 680.) Thus, in the view of the court, makewhole relief would not necessarily follow from an unfair labor practice "because there may be times when the Board may deem the make whole relief 'inappropriate.'" (Id.) The court concluded, therefore, that "under the language of the statute, the Board must examine the particular facts and circumstances of each case to determine 'appropriateness' of the make whole remedy." (Id.)

With regard therefore to Respondent's primary contention in support of its admitted refusal to recognize and bargain with the UFW as the representative of its grape employees, that of abandonment, " we note that it has been clear at least since the Board's decision in Nish Noroian Farms (1982) 8 ALRB No. 25 that a good faith belief in a loss of majority support was not a cognizable defense under the ALRA. Moreover, the Board has repeatedly held that, consistent with this "certified until decertified" rule, abandonment may be considered a defense only

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[11]We have previously discussed and disposed of Respondent's contentions that it did not succeed to the whole of the Coachella Valley farming operations it purchased from Tenneco West, Inc., namely the grape portion of the Tenneco enterprise (see Part I of the decision herein). As we noted, the Act precludes us from certifying less than all of the employees of a whole agricultural enterprise except under circumstances not present here. We also rejected Respondent's contention that its successor employer status with respect to grape employees became a nullity as a result of employee turnover occurring before or after the purchase or because there was a change in overall acreage or a change in the percentage of acreage devoted to certain crops.

where a union is defunct or disclaims interest in continuing to represent the bargaining unit. (Lu-Ette Farms (1982) 8 ALRB No. 91; Ventura County Fruit Growers (1984) 10 ALRB No. 45; O.E. Mayou & Sons (1985) 11 ALRB No. 25; Bruce Church. Inc. (1991) 17 ALRB No. 1).

Nevertheless, as noted above, the Board in 1994, at the urging of interested parties, explored the possibility of creating a regulation which would expand the definition of abandonment to include situations where a union is not heard from for a substantial period of time. In response to requests from interested individuals and association the Board submitted a proposed regulation which effectively would have excused an outright failure to bargain where the employer can affirmatively establish that the incumbent union had relinquished its representative status. Thus, the Board clearly signaled to all interested parties its intent to take up the issue of abandonment or dormant certification in the rulemaking process.

Further, the Union's approach to dealing with Respondent's grape employees created confusion, from Respondent's perspective, as it was conduct not typically seen after a union has been certified as the bargaining representative. In 1990, 1992 and 1993, pursuant to the Board's regulation governing work site access by union organizers, the UFW filed approximately six Notices of Intent to Take Access to fields in the Coachella and San Joaquin Valleys, including those farmed by Dole. The Notices were filed in accordance with 8 Cal. Admin. Code section 20900, et

seq. , which, in the main, grants a limited number of union organizers preelection worksite access at specified times.

Although the same regulation provides for postelection and even post-certification access under certain circumstances,[12] it is not typical for a union to seek post-certification access under that regulation. Consequently, given the facts of this case, it was not unreasonable for Respondent to erroneously believe that the Union sought to take access for the purpose of organizing the employees, as in an initial representation election.

Moreover, while the Union's failure to file unfair labor practice charges in response to Dole's refusal to bargain over the grape employees in 1990, 1992 and 1994 does not legally constitute abandonment of the unit, its decision to rest on its bargaining rights, in conjunction with the other factors discussed above, are factors to be considered in determining what remedy to impose for the refusal to bargain unfair labor practice charge which the Union ultimately did file.

In determining whether makewhole is appropriate under section 1160.3, the Board must not only evaluate the parties'

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[12]Unlike the ALJ, Member Ramos Richardson does not believe that section 20900 provides for post-certification access except in circumstances where a decertification petition or rival union petition has been filed. She believes that general post-certification is governed by case law, which holds that a certified bargaining representative is entitled to post-certification access at reasonable times and places for purposes related to its duty to bargain. The Board has stated a preference that parties reach agreement among themselves concerning post-certification access. (O.P. Murphy Produce Co.. Inc. (1978) 4 ALRB No. 106; F & P Grower Association (1984) 10 ALRB No. 28.)

legal arguments, but must weigh the equities involved in their conduct as well. (See, e.g., Mario Saikhon. Inc. (1987) 13 ALRB No. 8, holding that a makewhole award is in the nature of an equitable remedy and therefore may not be invoked without reference to the conduct of both parties to the bargaining process.) We find that after weighing all of the facts and equities in this case - the actions of the Union which created confusion from Respondent's perspective as to whether the Union believed it represented the grape employees; the actions of the Board itself as to whether it would adopt a new abandonment and/or dormant certification policy; and the Union's decision to rest on its bargaining rights over the grape employees for several years -do not justify our imposing a makewhole remedy for the period prior to the date of our Decision and Order herein.[13] Accordingly, we will order that the makewhole remedy commence thirty days from the date upon which the Union requests bargaining following the date of our Order, unless Respondent has commenced bargaining in good faith prior to that time.

ORDER[14]

Pursuant to section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (ALRB

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[13]Chairman Stoker is also persuaded that Respondent sought to clarify these issues through the only available process, that of bringing the matter directly to the Board.

[14]The recommended Order of the ALJ is modified with respect to the commencement of the make whole period and certain aspects of the mailing and reading provisions of the Notice to Employees. In addition, the Board has provided for an extension of the certification in accordance with standard practice in such cases.

or Board) hereby orders that Respondent, Dole Fresh Fruit Company/Dole Farming Company, 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), on request, with the United Farm Workers of America, ALF-CIO, (UFW or Union) as the certified exclusive collective bargaining representative of its grape employees in the Coachella Valley;

(b) In any like or related manner, interfering with, restraining, or coercing grape 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 the Coachella grape employees and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make its agricultural employees whole for all losses or pay and/or other economic losses they may have suffered as a result of Respondent's refusal to bargain. Loss of pay is to be determined in accordance with established Board precedent. The makewhole period to commence thirty days from the Union's request to bargain following the issuance of our Decision herein unless Respondent has, prior to that time, commenced bargaining in good

faith towards a contract or a bona fide impasse. The amount shall include interest to be determined in the manner set forth in E.W.Merritt Farms (1988) 14 ALRB No. 8.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the make whole amounts due those employees under the terms of the remedial order as determined by the Regional Director.

(d) Upon request of the Regional Director, sign a Notice to Employees embodying the remedies ordered. After its translation by a Board agent into all appropriate languages, as determined by the Regional Director, Respondent shall reproduce sufficient copies thereof in each language for the purposes set forth hereinafter.

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

(f) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all grape employees employed by Respondent in the Coachella Valley at any time between May 25, 1994 and May 24, 1995.

(g) Provide a copy of the attached Notice to each grape employee hired during the twelve-month period following the

date of the issuance of this Order.

(h) Arrange for a Board agent, or representatives of Respondent, to distribute and read the Notice, in all appropriate languages, to all of its grape employees in the Coachella Valley on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, a 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 and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(i) Notify the Regional Director in writing within 30 days after the date of issuance of this Order of the steps Respondent has taken to comply with its terms, and thereafter, at the request of the Regional Director, continue to report periodically until full compliance is achieved.

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive representative of all of Respondent's agricultural employees in the Coachella Valley, including grape employees, for the purpose of collective bargaining concerning their hours, wages and other terms and conditions of employment be extended for one year from the date on which Respondent resumes or resumed bargaining in good faith as that term is defined in section 1155.2, thereby barring

an election for said period. (Adamek & Dessert, Inc. v. ALRB (1986) 178 Cal.App.3d 970, 983 [224 Cal.Rptr.366]; section 1156.6.)

DATED: May 29, 1996

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

MEMBER FRICK, Concurring in Part and Dissenting in Part:

I concur in parts I through IV of the majority's opinion. However, for the reasons explained below, I cannot join in part V, in which the majority effectively eliminates the bargaining makewhole remedy recommended by the ALJ. On the facts of this case, the defenses to the duty to bargain proffered by the Employer are not only in direct contradiction to settled law under the ALRA, they cannot even be squared with case law under the National Labor Relations Act (NLRA), which affords much broader means for excusing an employer's duty to bargain. Thus, even if ALRA precedent did not present an insurmountable obstacle to the Employer's legal arguments, Labor Code section 1148, which

requires the Board to follow NLRA precedent where applicable, would provide an additional hurdle. When viewed in this context, the extraordinary nature of the Employer's claims becomes apparent.

In similar circumstances, indeed, in circumstances where more reasonable legal challenges have been made, the Board has consistently awarded the makewhole remedy. Not to do so here will engender uncertainty and confusion in the law and encourage employers in the future to pursue challenges to other well-settled legal principles on the false hope that they too will not be subject to the makewhole remedy. I fear this will set a trap for the unwary. Consequently, I believe that the facts of this case require the Board to award the bargaining makewhole remedy beginning on May 25, 1994, the date of the Employer's unlawful refusal to bargain which is the subject of the unfair labor practice complaint.[15]

Respondent argues that its conduct should be evaluated in light of the standard articulated by the California Supreme Court in J.R. Norton Co. (1979) 26 Cal.3d 1. Under Norton, the Board may not award makewhole in technical refusal to bargain cases where the employer had a reasonable good faith basis for

[15]This is the date recommended by the ALJ and reflects his view that, due to the Union's lack of diligence in enforcing the Employer's duty to bargain prior to that time, the makewhole remedy should not begin six months prior to the May 26, 1994 filing of the charge even though the Employer also refused to bargain prior to May 25, 1996. As explained further below, I do not believe that there are any other legitimate equitable considerations that would warrant any further restriction of the remedy.

challenging the Board's decision certifying the exclusive bargaining representative. Under this test, the employer's legal challenge must be more than subjectively in good faith, it must also be objectively reasonable. As noted in the majority opinion, the Board, in F & P Growers Association (1983) 9 ALRB No. 22, stated that in non-technical refusal to bargain cases, the makewhole remedy should be applied according to:

> . . . the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the Act, the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than to bargain.

In affirming both the award of makewhole and the standard applied, the Court of Appeal noted that this standard was consistent with the principles in Norton. (F & P Growers Association v. ALRB (1985) 168 Cal.App.3d 667, 680-683.) Consistent with the court's decision in F & P Growers, I would find that, while Norton is not controlling in the present circumstances, it is instructive in determining the propriety of the makewhole remedy. Implicit in the standard articulated in F & P Growers is that an unreasonable or frivolous appeal would result in the balance being struck in favor of the makewhole remedy. Thus, there is little, if any, difference between the two standards.[16]

Just as the court in Norton counseled that public policy

[16]I see no possible rationale for adopting a standard for awarding makewhole in the present case that would make the remedy easier to avoid than in technical refusal to bargain cases, which represent an employers' only opportunity for court review of the Board's decisions in election cases.

is not furthered where imposition of the makewhole remedy discourages judicial review of meritorious challenges to the validity of an election, F & P Growers signalled the Board's intent not to discourage other types of meritorious legal challenges. Consistent with this approach, I would not award the makewhole remedy where the controlling law is unclear or where a party seeks a logical extension of controlling law. With this in mind, I now turn to the legal claims proffered by the Employer.

Successorship

While there is no direct evidence that the Employer's claim that it was not a successor to the grape operations is made in bad faith, the claim is nonetheless patently frivolous. As discussed above, the ALRA requires, with only very limited exceptions not relevant here, that bargaining units include all agricultural employees of the employer in the State of California. Therefore, the Employer's claim that it succeeded to the bargaining obligation as to only a portion of the operations it acquired cannot be reconciled with unambiguous statutory prescriptions.

Further, there is no precedent to support the Employer's claim that a change in overall acreage or a change in the percentage of acreage devoted to certain crops, or employee turnover occurring before or after the Employer's acquisition of the operations, may form the basis for avoiding successorship. As explained above, such claims are not only contrary to existing

law, but are contrary to the policies underlying the ALRA.[17]

In sum, I find nothing objectively reasonable about the Employer's claims that it did not succeed to the bargaining obligation vis a vis the grape operations, nor do I see how such a claims further the policies and purposes of the ALRA.

Abandonment

As acknowledged by the majority, it is well-settled that a good faith belief in a loss of majority support was not a cognizable defense under the ALRA, and that, in light of the "certified until decertified" rule, "abandonment" may be considered a defense only where a union is defunct or disclaims interest in continuing to represent the bargaining unit. (Nish Noroian Farms (1982) 8 ALRB No. 25; Lu-Ette Farms (1982) 8 ALRB No. 91; Ventura County Fruit Growers (1984) 10 ALRB No. 45; O. E. Mayou & Sons (1985) 11 ALRB No. 25; Bruce Church. Inc. (1991) 17 ALRB No. 1.)

In 1994, the Board considered a suggestion from interested parties, first submitted in 1989, that it overrule its case precedent (which has been upheld by the courts) by regulation, and expand the definition of abandonment to include situations where a union is not heard from for a substantial

[17]If there had been changes in the operations that brought into question the continuing application of the statutory prescription of statewide units, the unit clarification process was available to address such issues. However, were the unit clarification petition granted in such circumstances, it would result not in the partial extinguishing of the bargaining obligation, but merely in the creation of multiple bargaining units.

period of time. Upon reviewing existing law and, in particular, the limits created by the language of the ALRA, the Board concluded that it did not have authority to expand the concept of abandonment in the manner urged. Instead, the Board proposed a regulation which would codify existing case law on abandonment and create a procedure by which an employer, without exposure to a refusal to bargain charge, could ask to have adjudicated the issue of whether a certified union had become defunct or had disclaimed interest in the unit. At no time did the Board itself propose to adopt a regulation expanding the definition of abandonment beyond defunctness and disclaimer of interest.

While expectations may have been raised when the Board agreed to look at the issue of abandonment in the regulatory process, there was nothing in that process that would have engendered confusion as to the present state of the law. Nor, of course, could a party expect that a subsequent change in law through the regulatory process, even if such a change were likely, would operate retroactively to shelter conduct occurring prior to the passage of the regulations.[18] Therefore, the regulatory process is wholly irrelevant to the propriety of the bargaining makewhole remedy in this case.

Having explained that the law on abandonment under the ALRA was well established at the time of the Employer's refusal to bargain, I now address whether the claim of abandonment proffered here reasonably may be said to be encompassed within such law or

[18]Ultimately, no regulatory change was adopted.

within a logical extension thereof. There is no need to repeat the Board's earlier discussion rejecting the Employer's abandonment claim under existing law. However, I note two points in this regard.

One, I know of no authority for the proposition that it is inconsistent with representative status for a union to agree not to negotiate over certain employees or subjects for a specified period of time. Even if agreeing not to negotiate with regard to the grape workers for two years could be considered to be inconsistent with the Union's duty of fair representation, there is no authority for the proposition that an appropriate remedy for a breach of that duty is to strip the union of its status as exclusive bargaining representative.[19] Moreover, as the majority acknowledges, the Union's failure to file unfair practice charges prior to 1994, while it may constitute a waiver of the right to challenge discreet acts of the Employer, cannot extinguish the overall duty to bargain. (Cardinal Distributing Company (1993) 19 ALRB No. 10; Ron Nunn Farms (1980) 6 ALRB No. 41.)

Two, while the Union's filing of Notices of Intent to Take Access was unusual, whatever confusion was generated by such conduct was resolved by the Union's periodic requests to bargain over the grape employees. Indeed, the first Notice in 1990, as well as Notices filed in 1992 and 1994, was followed shortly thereafter by a communication from the Union evidencing both a

[19]And, of course, no such charge has been filed.

desire to bargain and a claim to be the certified representative.[20] Moreover, since such conduct evidenced the Union's continuing interest in representing the employees, it is facially inconsistent with defunctness or disclaimer of interest.

The Board has previously rejected similar claims of abandonment based on the absence of the union for a period of time and awarded the makewhole remedy for the employer's refusal to bargain. (O. E. Mayou & Sons, supra. 11 ALRB No. 25 (employer refused union's request to continue to bargain based on earlier lack of contact with union for two years); Joe G. Fanucchi & Sons/Tri-Fanucchi Farms (1986) 12 ALRB No. 8 (employer refused to bargain based on lack of contact with union for periods of two years and polling of employees).) In Ventura County Fruit Growers. Inc., supra. 10 ALRB No. 45, as noted above, the Board rejected the notion that abandonment can be established where, as here, the union has renewed its interest in representing the bargaining unit. At that time, which was over nine years before Respondent's refusal to bargain in the present case, the Board found the employer's claim so contrary to existing law that the makewhole remedy was found to be appropriate. Therefore, the Employer's claim is not a novel one, but one which has been offered and rejected numerous times before.

Thus, it is fair to conclude that the Employer's

[20]There is no evidence in the record that the Union used the access to solicit support for an election petition. On the contrary, the credited evidence shows that the Union utilized the access in order to stay in contact with the employees and to promote its associate membership program.

abandonment claim is one which was clearly contrary to the law existing at the time the Employer refused to bargain. The law has not changed since that time, nor could there have been any reasonable reliance upon an expected future change in the law, either by regulation or case adjudication.

Lastly, on the facts of this case, the Employer's abandonment claim cannot be said to urge a logical extension of existing law. As discussed above, it is well settled that the loss of majority support defense recognized under the NLRA is not cognizable under the ALRA. Thus, it is a given that the avenues for extinguishing the duty to bargain are narrower under the ALRA than under the NLRA. Yet, the Employer's abandonment claim in the present case would be patently deficient even under NLRA precedent.

Under the NLRA, union inactivity is sometimes raised as evidence of loss of majority support which, of course, is not a recognized defense under the ALRA. Under the NLRA, the term "abandonment" is most often used in the context of determining whether, through inactivity or other circumstances, a union has abandoned a collective bargaining agreement that would otherwise bar a decertification or rival union petition. Thus, under the NLRA, "abandonment" does not constitute an independent defense to the duty to bargain. In addition, the National Labor Relations Board (NLRB) has made two pertinent points quite clear. One, lack of negotiations or of contact with the employer is insufficient to rebut the presumption of continuing majority status or establish

that a union has abandoned a contract. Two, prior union inactivity is irrelevant if the union exhibits a willingness to represent the bargaining unit at the time that its representational status is called into question. (Pioneer Inn Associates (1977) 228 NLRB 1263; Road Materials. Inc. (1971) 193 NLRB 990; Loree Footwear Corp. (1972) 197 NLRB 360.)

In Pioneer Inn Associates and Road Materials. Inc., there was neither union contact with the employer nor evidence of union contact with employees. The NLRB found no significance to lack of contact with employees since the employees were able to contact the union if they needed assistance and there was no evidence that the union refused or was unable to provide such assistance. In the present case, in contrast, there was not only evidence that the Union made numerous contacts with employees during the time of the alleged abandonment, but there was an undisputed ongoing bargaining relationship involving other unit employees, i.e., the date workers. In addition, the Union not only made periodic requests to bargain with regard to the grape workers, but expressed its unequivocal willingness to represent them at the time that the Employer refused to bargain. Thus, the facts of the present case do not even arguably fit within NLRB precedent on loss of majority support.

In sum, the Employer asks us not only to overrule precedent under the ALRA, but to also go beyond the parameters of precedent under the NLRA. In light of the recognized differences between the two statutes, this cannot constitute a reasonable

request. This is not to say that it would be unreasonable to test the bounds of this Board's precedent on abandonment, but the facts of this case simply do not provide the basis for any reasonable extension of such precedent. '

If the bargaining makewhole remedy is not appropriate in the present circumstances, it is difficult to see, absent the remote possibility of direct evidence that an employer's defenses were maintained in bad faith, how it would ever be appropriate. Such a result simply cannot be squared with the Legislative intent embodied in the language of Labor Code section 1160.3 providing the Board with discretion to award the remedy, nor with the teachings of Norton that the Board should apply an objective standard in exercising its discretion. Nor is there any precedent for excusing or suspending the makewhole remedy for a specified period of purported union misconduct where such conduct occurred prior to the employer's refusal to bargain.[21]

For the reasons stated above, I am compelled to find the bargaining makewhole remedy appropriate in this case. The makewhole period should commence on May 25, 1994, the date of Respondent's refusal to bargain, and continue until Respondent commences in good faith bargaining which culminates in a contract or a bona fide impasse. Utilizing the same standards cited approvingly by the majority here, the Board in the past has

[21]The Employer here does not allege that the Union exhibited any signs of "abandoning" the bargaining unit after the Employer's refusal to bargain in May of 1994. Therefore, there is no equitable basis for suspending or restricting the makewhole remedy after that date.

awarded the makewhole remedy in similar cases where employers have challenged the same legal principles, at times when such principles were arguably not as well established as they are now. As discussed above, I believe,, there are no legitimate equitable considerations on which to distinguish this case. Consequently, the failure to award the makewhole remedy in this case will inevitably engender confusion and unpredictability in the law. I fear that unsuspecting employers will feel emboldened by the majority's decision and challenge other well-established tenets under the ALRA, with the expectation that they will not be subject to the bargaining makewhole remedy, only to be rudely awakened by the fact that this or different Boards may well react differently to claims no less meritorious than those proffered here.

DATED: May 29, 1996

LINDA A. FRICK, Member

CASE SUMMARY

DOLE FRESH FRUIT COMPANY &
DOLE FARMING COMPANY, Inc.,
(UFW)

Case No. 94-CS-48-EC
22 ALRB No. 4

Background

On January 1, 1988, Respondent acquired all of the Coachella Valley assets of the former Tenneco West, Inc., a diversified farming enterprise whose employees were represented by the ALRB certified United Farm Workers of America, AFL-CIO (UFW or Union). Thereafter, Respondent and the UFW entered into various negotiations and agreements concerning the former Tenneco date workers. Respondent admitted, however, that since May 25, 1994, it rejected repeated requests by the UFW to bargain with respect to employees in the table grape operations which it also acquired from Tenneco, contending that any duty to bargain which it otherwise might have had been extinguished because (1 the unit as initially certified no longer existed (due to changes in the size of operations and employee turnover) and (2) the Union had abandoned the grape workers and therefore no longer represented them.

Decision of the Administrative Law Judge

The ALJ found that Respondent was a successor to Tenneco's Coachella Valley operations and therefore succeeded to the whole of Tenneco's bargaining obligation which included the table grape employees. Relying on cases in which the ALRB had previously addressed abandonment when asserted as a defense to a failure or refusal to bargain, and acknowledging that the ALRB has indeed recognized the defense of abandonment, he concluded that, in light of those precedents, Respondent had failed to show in this instance that the certified representative was either unwilling or unable to represent the grape employees. He cited to the Board's decision in Ventura County Fruit Growers (1984) 10 ALRB No. 45, in which the Board, on similar facts, held that " [a] t the critical time that Respondent [refused to bargain when so requested by the union], its abandonment theory was a factual impossibility." In accordance with Ventura. he recommended that Respondent be required to make its employees whole and that the makewhole period commence to run from May 25, 1994, the date on which Respondent admittedly refused to bargain.

Decision of the Agricultural Labor Relations Board

The Board affirmed the ALJ's findings on successorship and abandonment. The Board noted that Respondent's proposal to effectively sever out the table grape portion of its overall Coachella Valley bargaining unit would be contrary to express statutory policy which requires, as a general rule, that all of

the agricultural employees of an employer be included in a single bargaining unit and thus prohibits the Board from carving out units on the basis of such factors as crop divisions or job classifications. With regard to the Union's abandonment as a defense to the failure or refusal to bargain over the grape employees, the Board found that given the Union's repeated requests to include the grape employees in the parties' negotiations and the Union's urging of all Coachella Valley grape employees to press for an increase in wages, Respondent failed to show that the Union had in fact disclaimed interest in representing those same employees and therefore failed to sustain its legal burden of establishing that its duty to bargain had been extinguished.

With regard to a remedy for Respondent's failure to bargain, the Board limited the makewhole period to 30 days from the date upon which the Union requests bargaining following issuance of this decision. The Board reasoned that after weighing all of the facts and equities in the case, Respondent may have had cause to doubt the prior status of the defense of abandonment as a result of the Board's 1994 regulatory process in which it initially expressed interest in considering so-called "dormant" certifications occasioned when it appeared to employers that unions had become defunct or otherwise had relinquished their right of representation. The Board observed that certain actions of the Union could also have created confusion, from Respondent's perspective, as to whether the Union itself believed that it continued to represent the disputed employees (actions which included, but are not limited to, filing Notices of Intent to Take Access which normally are utilized only for initial organizing purposes) as well as the Union's decision to rest on its bargaining rights over the grape employees for several years. In light of these factors, the Board believed Respondent acted in good faith in pursuing this action and therefore did not deem the makewhole remedy appropriate prior to the issuance of this clarification of the doctrine of abandonment.

Concurrence & Dissent

Member Frick concurred with part I-IV of the decision, but dissented on part V, finding that the facts of this case, in light of well settled law, compel the conclusion that the bargaining makewhole remedy should be awarded as recommended by the ALJ, i.e., the remedy should begin on May 25, 1994, the date of the Employer's refusal to bargain which is the subject of the unfair labor practice complaint. Member Frick observed that the Employer's proffered defenses to its duty to bargain are not only in direct contradiction to settled law under the ALRA, they cannot even be squared with case law under the NLRA, which affords much

broader means for excusing an employer's duty to bargain. Though Member Frick would not award the makewhole remedy where the controlling law is unclear or where a party seeks a logical extension of controlling law, she found neither circumstance to be present in this case. Since the Board has awarded the makewhole remedy in similar cases where the same or similar challenges were made to established legal principles, Member Frick fears that not to award the remedy in this case will engender uncertainty and confusion in the law and encourage employers in the future to pursue challenges to other well-settled legal principles on the false hope that they too will not be subject to the makewhole remedy, thus setting a trap for the unwary.

In examining all surrounding circumstances reflected in the record, Member Frick found no legitimate equitable considerations that would warrant any further restriction of the remedy. In particular, there was nothing in the Board's previous regulatory efforts that would have engendered confusion as to the present state of the law, nor could a party expect that a subsequent change in law through the regulatory process, even if such a change were likely, would operate retroactively to shelter conduct occurring prior to the passage of the regulations. In addition, while the Union's filing of Notices of Intent to Take Access was unusual, whatever confusion was generated by such conduct would have been resolved soon after by the Union's nearly contemporaneous requests to bargain over the grape employees.

* * *

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged we, DOLE FRESH FRUIT COMPANY and DOLE FARMING CO, INC., violated the law. After a hearing at which all parties had an opportunity to participate, the Administrative Law Judge found that we refused to bargain with the United Farm Workers of America, the certified representative of our table grape employees.

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

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

1. To organize yourselves;
2. To form, join or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about 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:

1) Upon demand by the United Farm Workers of America, AFL-CIO (UFW) , we will bargain in good faith with regard to the terms and conditions of employment of our Coachella table grape employees.

2) We will makewhole all of our employees who suffered economic loss as a result of our refusal to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW).

DATED:

DOLE FRESH FRUIT COMPANY and DOLE FARMING 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 319 South Waterman Avenue, El Centro, CA 92243. The telephone number is (619) 232-0441.

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

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: DOLE FRESH FRUIT COMPANY and DOLE FARMING CO, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party,	Case No. 94-CE-48-EC

Appearances:

Marvin J. Brenner
El Centro ALRB
for General Counsel

Mary Mecartney
Marcos Camacho a Law Corp,
for Charging Party

Howard A. Sagaser
Sagaser, Hansen & Franson for
Respondent

DECISION OF THE ADMINISTRATIVE LAW JUDGE[1]

[1]Portions of the Transcript erroneously refer to the undersigned ALJ as Judge Gray. The transcript is hereby corrected to reflect my correct name.

This case was heard by me on December 12, 1994 and January 15-18, 1995. In a duly issued complaint, General Counsel alleged that Respondent Dole,[2] an admitted agricultural employer,[3] unlawfully refused to bargain with the United Farm Workers of America, AFL-CIO over the terms and conditions of employment of Respondent's table grape operations in the Coachella Valley on or about May 25, 1994. It is alleged that this duty devolved upon Respondent in its capacity as a successor to Tenneco West, Inc.

It is undisputed that 1) the United Farm Workers of America was certified as the collective bargaining representative of all of Tenneco's agricultural employees in the Coachella Valley in Case No. 77-RC-6-C (See, 5 ALRB No. 27 [1979]); and 2) that Dole purchased all the assets of Tenneco West in 1988. Dole admits that, as a result of that purchase, it is a successor to the date portion of the former Tenneco unit, and has not only recognized the UFW as the representative of the date operations purchased from Tenneco, but has also engaged in collective bargaining over the terms and conditions of employment of the date employees.

Dole also admits that since May 25, 1994, it has refused to bargain with the UFW over the terms and conditions of the table

[2]At the Pre-Hearing Conference, and without objection by Respondent, I permitted General Counsel to amend the Complaint to name Dole Fresh Fruit Company and Dole Farming Co. as joint Respondents. When I refer to Dole in this decision, I mean both entities.

[3]See Answer to Complaint, Response to Para. 2.

grape operations purchased from Tenneco, but contends that it is under no duty to do so.

I.

IS RESPONDENT A SUCCESSOR?

A.

BACKGROUND OF THE UNIT

On April 15, 1977, the UFW filed a Petition for Certification for a unit consisting of all the agricultural employees of Tenneco West in the Coachella Valley, specifically identifying employees working in "grapes, peaches, citrus, dates" as intended to be included in the petitioned-for unit.

In response to the petition, Tenneco contended that the unit was inappropriate for a variety of reasons, among them, that the date gardens were non-contiguous with the rest of the proposed unit because the gardens were scattered throughout the Coachella Valley, and that dates historically have been operated "entirely independently of all other operations . . . ." Tenneco further contended that the citrus employees working on land owned or leased by it were the employees of another statutory employer, a custom harvester. According to Tenneco, three separate units were appropriate: 1) all date operations; 2) all citrus harvesting operations; and 3) all grapes, peaches, and other crops.

Consistent with this position, Tenneco challenged the votes of the date employees. The Acting Regional Director concluded that a single unit, including both the date employees and the general farming/grape employees was appropriate. Tenneco

appealed to the Board which affirmed his conclusion that a single unit consisting of all the agricultural employees of Tenneco in the Coachella Valley was appropriate:

> The ARD found that the 'Cal-Date employees are all employed in the Coachella Valley, as are the Tenneco West, Inc. employees who work in the grape and citrus operations. His report indicated that the valley is approximately forty miles long and 15 miles wide. The climate does not vary significantly from one end of the valley to the other, and the source of irrigation water for all Coachella Valley agriculture is the Colorado River. ... We find . . . that Tenneco West's citrus and grape operations and the Cal-Date operations occur in a single definable agricultural production area.[4]

Tenneco's Response to the Petition For Certification indicates that at the time of the Petition, it had 1202 acres of dates; 485 acres of grapes, grown at two separate ranches (Mar-Vel Farms and H&M ranch); 2,211 acres of citrus; and 19 acres of peaches and miscellaneous crops.

By 1980, Tenneco's grape acreage had increased to 1283; citrus had been reduced to 1117 acres and vegetables had increased to 457. The increase in grape acreage was the result of the acquisition by Tenneco Farming Company (the parent company of Tenneco) of 459 acres, the so-called Melikian Vineyards, from Mel-Pak in December 1979. When Respondent acquired Tenneco's grape operations in 1988, total grape acreage, including the Melikian acquisition, stood at 1323 acres -- not much different from the size of Tenneco's Coachella Valley grape operation immediately

[4]The finding that all of Tenneco's operations were in a single definable agricultural production area required the Board to certify a single unit of all the employer's agricultural employees. John Elmore Farms (1977) 3 ALRB No. 16

after the Melikian acquisition.[5]

On June 17, 1977 the United Farm Workers had filed a Petition for Certification seeking an election among the employees of Mel-Pak; two rival unions intervened. An election was held on June 23, 1977. After resolution of various challenges, a final tally of ballots issued on October 31, 1979; the UFW had a majority of the valid votes cast, See, 77-RC-12-C, Second Amended Tally of Ballots. The employer had earlier filed Objections to the Election, which were still pending when the final tally issued.

On December 11, 1979, Tenneco informed the United Farm Workers of America that it was going to include the Mel-Pak vineyards in the Tenneco Coachella Valley bargaining unit. Around the same time, Mel-Pak moved to dismiss the Petition for Certification in 77-RC-12-C on the grounds that Tenneco had succeeded to any bargaining obligation it might have. By order dated August 25, 1980, and by Direction of the Board, the Executive Secretary dismissed the Petition for Certification among Mel-Pak employees and issued an order that the "employees in the unit in which this election was conducted in the above-captioned case are hereby considered to be part of the unit of all agricultural employees of Tenneco in the Coachella Valley.[6]

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[5]By 1984, Tenneco had eliminated all its vegetable operations; by 1986 Tenneco's citrus operations had been reduced to 52 acres.

[6]The order was issued in response to a motion by Mel-Pak to dismiss the pending representation petition on the grounds that Tenneco was either a successor to Mel-Pak or the Mel-Pak employees

Thus, if Dole is a successor to Tenneco's bargaining obligation, absent any other considerations, that obligation extends to Tenneco's entire Coachella grape operations.

B.

SUCCESSORSHIP FACTS

Under the Purchase Agreement between Tenneco and Respondent's parent company, Castle and Cooke, Respondent purchased:

> a) the business of processing and marketing of almonds, pistachios, dates and raisins;
> b) the packing and marketing of perishable fruits and vegetables;
> c) the farming of acreage developed for citrus, nut and deciduous fruit trees and for grapes;
> d) the retailing of dried fruits, nuts and specialty gifts;
> e) urban development operations.

Respondent also purchased all receivables, all inventories, all claims against suppliers, advances, deposits, prepayments, supplies, equipment[7] and materials, databases, programs, spare parts, vehicles, all rights to refunds, furniture, furnishings and fixture, partnerships and joint venture interests, governmental permits, authorizations, trade-names, trade-marks,

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had been accreted to the Tenneco unit, See, Employer's Motion to Dismiss Petition Case No. 77-RC-12-C. The Deputy Executive Secretary noted that Tenneco West had hired all of Mel-Pak's former employees:

> "The same crew leaders who had previously worked for Mel-Pak continued to be employed by Tenneco West on the former Mel-Pak properties. Working conditions of the former employees remained the same except for a wage increase which conformed to Tenneco West's pay scale."

[7]Respondent separately stipulated that it purchased all buildings and all equipment used to farm the properties it purchased.

proprietary marks, brand names, trademark registrations[8] and trademark applications, copyrights, formulas, customer lists, product catalogs, product literature, packaging materials, supplier lists, records, stock, and art work located at any of the business facilities.

Charles Schmidt, Tenneco's Farm Manager for the Coachella properties immediately before the acquisition, and Respondent's Coachella Farm Manager immediately after the acquisition, testified that Respondent farmed the same number of grape acres as Tenneco did and used the same packing facility. It paid the same wages. Respondent stipulated that there was continuity between the table grape supervisory work force throughout entire calendar year 1988. I:23 At the time of the sale to Respondent, Tenneco had between 200-250 employees pruning grapes. Schmidt testified that the same employees continued to prune the same ranches the day after the sale.

Schmidt also testified that historically there has been considerable turnover in grapes, with perhaps 50% of the workforce in a given operation returning for the succeeding operation and that turnover in 1988 was no different. According to Schmidt, about 50% of the employees who pruned in January returned after layoff for suckering; about 75% of those returned for the harvest, which is ordinarily Respondent's peak period for grapes. The parties stipulated that during the immediately succeeding calendar

[8] Dole acquired the trademark Sun Giant label, which it used for about a year.

year 1988 after Dole acquired Tenneco,- it employed a total of 1357 employees, 453 of which worked for Tenneco in 1987. 1:34

C.

SUCCESSORSHIP STANDARDS

In Gourmet Harvesting and Packing Inc. and Gourmet Farms (1988) 14 ALRB No. 9, this Board indicated it would look at the following criteria to determine successorship:

> (1) [W]hether there has been a substantial continuity of the same business enterprise,-
> (2) whether the new employer uses the same facilities,-
> (3) whether the new employer has substantially the same work force;
> (4) whether the same jobs exist under the same working conditions;
> (5) whether the alleged successor employs the same supervisors; [Citations]
>
> * * *
>
> The Board does not require that all of these factors be present to find successorship, but only enough to warrant a finding that no basic change had occurred in the employing industry. [Cite]

The Board emphasized that, "although all circumstances must be considered in order to determine whether the employing industry remains substantially unchanged notwithstanding a change in the ownership of the operation, " the focus of an inquiry into successorship is whether or not "those employees who have been retained will understandably view their job situations as essentially unaltered."

Under the NLRA, where a majority of the predecessor's workforce has been retained by the alleged successor, successorship will generally be found. Our Board -- with the approval of the Supreme Court -- has repeatedly held that workforce majority is not an essential factor in finding

successorship, see Highland Ranch and San Clemente Ranch (1979) 5 ALRB No. 54 (affd) (1981) 29 Cal 3d. 874, although it will not find successorship in the absence of proof of substantial workforce continuity. Michael Hat Farming Company (1993) 19 ALRB No. 13

Dole purchased the same business formerly operated by Tenneco, Inc. The grape pruning employees did the same work on the same ranches for the same wages the day after the sale as they had done the day before the sale. Nothing happened after the sale which would have caused them to "view their job situations as essentially altered."

It remains to consider the issue of "substantial workforce continuity". Although the Board has not defined a threshold for determining "substantial workforce continuity", it follows from the fact that "substantial continuity" is different from "workforce majority", that "substantial" has to mean less than 50% of the workforce. The Random House Dictionary of the English Language defines "substantial" as meaning "ample or of considerable amount"; in evidence, "substantial" evidence means more than a "mere scintilla" but less than "the weight of the evidence", Consolo v FMC (1966) 383 U.S. 607, 620-21; for jurisdictional purposes, the NLRB has treated 15% of outside work as "substantial" enough to subject an employer to NLRB jurisdiction.[9]

[9] See, The Garin Company (1964) 148 NLRB 1499; Employer Members of Grower-Shipper Vegetable Ass'n. (1977) 230 NLRB 1011.

Since, in the present context, "substantial workforce continuity" must be taken to mean less than 50%, and "substantial" does not otherwise connote much more than "not insignificant", I find that 30% workforce continuity is "substantial" enough to make Dole a successor to Tenneco. Accordingly, I find that Dole succeeded to the Tenneco's bargaining obligation. Since, that obligation included table grapes, absent any other considerations, Respondent had an obligation to bargain over the terms and conditions of the table grape employees.

II

RESPONDENT'S DEFENSES[10]

Following issuance of the Board's certification of the UFW, Tenneco and the Union[11] met off and on from mid-January 1979

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[10]Before describing Respondent's defenses, I will briefly describe one defense which I struck at the beginning of the hearing. Respondent sought to prove that, by engaging in the grape boycott, the Union abandoned the unit. Because the defense of abandonment goes to the relationship between a union and the unit at issue, I ruled that I would not take evidence regarding the wisdom, the goals, or the propriety of the boycott as an economic weapon. However, to the extent the boycott emerged during the hearing as a stated motive for the Union's actions with respect to the unit at issue, I permitted such testimony to come in.

[11]I go into the bargaining history between Tenneco and the Union because Dole's abandonment claim depends, in part, on the bargaining history prior to its acquisition of the Tenneco property. See, e.g., Respondent's Post-Hearing Brief, at p. 17 Butch Stewart, who was responsible for bargaining on behalf of Dole after the acquisition, was also Personnel Manager for Tenneco from 1986. As will be discussed below, it was he who first told Chavez and Rodriguez that the company had no bargaining obligation because 1) grapes were not part of the Tenneco unit: "Historically they have always been diverse. * * * Dates have always been treated as a separate subject, a separate group of employees . . . . " 11:54; and 2) even if they were part of the unit, the Union had abandoned the grapes before Respondent had

until February 1987 without concluding- a collective bargaining agreement.[12] The parties first wage agreement was reached in August 1979. Wages were increased in both dates and grapes. On December 24, 1980, Tenneco and the Union agreed to increase the grape wages in all classifications to the Steinberg rates.[13] On January 14, 1981, the parties agreed to increase wages in all date classifications. On December 16, 1981, the parties apparently agreed on increases in the grapes. On January 7, 1982 the parties agreed to new date wages. On January 17, 1983, the parties agreed on wage increases in both dates and grapes. On January 30, 1984, the parties agreed to increase date wages and to change the qualification for vacation for date workers; in December 1984, wages were increased in grapes.

On May 8, 1985, the parties agreed to raise date wages and to change vacation eligibility again. On July 2, 1985, Preonas wrote to Saul Martinez rejecting any additional increases

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acquired them: "It goes back to mid-1986. My entire knowledge and focus of activity in this Coachella Valley had been with date agricultural employees. Even with my tenure with Tenneco West and my time as personnel manager for the food division, only dealt with grapes . . . " II:55

[12]Although agreeing on a great many articles, the parties remained apart on a variety of issues, including UFW Security, Hiring, Grievance and Arbitration, Maintenance of Standards, Subcontracting, Successor Clause, Holidays, Vacation, RFK medical Plan, JDC Pension Plan, MLK Fund, Housing and Grower-Shipper and Wages. See GCX 1 p. 451

[13]I can take administrative notice that the reference to Steinberg rates refers to a grape operation, see, David Freedman and Sons. (1993) 15 ALRB No. 9. Moreover, the particular classifications contained in the agreement clearly refer only to grapes, i.e., girdling, tying, and pruning of Perletts and Thompsons.

in grape wages for the remainder of calendar year 1985. On October 7, 1985, the company notified the UFW of its intent to close company housing at the grape ranches.

On January 1, 1986, the UFW submitted a comprehensive proposal incorporating all its previous proposals. On January 20, 1986, the UFW submitted another comprehensive proposal, including grape wages. On January 29, 1986 the parties again agreed to change vacation eligibility, and qualification for the medical plan, and layoff and recall rights for date workers only.

In early November, and again in December, 1986 Tenneco advised the UFW that it was going to close some date gardens and associated company housing. The parties bargained over recall procedures and the orderly evacuation of the housing. This was the last bargaining between the Union and Tenneco on any subject prior to the sale to Dole.

From this history, a number of conclusions may be drawn of significance to the present proceeding: It is fair to say, as Stewart testified, that, over the life of their relationship, the Union and Tenneco evolved a practice of bargaining separately over dates and grapes. Except for two occasions, every agreement between Tenneco and the Union is either for dates or for grapes, but not for both. It is also clear, as Stewart testified, that the Union's January 20, 1986 comprehensive proposal was its last proposal regarding grapes.

Although Stewart is thus correct that Tenneco and the Union discussed dates almost a year after their last contact

concerning grapes ("[Our] entire focus" had been on dates for a year and a half prior to the sale. ... We only dealt with dates." 11:55), his testimony is misleading since it was Tenneco who presented the date-housing issue to the Union for bargaining. Except for responding to the company's notice, the Union was no more active in representing date workers than it was in representing grape workers. As we shall see, from 1988 through 1992, Dole would also present date issues to the Union for bargaining, but either sought to put off bargaining over grapes {in 1990) or directly refused to bargain over them (in 1992.)[14]

A.

BARGAINING HISTORY BETWEEN
DOLE AND THE UFW

Stewart testified that his first contact with the UFW after Respondent's acquisition was in January 1990 when he received a phone call from a ranch manager in Coachella that there was a large increase in the cost of insurance and in COBRA coverage for its date employees. Despite having had no contact with the UFW for nearly two years with respect to the date employees, Stewart sent a letter to the UFW to notify it that the

[14]I might add that despite Stewart's contention that the Union had abandoned the grapes after 1986, Tenneco never took that position. In fact, in the Purchase Agreement between itself and Dole, Tenneco clearly advised Dole that the UFW was certified to represent its grape employees: "The United Farm Workers Union (the "UFW") was certified to represent TFC's date, citrus, and grape agricultural employees in Coachella. Negotiations between TFC and the UFW commenced in 1977 and have continued through the date hereof, but the parties have not yet agreed upon a collective bargaining agreement." GCX 1, pp. 434

company intended to change plans. The UFW accepted the change.

On April 11, 1990, the UFW filed a Notice of Intent to Take Access on Dole Fresh Fruit Agricultural Operations (Statewide.) A month later, on May 23, 1990, the UFW filed another Notice of Intent to Take Access for Dole Fresh Fruit (for all agricultural employees statewide). Arturo Rodriguez, President of the UFW, testified that the UFW did not file these Notices of Intent to Take Access for the purposes of having an election, but in order to communicate with workers about the Union's Associate Membership Campaign,[15] as well as to stay in touch with workers about their concerns. The Union filed Notices of Intent to Take Access at grape companies throughout the state, including those at which the Union had been certified. Around the same time, Schmidt advised Stewart that the date employees wanted a wage increase. By letter dated May 11, 1990 Stewart invited negotiations:

> Since the 1988 acquisition of Tenneco West a wage study has revealed that it has been quite some time since the employees in Coachella Date Agriculture have received a pay increase. In recognition of this fact and in order to remain competitive, the Dole Farming Company-Date Agriculture desires to implement the wages proposed in the enclosed exhibit 1. If you have any questions or comments concerning this interim wage increase, please notify the Dole Farming Company-Date Agriculture in writing prior to June 1, 1990.

This time the Union wanted negotiations and the parties agreed to meet on June 19. Evidently taking the company's

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[15]The Associate Membership Program is designed to allow workers not covered by collective bargaining agreements to enjoy certain benefits available to members, such as medical insurance in Mexico, tax, and immigration advice.

invitation to bargain as an opportunity to bargain over the entire unit, Romero's counter-proposal regarding the date workers contained a request to bargain over grapes:

> Also please be advised that we would like to set some dates for negotiating »the appropriate bargaining units [sic] that the United Farmworkers ... is the exclusive representative of: vegetables, citrus and grapes.

There is ambiguity in the record over whether or not Stewart ever directly refused to bargain over grapes.[16] Stewart initially testified that he did not recall doing so, 11:51; a moment later, he testified that he wanted "to change" his answer and stated that, "either the subject never came up or I specifically said it, I won't negotiate these items. We were talking about dates and we kept it at dates." II:51 Since Stewart's new response continues to preserve the possibility that he did not directly refuse to bargain over grapes, it is not clear how his testimony has changed unless he is to be understood as now insisting that, by only discussing dates, he necessarily implied the company would not bargain over grapes. Romero testified that it was possible he and Stewart discussed grapes, but he could not recall if they did. He also testified he knew Dole did not want to negotiate over grapes, V:23. According to him, he caught the company's implication.

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[16]Both the Union and the Respondent argue that Stewart advised the Union it would not bargain over grapes, Post-Hearing Brief for Respondent, p. 10; Post-Hearing Brief for the Union, p. 5. Respondent offers no citation for its assertion; Charging Party cites the testimony of Chuck Schmidt at III:31-32. Schmidt's testimony is confusing, but it appears to me that he is discussing 1992 negotiations.

Despite the concordance between Romero's and Stewart's testimony on this point, given the parties' history of negotiating separately over dates and grapes, it is hard for me to believe that the mere failure to discuss grapes during date negotiations would be taken as implying that Respondent was refusing to bargain over grapes. However, according to Respondent, the parties actually agreed not: to talk about grapes after they had concluded their date negotiations.

Stewart testified the agreement came about in this way. Besides date wages, the parties discussed a good many other issues, including the matter of retroactive vacation pay. Agreement was apparently reached on August 8, 1990 on all items pending ratification by the union. Since Stewart was waiting to be advised by Romero that the agreement had been ratified, he did not, issue the retroactive pay.

Stewart testified that sometime later he heard from Romero that the latter had not taken the retroactive vacation pay issue to the union for ratification and the workers were clamoring for their pay. Stewart told Romero that he would expedite the retroactive pay, which he did, and he was able to provide checks promptly. After he did so, Romero thanked him. Then, according to Stewart, the following exchange took place:

> . . . Gustavo and I met outside and he thanked me for getting these guys off his neck. And I said, well, one favor deserves another. He said, what's that. And I said, I want you to leave my grapes alone for two years. And we shook hands and he agreed to that. RT II 108

Romero denies that such a conversation took place. For the

following reasons, I find chat it did.

In the first place, there was to be no contact between the parties until 1992, two years later. Although, in view of the bargaining history of the parties, such a gap does not prove the parties had an "understanding" not to bargain over grapes, it is nevertheless consistent with it. Since I have already expressed my doubts about the significance of the failure to discuss grapes at the table, the only remaining evidence in the record that would support both parties' testimony that Respondent did not want to bargain over grapes is Stewart's testimony that he asked the Union "to leave [them] alone."

Against the weight of these factors, General Counsel and the Union argue that Romero would not reach such an understanding, both because he did not have the authority to do so and because it would be an unfair labor practice. But Romero also testified that he neither pressed for bargaining nor filed an unfair labor practice in the face of what he understood to be Respondent's refusal both because the Union was "onto other things" and he thought either course would be useless:

> Q: [By Respondent's Counsel] Why didn't you ask Mr. Stewart for a response to you letter [requesting negotiations?]
>
> A: [Romero] Well, we got into other things. And the climate at that time with the ALRB, there was [sic: weren't?] too many people that wanted to do that because Tim Foote was the Director here. All our charges were being thrown in the trash can. And so we went to other things, mainly the boycott.
>
> * * *
>
> Q: Were there any other reasons why you didn't file an

unfair labor practice charge against Dole" in 1990 for not negotiating with the grapes?

A: Well, we decided to go to the boycott.

* * *

Q: Maybe you can help me out. The boycott had been in existence for four years. You write a letter to Mr. Stewart on June 18th wanting to negotiate about the grapes. He doesn't respond to that one letter. You negotiate with them on an interim date agreement and then you go to the boycott, is that correct? Is that what occurred? V: 20-22

A: The boycott and other activities, the associate membership and all the rest of it and getting all these workers to come into, to become part of the Union as associate members and other activities.

This testimony indicates that, on the one hand, the Union was committed to the boycott and, on the other, that the Union believed it could not expect a remedy from the Board if it were to insist that Respondent bargain over grapes. Thus, a proposal "to leave [the] grapes alone" did not leave the Union in any different position than the one it believed it was in.

As noted above, there was no contact concerning grapes through 1991. Rodriguez testified that the Union was aware that the wages of Coachella grape workers had been frozen since 1988 and had hoped to "do something" for them in 1991, but put it off until spring 1992. Arturo Rodriguez described two related efforts in the Coachella Valley. One was the continuation of the Associate Membership Program, the other was a specific campaign directed at organizing workers in the Coachella Valley. According to Rodriguez, the Union had a series of meetings with grape workers to see if they would support a campaign to obtain wage

increases. The Union also prepared leaflets addressing the need for contracts covering grape employees.

Once again, the Union filed N/A's on Dole to gain access to the workers to obtain Associate Members and to distribute leaflets.[17] On May 14, 1992 the UFW filed a Notice of Intent to Take Access on Dole's Coachella operations. On August 14, 1992 Rodriguez filed an N/A seeking access to Dole's grape employees statewide. On August 31, 1992, Brito filed an N/A seeking access to Dole employees in Coachella. It is undisputed that the grape workers received a wage increase in June 1992, prior to these latter notices being filed. During late summer through early autumn, Respondent and the Union engaged in negotiations over dates. Bargaining was precipitated by a series of work stoppages, and eventually a strike, by the date workers. Stewart initially met with the UFW's President, Cesar Chavez, to settle the strike. As Romero had requested grape negotiations during the 1990 negotiations, Chavez now requested them during this new round of negotiations.[18] Stewart, for the first time, directly advised

[17]General Counsel and the union also rely on evidence that the union was generally "organizing" Coachella grape workers including Dole's employees, to show that it did not abandon the unit. I am confining my analysis to the union's efforts with respect to the unit under certification since the certification creates a special sort of relationship different from all other relationships.

[18]Respondent argues that the UFW only suggested the parties might discuss grapes sometime in the future, relying on Schmidt's testimony that: "Mr Chavez asked to continue on. And it was a point of contention. And Mr Chavez had offered up that potentially we would be discussing grapes at a later time. And Mr Stewart's response was no, we would not that the UFW did not represent the grape workers." III:28 While Schmidt does speak of a "potential"

the Union that Respondent believed it had no obligation to bargain over table grapes because the Union had abandoned the unit. The reasons he gave were that the date unit was totally different, dates had always been treated as a completely separate subject, and the Union had abandoned the unit. It is undisputed that the Union did not file unfair labor practice charges.

After these events, little of note happened until May 1993 when the Union filed another N/A to take access to grape workers both to maintain contact with the workers and specifically in order to solicit support for the Union in the Bruce Church[19] case.

Later in 1994, the Union again filed N/A's to obtain access to Dole grape workers. When the company formally refused to bargain, the Union decided to file charges because it believed that the "political climate had changed" and it would now obtain a hearing on its charge.

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discussion of grapes, I do not read his testimony as implying that Chavez was only speaking of bargaining "hypothetically." Moreover, such a reading is contradicted by Stewart's testimony. Stewart testified: "at least three times I told United Farm Workers representatives that I would not negotiate grapes." II:52 "When I spoke to Mr. Rodriguez I basically said two things, hey, we're in a date harvest right now, we're standing right besides a date garden. ... I guess we're talking about date. He had said something roughly along the lines that he also wanted to talk about grapes. And I said I must be at the wrong negotiations because I assumed we were talking about dates." II:57-58 Stewart's remark that he must be at the wrong negotiations if Rodriguez wanted to talk about grapes, clearly implies that Rodriguez wanted to talk about them.

[19]I can take administrative notice that this refers to the lawsuit filed against the United Farm Workers for damages growing out of the boycott of Bruce Church lettuce.

B.

ABANDONMENT

Respondent contends that it had no duty to bargain over table grapes because the Union abandoned that part of the unit. In this context, Dole relies upon the agreement between Stewart and Romero to leave the grapes alone; the repeated taking of access under section 20900 of the regulations, which, Respondent maintains, permits organizational access only and which, so the argument goes, must be taken as an admission that grapes were not in the unit; the failure to file refusal to bargain charges over the company's refusal to bargain grapes; and the pattern of selectively bargaining over dates, but not grapes.

Respondent also argues that, even if it is found to be a successor and the Union is not found to have abandoned the unit, no remedy should issue in this case, both because it reasonably believed the Union had abandoned the unit, and the unit has changed so much since the certification of the Union that only a new election is consistent with the principle of majority choice which underlies the ALRA. I reject this argument at the outset. While our Board has recognized the defense of abandonment, it has held that a union remains the certified representative until decertified in an election sought by the employees in the unit. See, Cardinal Distributing Company (1993) 19 ALRB No. 10. There is no warrant for my ordering another election to test the Union's majority support.

In Bruce Church (1991) 17 ALRB No. 1 the Board cited

with approval the definition of abandonment contained in O.E. Mayou & Sons (1985) 11 ALRB No. 25, at p. 12, n. 8, as a showing that a "union [is] either unwilling or unable to represent the bargaining unit." In this case, since it is clear that the Union suffered from no "disability", the question becomes whether or not Respondent has shown that the union was unwilling to represent the unit. Bruce Church also makes it clear that, in the context of an abandonment defense, "unwilling" must mean more than that a union has waived the opportunity .to bargain:

> [T] he Board has held that a Union remains the certified representative until decertified "or until the Union becomes defunct or disclaims interest in continuing to represent the unit employees . . . ." [Citation] Moreover, the Board has defined abandonment as a showing that the Union was either unwilling or unable to represent the bargaining unit. [Citation] The above standards were set out by the Board in the context of rejecting employer claims that, as under the National Labor Relations Act (NLRA), the bargaining obligation may cease upon a showing of good faith belief in the loss of majority support. The Board found that the language of the ALRA instead required formal decertification or. in essence, a showing that the Union had effectively left the scene altogether. Bruce Church at pp. 9-10

As noted, Respondent relies heavily upon the conversation between Romero and Stewart to argue that the Union "entered into a contractual waiver of its representation of the grape workers", Post-Hearing Brief, p. 33 and, therefore showed itself unwilling to represent them.

Although I have found that Stewart and Romero entered into an understanding not to bargain over grapes for two years, the agreement by its terms does not purport to waive bargaining forever. Moreover, in view of the fact that Stewart only sought

to obtain such an agreement because Romero was" asserting the union's representational status, Respondent is estopped from treating the parties' agreement as proof that the union was unwilling to represent the grape employees.[20]

Respondent has cited no case for the authority that a mutual agreement not to bargain over part of a unit for a set period of time constitutes an abandonment.[21] Not only do the terms of the agreement speak differently, but Stewart himself had to again advise Chavez and Rodriguez in 1992 that he would not bargain over grapes. Thus, while it is true that the Union did not insist upon negotiations over grapes in 1990 when Stewart asked to put them off, or demand negotiations in 1992 when Stewart refused to bargain over them, it is also clear that every time ,the Union was given the opportunity to bargain over dates, it also requested bargaining over grapes and thereby asserted its representational interest.

The fact that the Union chose not to file unfair practice charges in 1992 when Respondent refused to bargain is meaningless: the Board has specifically held that the failure to

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[20]Under the doctrine of equitable estoppel,"a party that, in obtaining a benefit, engages in conduct that causes a second party to reasonably rely on the "truth of certain facts" that are assumed may not controvert those facts later to the prejudice of the second party." R.P.C. Inc (1993) 311 NLRB 232, 233. The "assumed fact" is that the Union wanted to bargain over grapes.

[21]General Counsel's and the Union's argument that under Board law, an agreement that something is outside the scope of bargaining is unlawful is beside the point: Romero and Stewart did not make such an agreement. They simply agreed not to bargain for a set period of time.

file charges does not extinguish the duty to bargain, Cardinal Distributing Company 19 ALRB No. 10, p. 4:

> [Respondent's] arguments are based on the faulty premise that under the ALRA a failure to file a charge against a purported withdrawal of recognition can extinguish the overall duty to bargain. As explained by the ALJ, the only recognized exception to the "certified until decertified rule" is abandonment of the bargaining unit .... In short, a failure to file a timely charge against an attempted withdrawal of recognition cannot make the withdrawal effective where the statutory scheme does not permit such actions by the employer.

Romero admitted, and I have found, that the Union channeled its energies into the boycott and the Associate Membership program and organizing the Coachella Valley table grape employees, and sought access to Respondent's grape employees for these purposes. Respondent argues that in taking access under section 20900, the Union impliedly admitted that it did not represent the grape employees.

I reject the argument for a variety of reasons. In the first place, while Notices of Intent to Take Access are authorized for the purpose of obtaining an election, section 20900(e)(1)(C) also specifically provides that the right to take access under section 20900 "recommences" either 30 days prior to the expiration of the certification or the election bar and 13 months prior to the expiration of the contract bar. Thus, under the regulations, a certified union may take access under section 20900 after the expiration of the bars to an election.

It is true that Board decisions repeatedly speak of post-certification access as different from organizational access and refer to the O.P. Murphy (1977) 4 ALRB No. 106, case as the

fountainhead of the former. See F&P Growers (1-984) 10 ALRB No. 28 While there is thus a discrepancy between Board case-law concerning the source of post-certification access and the regulations, the Union is plainly not wrong to have read the access regulation the way it has. Accordingly, to the extent Respondent would have me conclude that the Union could only be seeking to organize employees when it took access under section 20900 access, I decline to do so. More importantly, the NLRB has held that even if a Union mistakenly seeks to have an election at a unit for which it is already certified, such a mistake actually proves its representational interest. Oil Capital Electric (1992) 308 NLRB 1149.

Not only are each of the indicia relied upon by the Respondent not sufficient in themselves to warrant a finding of abandonment, but the Board has also held that so long as a union asserts its representational interest prior to the time an employer refuses to bargain, any defense of previous abandonment is unavailing:

> Notwithstanding the relative inactivity of the union during . . . distinct time periods, [once a] union becomes active by virtue of its . . requests to commence negotiations ..... it thereby affirmatively
> notified Respondent of its desire and intent to actively represent the employees in the conduct of negotiations. At the critical time that Respondent [refused to bargain] its abandonment theory was a factual impossibility. Ventura County Fruit Growers (1984) 10 ALRB No. 45, p. 7-8

Accordingly, I reject Respondent's claim of abandonment and find that Respondent unlawfully refused to bargain.

REMEDY

In Ventura County Fruit Growers, supra at p. 9, the Board held that:

> In F&P Growers [cite] we considered whether makewhole should be imposed when an employer's refusal to bargain is based not on a challenge to the certification election but on a claim of loss of majority support. We concluded that once the Board had clarified the exclusivity of the decertification process in the related decisions of Nish Noroian ... [8 ALRB No. 25] and Cattle Valley Farms [8 ALRB No. 24] the employer could claim no public interest in refusing to bargain on good faith doubt of the union's majority support, especially while its employees had sought no decertification or rival union elections. Since litigation of the claim of loss of majority support could not possibly further the policies and purposes of the ALRA, we held that the employer rather than the employees should bear the financial risk of having to litigate rather than bargain and imposed the makehwole remedy.

Based upon the foregoing, the makewhole remedy is appropriate.[22]

ORDER

WHEREFORE, as the remedy for the unfair labor practices alleged above, IT IS HEREBY ORDERED THAT Respondent, its officers, agents, labor contractors, successors and assigns to:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO as the exclusive collective bargaining representative of the Coachella table grape

[22]General Counsel seeks to have makewhole commence six months earlier than May 25, 1994. Since the Union was less than diligent in seeking to enforce Respondent's obligations under the certification, I decline to order the remedy to commence earlier.

employees in the certified unit;

(b) In any like or related manner, interfering with, restraining or coercing agricultural employees in the exercise of the 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, bargain collectively in good faith with the United Farm Workers of America, AFL-CIO as the exclusive collective bargaining representative of the Coachella table grape employees in the certified unit.

(b) Make its agricultural employees whole for all losses of pay and/or other economic losses they have suffered as a result of Respondent's refusal to bargain. Loss of pay is to be determined in accordance with established Board precedent. The amount shall include interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 8.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the make whole amounts due those employees under the terms of the remedial order as determined by the Regional Director.

(d) Upon request of the Regional Director, sign a Notice to Employees embodying the remedies ordered. After its translations by a Board agent into all appropriate languages, as determined by the Regional Director, Respondent shall reproduce sufficient copies of the Notice in each language for all purposes

set forth in the remedial order.

(e) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of a final remedial order, to all agricultural employees employed by Respondent at any time from May 25, 1994, until the date of the mailing of the notice.

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

(g) Arrange for a Board agent to distribute and read the 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 and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent, to all non-hourly wage employees in order to compensate them for time lost at this reading and during the quest ion-and-answer period.

(h) Provide a copy of the Notice to each agricultural employee hired to work for the company for one year following the issuance of a final order in this matter.

(i) Notify the Regional Director in writing, within 30

days after the date of issuance of this order,.' of the steps Respondent has taken to comply with its terms, and, continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: April 13, 1995

Thomas Sobel,
Chief Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged we, DOLE FRESH FRUIT COMPANY and DOLE FARMING CO, INC., violated the law. After a hearing at which all parties had an opportunity to participate, the Administrative Law Judge found that we refused to bargain with the United Farm Workers of America, the certified representative of our table grape employees.

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

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

1. To organize yourselves;
2. To form, join or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about 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:

1) Upon demand by the United Farm Workers of America, AFL-CIO (UFW), we will bargain in good faith with regard to the terms and conditions of employment of our Coachella table grape employees.

2) Should we fail to comply with the union's request to bargain, the Board will require that we make whole all of our grape employees who suffered economic loss as a result of our refusal to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW).

DATED:

DOLE FRESH FRUIT COMPANY and
DOLE FARMING 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 319 South Waterman Avenue, El Centro, CA 92243. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE.