Healdsburg, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GALLO VINEYARDS , INC . , Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 95-CE-49-SAL (21 ALRB No. 3) 23 ALRB No. 7 (July 17, 1997)

DECISION AND ORDER[1]

This case arises in connection with Gallo Vineyards, Inc.'s (Employer, Respondent or Gallo) challenge to the propriety of a representation election conducted by the Agricultural Labor Relations Board (ALRB or Board) on July 26, 1994. Following the Board's certification of the United Farm Workers of America, AFL-CIO (UFW or Union) as the exclusive representative of all agricultural employees of Gallo Vineyards, Inc. in Sonoma County, California, Respondent not only refused to recognize and bargain with the Union, but also sought to have a superior court under the standard of Leedom v. Kyne (1958) 358 U.S. 1 invalidate the

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[1]All decisions of the Agricultural Labor Relations Board, in their entirety, are issued as precedent for future cases. (Gov. Code, § 1425.60.)

Board's csrtification.[2] Upon final disposition of Respondent's extraordinary challenge of the Board's certification, this case is now before us upon General Counsel' s complaint that Respondent has failed and refused to bargain with the certified union.

Pursuant to Title 8, California Code of Regulations, section 20260, the parties have requested that the Board transfer this matter to itself for findings of fact, conclusions of law, and order. Accordingly, they have filed a joint stipulation of facts, as amended, and briefs in support of their respective positions directly with the Board.[3] As there is no conflict in the evidence, the parties have waived the right to a hearing they otherwise could have had with regard to the unfair labor practice

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[2]As the Act does not provide for direct judicial review of representation matters, such review may be obtained only by the employer who declines to bargain for "technical" reasons in order that the certified representative may file an unfair labor practice charge which matures into a final Board decision and order appealable to the courts of appeal. By its foray into the superior court, Gallo sought to bypass this statutorily mandated review process.

[3]0n various dates in January 1997 Respondent, General Counsel and the UFW entered into a stipulation of facts and amendment thereto. Also included was a request for administrative notice listing certain documents to be submitted to the Board within 20 days of the execution of the agreement. None of the documents so described have been provided by any of the parties. Nonetheless, as is apparent from our decision herein, the Board has taken into consideration all documents relevant in resolving the sole question in this matter, that of an appropriate remedy for Respondent' s admitted refusal to bargain with the certified representative. In that regard the Board has declined to take administrative notice of the record of its 1994 rulemaking proceeding and its Election Manual due to lack of relevance and of its regulations because such notice is unnecessary.

charge in which the UFW alleged, and Respondent admitted, that it failed or refused to provide bargaining related information and to bargain in good faith in direct violation of section 1153(e) and derivatively in violation of section 1153 (a) of the Agricultural Labor Relations Act (ALRA or Act).[4]

FINDINGS OF FACT

I. Jurisdictional Facts

As there is no dispute that Respondent is an agricultural employer, that the United Farm Workers of America, AFL-CIO is a labor organization, that an unfair labor' practice charge was duly filed and served and a complaint issued, we find that this Board has jurisdiction.

II. Procedural Facts/Background[5]

On July 18, 1994, in accordance with section 1156.3, the UFW filed a petition for certification seeking exclusive representation of the agricultural employees of Gallo Vineyards, Inc. who are employed in Sonoma County. The tally of ballots from the July 26, 1994 election revealed that 81 employees had cast ballots for the UFW while 21 employees voted No Union. Five challenged ballots were left unresolved because they were not sufficient in number to affect the outcome of the election.

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[4]Unless otherwise indicated, all section references herein are to the California Labor Code, section 1140 et seq.

[5]The findings of fact which follow are drawn in the main from the stipulated facts entered into between the parties on February 21 and 22, 1996 and an amended stipulation dated January 22 and 23, 1997. The Board has augmented the stipulations with factual matters contained in its own administrative record of these proceedings.

Pursuant to section 1156.3(c), the Employer filed an objection to the election on the grounds that the Board may not conduct an election unless the number of employees employed during the eligibility period is not less than 50% of the employer's "peak" agricultural employment for the calendar year in which the petition was filed.

Following investigation of the objection, the Board's Executive Secretary found that the objection and documentary evidence submitted in support thereof failed to establish prima facie that, in accordance with established Board precedent, the Board's Regional Director was not reasonable when he determined that the petition was timely filed and that the election was held when the Employer was at "peak." Accordingly, the Executive Secretary dismissed the objection on August 30, 1994.

Thereafter, the Employer appealed the Executive Secretary's ruling to the Board which granted the request for review and set for hearing the question "whether the Regional Director's peak determination was reasonable in light of the information available at the time of the pre-election investigation."

On November 9, 1994, following a full investigatory hearing in which all parties participated, the Investigative Hearing Examiner (IHE) of the Board issued a decision in which he found that the Regional Director properly concluded that the peak requirement had been met and recommended that the objection be dismissed and the Union be certified.

On July 2S, 1995, having reviewed the IHE's decision in light of the Employer's exceptions and the UFW s brief in response, the Board issued a decision in which it adopted the IHE's recommendation that the objection be dismissed and certified the UFW as the exclusive representative of all agricultural employees of the Employer in Sonoma County, California. (Gallo Vineyards. Inc. (1995) 21 ALRB No. 3.)

By letter dated July 28, 1995, UFW president Arturo Rodriquez invited the Employer to commence negotiations and to provide certain information relative to bargaining. A response from the Employer dated August 11, 1995 advised that, "in order to obtain resolution of this matter in the courts, we are required to refrain from bargaining" and therefore we are "unable to comply with your request. "

The Union responded on August 31, 1995 by filing an unfair labor practice charge in which it alleged that the Employer had violated the Act by failing to bargain in good faith. While the General Counsel was investigating the charge, Respondent brought an action in superior court for injunctive relief against the Board in order to prevent the Board from completing the unfair labor practice process as well as an order requiring the Board to revoke its certification.

Although ultimately successful in obtaining a writ against the Board in the superior court[6], Respondent did not fare

[6]The superior court first ruled in the Board's favor, and then inexplicably decided to reconsider its decision during a

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so well in the court of appeal where a unanimous court vacated the writ and dismissed the action on the grounds that the superior court was without jurisdiction to interfere with the Board's orderly processes. (Agricultural Labor Relations Board v. Superior Court of Stanislaus Co. (Gallo Vineyards. Inc., at al.. Real Parties in Interest) (1996) 48 Cal.App.4th 1489 [56 Cal.Rptr.2d 409], hg. den. Nov. 20, 1996.) (Hereafter, Gallo) The Board was now free to consider the merits of General Counsel's complaint. Since Respondent has subsequently agreed to recognize and bargain with the Union and thereby to abandon its challenge as to the propriety of the certification,[7] our only remaining task is to fashion an appropriate remedy for the intervening period between the refusal to bargain and the onset of good faith bargaining which will further the purposes and policies of the Act.

Conclusions of Law

This Board has adopted the National Labor Relations Board's (NLRB or national board) proscription against relitigation of previously resolved representation issues in

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[6](...continued)
hearing to resolve a dispute over the language of the order dismissing Gallo's petition.

[7]On January 22 and 23, 1997, the parties amended their stipulation in order to note that by letter dated December 20, 1996, Gallo advised the UFW that it was prepared to bargain "for the purpose of negotiating a collective bargaining agreement" and requested that the Union submit dates for an initial meeting. On January 16, the Union responded by providing the name of its assigned negotiator and advising that he will be available any time after February 9, 1997.

subsequent related unfair labor practice proceedings, absent a showing of newly discovered or previously unavailable evidence, or other extraordinary circumstances. (Ron Nunn Farms (1980) 6 ALRB No. 41.) As Respondent has not presented any newly discovered or previously unavailable evidence and has made no claim to extraordinary circumstances, we shall not reconsider the representation issues in this proceeding. Accordingly, we conclude that Respondent violated section 1153 (e) and (a) of the Act by its failure or refusal to comply with its bargaining obligation as defined in section 1155.2(a).

The Remedy

Having found that Respondent has engaged in an unfair labor practice within the meaning of section 1153 (e) and (a) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the UFW as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on February 10, 1997, the day after the date that the Union, in responding to Gallo's letter requesting available dates for the commencement of bargaining, indicated its negotiator would be available for an initial meeting. (See e.g. Burnett Construction Company (1964) 149 NLRB

1419, 1421, enfd. (10th Cir. 1965} 350 F. 2d 57 [60 LRRM 2004] ,-NLRB v. All Brand Printing., Corp. (2d Cir. 1979) 594 F. 2d 926, 929 [100 LRRM 3142] ; Adamek & Dessert, Inc. v. Agricultural Labor Relations Board (1986) 178 Cal.App.3d 970, 983 [224 Cal.Rptr. 366].)

Our remedial considerations cannot end, however, without inquiry into the appropriateness of the "makewhole" remedy in order to fully remedy failure of the duty to bargain. Section 1160.3 provides that, upon finding a violation of section 1153(e), the Board may require that employees be made whole "when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of [the Act]." The bargaining makewhole remedy seeks to place employees in the position they would have been in had their employer bargained in good faith to contract regarding their hours, wages, and other terms and conditions of employment.

Where, as here, an employer refuses to bargain with a labor organization in order to gain judicial review of a Board certification, we may consider invoking the makewhole remedy on a case-by-case basis. (J. R. Norton Company v. Agricultural Labor Relations Board (Norton) (1979) 26 Cal.3d 1 [160 Cal.Rptr. 710] .)[8] As defined by the California Supreme Court in Norton,

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[8]The Norton court rejected the Board's previous practice of automatically awarding makewhole in all technical refusal to bargain cases since such a per se approach would place burdensome restraints on parties who legitimately seek judicial resolution

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supra. the bargaining makewhole remedy "is compensatory in that it reimburses employees for the losses they incur as a result of delays in the collective bargaining process." (Norton at 36.) As the Norton court explained:

> When the integrity of a representation election is being attacked, two competing considerations arise that are both fundamental to the promotion of ALRA policy. The first is the need to discourage frivolous election challenges pursued by employers as a dilatory tactic designed to stifle self-organization by employees. The second is the important interest in fostering judicial review as a check on arbitrary administrative action in cases in which the employer has raised a meritorious objection to an election and the objection has been rejected by the Board.
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> (Norton at p. 30.)

Accordingly, Norton directed that we examine the "totality" of the employer's conduct as well as its litigation posture in order to determine "whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief" that the outcome of the election would have been different had it been properly conducted. *(Id.,* at 39.)

The court cautioned that the Board is not deprived of its makewhole authority simply because a claim may be colorable, but also warned against reckless application of the remedy so as to inhibit the pursuit of important issues. Accordingly, the

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[8](...continued)
of cases in which a potentially meritorious claim could be made that the Board had abused its discretion. *(Id.,* at pp.27-28, 32).

Board has traditionally interpreted Norton to mean that in order to avoid the makewhole remedy, the employer's litigation posture must have been reasonable at the time of the refusal to bargain and that the employer must have acted in good faith. (J. R. Norton (1980) 6 ALRB No. 26.)

In George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1985) 40 Gal.3d 654 [221 Cal.Rptr. 488], the court approved of the Board's post-Norton approach to the awarding of makewhole in such cases, an approach which requires consideration of both the merit of the employer's challenge to the Board's certification of the election and the employer's motive for seeking judicial review. In evaluating the appropriateness of makewhole, we are required to inquire into an employer's motive or state of mind at the time of the refusal to bargain. "Since it would be extraordinary for a party directly to admit a 'bad faith[1] intention, his motive must of necessity be ascertained from circumstantial evidence...." (Continental Insurance Co. v. HLEB (2d Cir. 1974) 495 F.2d 44, 48 [86 LRRM 2003].) Thus, good ' faith must be determined from the totality of circumstances. (NLRB v. Tomco Communications. Inc. (9th Cir. 1978) 567 F.2d 871, 883 [97 LRRM 2660].) Accordingly, the Board will consider any available evidence of good or bad faith, together with an evaluation of the reasonableness of the employer's litigation posture, and recognizes that it is free to draw reasonable inferences from all the surrounding circumstances.

As noted previously, when the certified Union asked Respondent to bargain, Respondent refused on the grounds that it was testing the Board's certification. The ALRA, which is closely modeled on the National Labor Relations Act (NLRA), provides for judicial review of "final orders" of the ALRB. A final order is a Board decision either dismissing an unfair labor practice complaint or remedying an unfair labor practice. (Belridge Farms v. Agricultural Labor Relations Bd. (1978) 21 Cal.3d 551, 556 [147 Cal.Rptr. 165].) The California Supreme Court and courts of appeal have held that a certification order under section 1156.3 of the ALRA is not a final order of the Board. Therefore, it is not normally subject to judicial review except as part of a petition for writ of review of a Board order in a subsequent unfair labor practice case. (Nishikawa Farms. Inc. v. Mahony (1977) 66 Cal.App.3d 781, 787 [136 Cal.Rptr. 233]; George Arakelian Farms. Inc. v. Agricultural Labor Relations Bd. (1989) 49 Cal.3d 1279 [265 Cal.Rptr. 162]; J. R. Norton Co. v. Agricultural Labor Relations Bd, supra, 26 Cal.3d. 1; Perry Farms. Inc. v. Agricultural Labor Relations Bd. (1978) 86 Cal.App.3d 448 [150 Cal.Rptr. 495].)

As a result of the Legislature deliberately choosing to immunize the Board's certifications from direct challenge, employers often engage in so-called "technical refusals to bargain," that is, they refuse to recognize a certified union in order to trigger unfair labor practice proceedings which will eventuate in a Board order which they then seek to overturn in an

appellate court. In this case, however, Respondent did not follow this Legislatively prescribed route of review. Rather, as we have noted, it sought direct review of the Board's certification in the trial courts. Thus, we evaluate the reasonableness of Respondent's litigation posture in light of the standards applicable to such direct review.

Under federal case law, the proscription against direct judicial review of certification orders issued by the NLRB is not absolute. In exceptional circumstances, courts have entertained suits for injunctive relief where questions of representation were involved. In Leedom v. Kyne (1958) 358 U.S. 184 [43 LRRM 2222], the U.S. Supreme Court upheld a district court injunction setting aside an NLRB election and certification where the NLRB had clearly acted in excess of its delegated powers and contrary to a specific prohibition in the NLRA. The courts have generally interpreted Leedom v. Kyne as sanctioning the use of injunctive powers only in a very narrow situation in which there is a plain violation of an unambiguous and mandatory provision of the Statute. (Nishikawa Farms, Inc. v. Mahony, supra, *66* Cal.App.3d 781, 788.)

The California courts have recognized the narrowness of the Leedom *v.* Kyne exception as applied to the ALRB. The court of appeal in Nishikawa Farms. Inc. v. Mahony, supra, 66 Cal.App.3d 781, stated, "the Leedom v. Kyne exception is a very limited one," and quoted from McCulloch v. Libbey-Owens-Ford Glass Co. (B.C. Cir. 1968) 403 F.2d 916, 917 [68 LRRM 2447]:

> [T]o say that there are possible infirmities in an action taken by the Board. . .is not to conclude that there is jurisdiction in the District Court to intervene by injunction. For such jurisdiction to exist, the Board must have stepped so plainly beyond the bounds of the Act, or acted so clearly in defiance of it, as to warrant immediate intervention by an equity court. . . .

(Nishikawa Farms, Inc. v. Mahony, supra, 66 Cal.App.3d at 790.)

It is important to note that the court in Leedom v. Kyne was influenced by the fact that the petitioning party, in that case the union, had no other avenue of review. Commentators have strongly suggested that the court would not have granted relief had it instead been the employer who sought relief, because the employer could have obtained normal appellate review via a technical refusal to bargain. (See Hardin, The Developing Labor Law (3d ed. 1992) p. 1897/ L. Jaffe, Judicial Control of Administrative Action (1965) p. 348.) Indeed, courts have been very reluctant to entertain Leedom v. Kyne actions where the issues could be raised in an unfair labor practice proceeding. (See, e.g., United Farm Workers of America v. Superior Court (1977) 72 Cal.App.3d 268, 273 [140 Cal.Rptr. 87]; Hanna Boys Center v. Miller (9th Cir. 1988) 853 F.2d 682 [129 LRRM 2082]; Grutka v. Barbour (7th Cir. 1977) 549 F.2d 5 [94 LRRM 2584], cert. den. (1977) 431 U.S. 908 -[95 LRRM 2144].) The Court of Appeal in Gallo, supra, 56 Cal.Rptr.2d 409, 418, cogently summarized both federal and California law, finding that application of the Leedom v. Kyne exception to the general rule against direct judicial review is dependent on three factors, all of which must be present. First, the challenged order must be a

plain violation of an unambiguous and mandatory statutory provision. Second, the order must deprive the complaining party of a right assured to it by the statute. Third, indirect review of the order, through an unfair labor practice proceeding, must be unavailable or patently inadequate.

Here, as noted above, the Employer had a statutory-avenue of review through a technical refusal to bargain, which would have resulted, as required by the ALRA, in review by the appellate courts. Every issue that was raised by the Employer in the superior court action could have been raised before the Board and the reviewing appellate court in the unfair labor practice proceeding. Moreover, such review would have been on the merits rather than under the extremely narrow Leedom v. Kyne standard. Thus, it is difficult to perceive Respondent's Leedom v. Kyne action in superior court as having been filed for any purpose other than delay of its bargaining obligation.[9]

Not only did Respondent have the normal "technical refusal to bargain" process of review available to it, but its argument that the Board had clearly acted contrary to specific, unambiguous and mandatory provisions of the ALRA or valid regulations (and that a Leedom v. Kyne exception should therefore be made) was not reasonable. Respondent contended that the method the Board used to determine peak in this case, comparing

[9]In Member Prick's view, Chairman Stoker's dissent evaluates Gallo's actions as if it had followed the normal avenue of review through a technical refusal to bargain rather than under the extremely narrow standards applicable to a Leedom v. Kyne action, which is the route actually taken by Gallo.

the absolute number of currant employees with, a projected average of the number who would be employed later in the season, was impermissible, and that the Board may determine peak only by comparing the current payroll body count with the body count at peak, or average with average. Such contention was clearly erroneous. In Adamek & Dessert. Inc. v. Agricultural Labor Relations Bd. , supra. 178 Cal.App.3d 970, the Court of Appeal held that the language of section 1156.3 (a) (1) prohibited the Board from applying averaging to the number of employees on the pre-petition payroll. However, the court found that the statute does not say how the estimated number of employees employed during the prospective peak period is to be determined. (Id. at 978.) The court did not find that averaging peak employment was inconsistent with section 1156.3 (a) (1) . And, in fact, the court affirmed the Board's finding of peak, which the Board calculated by comparing the body count from the eligibility (i.e., the current payroll) period with the averaged number of employees on the peak employment payroll. *(Id.* at 979.)

Thus, under the Court of Appeal's decision in Adamek, the Board is not statutorily prohibited from averaging peak period employment as it did in this case. (Adamek & Dessert, supra. 178 Cal.App.3d at 978.) In order to qualify for the Leedom v. Kyne exception, petitioner would have to be able to identify a clear and mandatory statutory provision which the Board has violated. (Physicians National House Staff Ass'n v. Fanning (D.C. Cir. 1980) 642 F.2d 492, 496 [104 LRRM 2940];

Chicago Truck Drivers v. NLRB (7th Cir. 1979) 599 F.2d 815, 819 [101 LRRM 2624].) Since the Board's method of computing peak in this case did not plainly violate an unambiguous and mandatory provision of the ALRA, the Board's action did not justify the court's extraordinary review of the Board's non-final order, and Respondent had no reasonable expectation that the superior court would undertake such a review.

Respondent likewise had no reasonable expectation that the superior court would agree with its contention that the Board violated the ALRA by failing to apply crop and acreage statistics on a uniform statewide basis. In Scheid Vineyards and Management Co. v. Agricultural Labor Relations Bd. (1994) 22 Cal.App.4th 139 [27 Cal.Rptr.2d 36], hg. den. April 13, 1994, the court found that the Board agent's peak determination was reasonable when made, even though the agent had not used statewide acreage and crop statistics. *(Id.,* at 146.) The court noted that under the Board's regulations, if the employer itself did not supply the required information regarding its peak figures, the presumption would be made that the petition is timely filed with respect to the employer's peak of season. (Id., at 146, citing Cal. Code Regs., tit. 8, § 20310(e) (1) (B) and Ruline Nursery Co. v. Agricultural Labor Relations Bd., (1985) 169 Cal.App.3d. 247, 258 [214 Cal.Rptr. 704].)

In its decision herein, the Board declared that it stood ready to utilize such statistics in appropriate cases, but experience had thus far not resulted in any useful methods of

utilizing crop and acreage statistics on a uniform statewide basis. Further, no party in the instant case had brought, any such statistics to the Board's attention or explained how they might properly be utilized.

The Board examined the legislative history of section 1156.4 of the Act and found that the history confirmed the Board's conclusion that the language of the section referring to uniform statewide crop and acreage statistics was not intended to require the Board to utilize such statistics in all cases, regardless of circumstances. Most importantly, the legislative history did not indicate that statewide statistics applied uniformly were to be determinative where, as here, the Employer's records supply adequate data from which the Board agent can accurately estimate peak.

The Court of Appeal in Scheid upheld the Board's analysis in prospective peak cases and specifically rejected Scheid's contention that the Board had failed to investigate peak fully in that case because it failed to take into consideration acreage and crop statistics. (Scheid Vineyards and Management Co. v. Agricultural Labor Relations Bd.. supra. 22 Cal.App.4th at 145-146.) Because the Court of Appeal in Scheid ruled that the ALRA did not impose a clear and mandatory duty upon the Board to consider statewide acreage and crop statistics when investigating peak, Respondent had no reasonable expectation that the superior court would find that the Board had such a duty.

Respondent; also contended that the Board violated the Administrative Procedure Act by failing to apply an existing Board regulation (Cal. Code Regs., tit. 8, §20310 (a)(6)(B)). Respondent had no reasonable expectation that the superior court would agree with its argument that the Board was bound to follow the regulation since it had not formally rescinded it.

Section 20310(a)(6)(B) directed the Board's regional offices to determine peak by first comparing the body count of the eligibility period with the body count for the peak payroll period, and, if that did not result in a finding of peak, to compare the average for the eligibility payroll period with the average for the peak payroll period before dismissing the petition. Since Adamek found that the practice of averaging the number of employees in the pre-petition payroll period was invalid, the Board ruled in Triple E Produce Corp. (1990) 16 ALRB No. 14, that, pending modification of the language of the regulations section, only the absolute number of employees on the pre-petition payroll list should be compared with the projected peak numbers, first with the projected absolute number, and then with the projected average number of peak employees, before a petition could be dismissed for lack of peak. This rule had been consistently applied throughout the ensuing five years.

Petitioner contended that the Board was bound by the language of Title 8, California Code of Regulations, section 20310(a)(6)(B), until that language had been formally withdrawn in rulemaking proceedings under the Administrative Procedure Act.

However, the Board reasonably concluded in its decision herein that it was not compelled to adhere to a regulation which a Court of Appeal had found to be invalid, and that section 1144 of the ALRA does not make rulemaking the exclusive method for statutory interpretation. The Board's authority to proceed by adjudication rather than only by formal rulemaking procedures under the Administrative Procedure Act has long been asserted by the Board and recognized by the courts . (Agricultural Labor Relations v. Superior court: (1976) 16 Cal . 3d 392, 413 [128 Cal.Rptr. 183]; California Coastal Farms v. Agricultural Labor Relations Bd. (1980) 111 Cal.App.3d 734 [168 Cal.Rptr. 838].) The National Labor Relations Board, on which the California Legislature closely modeled the ALRB, historically has and continues to articulate its generally applicable rules on a case by case basis.

The Triple E rule embodies the Board's reasonable and expert judgment as to the meaning of the statute, and now represents the applicable law on this issue. Thus, the Board reasonably rejected the petitioner's contentions that Adamek was an impermissible interference with the Board's interpretation of the statute, and that the Board was bound by the unrevised language of its regulations section until the procedure for formally striking the section had been concluded. Respondent had no reasonable expectation that the superior court would agree with its position on this issue.

As discussed supra, under the ALBA an order certifying a bargaining representative is not a final order of the Board which may be judicially reviewed. However, an employer may obtain judicial review of an election and certification by (1) refusing to bargain with the representative whose certification it challenges; (2) being found guilty by the Board of an unfair labor practice because of such refusal to bargain; and (3) obtaining review of the election and certification in the course of judicial review on the unfair labor practice decision. (Perry Farms. Inc. v. Agricultural Labor Relations Bd., supra, 86 Cal.App.3d at 470.) This method of review of election 'certifications is modeled after the federal scheme of the NLRB.

Since this common method of obtaining judicial review was available to Respondent, Respondent failed .to demonstrate the need for an extraordinary remedy in equity. (Nishikawa Farms, Inc., v. Mahony, supra. 66 Cal.App.3d at 788.) Respondent not only had an avenue of review through the unfair labor practice process but, as noted above, that process had already begun when Respondent filed its action in superior court. Thus, the normal "technical refusal to bargain" procedure was delayed by the action undertaken in superior court.

We believe that Respondent had no colorable legal grounds for its position that the election was not properly conducted, and no legitimate basis for believing that its extraordinary Leedom v. Kyne action in superior court would be

successful.[10] Since it was clear that, at the time of its refusal to bargain, Respondent was on notice that all of its arguments had previously been considered and rejected by various Courts of Appeal, we conclude that Respondent was not pursuing a reasonable, good faith litigation posture when it filed its superior court action. We conclude, therefore, that Respondent was motivated not by an effort to seek resolution of open questions of law, but rather by a desire to delay its obligation to bargain with its employees' chosen representative. Had delay not been a factor in Respondent's motivation, Respondent could have followed the more prudent approach of facilitating Board review of its refusal to bargain without extraordinary court intervention. We find, therefore, that Respondent was not pursuing a reasonable, good faith litigation posture when it filed its superior court action, and that a makewhole remedy is thus appropriate.

The makewhole period will commence September 12, 1995, the date the Employer filed its Leedom v. Kyne action in superior court), and will end on December 9, 1996.[11]

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[10]Member Prick agrees that, in light of the narrowness of the Leedom v. Kyne exception, Gallo's action in superior court did not constitute a reasonable litigation posture under the standards set forth in J.R. Norton v. ALRB. supra, 26 Cal.3d 1. However, she believes that Gallo could have had a reasonable litigation posture under the broader standard of review available under the proper avenue of judicial review, i.e., a technical refusal to bargain.

[11]That is the date the superior court, on instruction from the court of appeal, vacated its earlier order and. dismissed Gallo's Leedom v. Kyne action. Members Richardson and Harvey

(continued...)

ORDER

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

1. Cease and desist from:

(a) Refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO, as the certified exclusive bargaining representative of its Sonoma County, California agricultural employees in violation of section 1153(e) and (a).

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

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

(a) Continue to meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its Sonoma County agricultural

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[11] (. . .continued)
would have continued the makewhole period to December 20, 1996, the date the Employer notified the UFW that it was prepared to bargain for the purpose of negotiating a collective bargaining agreement. However, the Order terminates makewhole on December 9, 1996, because that is the latest date to which all three majority Board members agree that makewhole should extend.

employees and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole its agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with the Board's Decision and Order in E. W. Merritt Farms (1988) 14 ALRB No. 5. The makewhole period shall extend from September 12, 1995 until December 9, 1996.

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

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

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

(f) Mail copies of the attached Notice, in all

appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from July 27, 1994 until July 28, 1995.

(g) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its 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 has been altered, defaced, covered or removed.

(h) Arrange for a representative of Respondent, or a Board agent, to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on Company time and property at time(s) and place (s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly 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 continue to report periodically thereafter, at the Regional Director's request, until compliance is achieved.

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's Sonoma County agricultural employees be, and it hereby is, extended for a period of one year commencing on February 10, 1997.

Dated: July 17, 1997

IVONNE RAMOS RICHARDSON, MEMBER

LINDA A. FRICK, MEMBER

TRICE J. HARVEY, MEMBER

CHAIRMAN STOKER, DISSENTING IN PART:

Though I agree with much of my colleagues' decision, I am not persuaded that Respondent's attempt to perfect a judicial challenge to the underlying election warrants invocation of the extraordinary bargaining makewhole remedy. To that extent, therefore, I dissent from the majority opinion in this matter.

Statutes must be construed so as to effectuate their intent and beneficial purposes, not to defeat them. My reading of the Agricultural Labor Relations Act leads me to the conclusion that the Legislature broadly endorsed the concept of collective bargaining for seasonal farm workers and, accordingly, provided that representational rights not be determined in the off-season by a "year-around worker minority" to the exclusion of seasonal employees. (Ruline Nursery Co. v. Agricultural Labor Relations

Board (1985) 169 Cal.App.3d 247, 256 [216 Cal.Rptr. 162].) To that end, a comprehensive regulatory scheme was envisioned in order to ensure that elections will be conducted only when the employee complement is comprised of at least 50 percent of the employer's peak agricultural work force for the current calendar year.

When viewed in that context, it is apparent that the pivotal question Respondent poses here is the extent to which the Legislature has charged this Board with a responsibility to enforce the Legislative policy vis a vis the prospective "peak" requirement of Labor Code section 1156.4. In enacting section 1156.4, the Legislature intended to assure that, inter alia,

> ...the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California...
> (Emphasis added)

Respondent believes that the clear import of the language quoted immediately above vests the Board with an affirmative obligation to develop the data described therein. Indeed, Respondent's reading of section 1156.4 is precisely how the Board itself has historically interpreted the relevant statutory language. Faced with construing that provision, the Board explained in Bonita Packing Co.. Inc. (Bonita) (1978) 4 ALRB No. 96 that "it is incumbent upon this Board... to develop standards for estimating peak employment and determining the timeliness of petitions which reflect such factors as crop and acreage data applicable on a statewide basis." Similarly, in Tepusquet Vineyards (Tepusquet) (1984) 10 ALRB No. 29, the Board

acknowledged its responsibility "to develop standards for projecting peak based on crop and acreage data applicable on a statewide basis."

According to the majority's view of this case, however, it was unreasonable for Respondent to seek judicial review because it only sought to pursue a question which the California Court of Appeal for the Sixth Appellate District had already considered and decided, in Scheid Vineyards v. Agricultural Labor Relations Board (1994) 22 Cal.App.4th 139 [27 Cal.Rptr.2d 36]. While the Scheid court did indeed examine the relevant portion of section 1156.4 which is in issue here, it did so only to the extent necessary to determine the reasonableness of the Board's regulation which requires employers who contend that they have not yet reached peak employment to submit acreage and crop statistics pertaining to their own agricultural operation in 'order to avoid the presumption "[t]hat the petition is timely filed with respect to the employer's peak of season." (Cal. Code Regs., tit. 8, section 20310; Ruline Nursery Co. v . Agricultural Labor Relations Board supra, 169 Cal.App.3d. 247 [216 Cal.Rptr. 162].) However, and this is the distinction the majority fails to observe, the Scheid court was not required to examine whether the Act imposes upon the Board itself a duty to compile the type of data contemplated by section 1156.4 and research reveals no judicial opinion on point. Simply put, Respondent's defense is predicated on a question of initial

statutory construction.[12]

Here, at least two courts permitted Respondent to proceed at the trial court level. First, the superior court decided it had jurisdiction to hear the case and, secondly, a court of appeal declined to entertain the Board's petition to remove the matter from the lower court, instead electing to defer to the superior court which ultimately concurred in Respondent's substantive position.

It will be recalled that the majority does even more than conclude that it was not reasonable for Respondent to believe that it would prevail in the superior court, but also concludes that Respondent's recourse to that court was predicated on its effort to delay the bargaining obligation. In other words, the majority has chosen to penalize a party for a course of action which two courts allowed to proceed. In light of the judicial development of these proceedings, it seems unreasonable to suggest that Respondent pursued a litigation posture in order to achieve ends other than those that effectuate the policies of the Act, by attempting to delay the bargaining obligation.

What makes this case so unusual is that, as evidenced by the Bonita and Tepusquet cases, the Board's own assessment of its duty under section 1156.4 parallels the view Respondent asserted

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[12]The question of first impression raised, whether the Board must comply with the requirement of section 1156.4 to develop uniform statewide crop and acreage statistics, as noted previously, was addressed by the Board in Bonita and Tepusquet. The question, however, remains one of first impression for the reviewing courts.

before the Board and in the courts. Significantly, the merits of Respondent's arguments were even substantiated by the superior court which ruled in Respondent's favor. The fact that the court of appeal reversed, and Respondent ultimately lost, should not serve to render Respondent's initial recourse to the lower court unreasonable.

Finding no inconsistency or conflict between Respondent's defense of its refusal to bargain and the Board's own validation of that potential defense in Bonita and Tepesquet, I cannot agree that Respondent's efforts to perfect a judicial challenge to the underlying election was asserted in bad faith.[13]

DATED: July 17, 1997

MICHAEL B. STOKER, CHAIRMAN

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[13]Respondent believes that had the data described in section 1156.4 been available to the Regional Director in this instance, he would have readily and independently have ascertained that the petition for certification was not timely filed and therefore there could not have been a bona fide question concerning representation which would warrant going forward with the election. I am mindful of the fact that the Board has questioned whether the statistics contemplated by section 1156.4 would be significant in determining, the timeliness of a representation petition, and I share the Board's views in that regard. (See my separate opinion in Gallo Vineyards. Inc. (1995) 21 ALRB No. 3.) The question here, however, stands apart and turns only on whether, in seeking a judicial review of the underlying election, Respondent pursued a good faith litigation posture in order to escape the makewhole remedy. (See, Dole Fresh Fruit Company/Dole Farming Company. Inc. (1996) 22 ALRB No. 4.)

CASE SUMMARY

Gallo Vineyards, Inc.
(UFW)

23 ALRB No . 7
Case No. 95-CS-49-SAL
(21 ALRB No. 3)

Election

Pursuant to a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union) on July 13, 1994, the Board's Salinas Regional Director conducted an investigation and, finding that the petition raised a valid question concerning representation, conducted a secret ballot election among the Sonoma County agricultural employees of Gallo Vineyards, Inc. (Employer or Respondent) on July 26, 1994. The tally of ballots revealed 81 votes for the UFW, 21 votes for No Union, and 5 challenged ballots.

Hearing & Decision on Employer's Objection to Election

Thereafter, the Employer timely filed a single objection to the election on the basis of section 1156.4 of the Agricultural Labor Relations Act (ALRA or Act) which requires that elections be held only when the current employee complement, as determined from the payroll period immediately preceding the filing of the petition, is no less than 50 percent of the employer's peak employment for the current calendar year. The Employer contended that it would not reach peak employment until sometime later in calendar year 1994 and, further, the employee complement in support of the petition was less than half of its anticipated or prospective peak.

A full evidentiary hearing was held before an Investigative Hearing Examiner (IHE) to determine whether, in accordance with established precedents, the Regional Director's determination that the petition was filed in accordance with the statutory peak requirement was reasonable in light of the information available to him at the time of his investigation.

The IHE found that the Regional Director had acted properly and recommended to the Board that the election be upheld. The matter was transferred to the Board after the Employer filed exceptions to the IHE's decision and the UFW filed a brief in response. On July 26, 1995, the Board issued a decision affirming the IHE's findings and certifying the UFW as the exclusive representative of all of the Employer's Sonoma County agricultural employees for purposes of collective bargaining.

Employer's Refusal to Bargain

On July 23, 1995, the Union invited the Employer to commence negotiations. Since there is no direct judicial review of decisions in representation matters, the Employer advised the Union that it would refuse to bargain in order to perfect a judicial challenge to the underlying election. Accordingly, the Union filed an unfair labor practice charge in order to permit issuance of a final and appealable Board decision based on the Employer's admitted refusal to bargain and General Counsel filed a formal complaint based on the charge.

Employer's Recourse to Superior Court

Before the matter could reach the Board, and ultimately a court of appeal, by the normal process (a technical refusal to bargain), the Employer sought immediate judicial intervention by filing a writ in the superior court on the grounds that the Board had violated a clear and unambiguous statutory provision, thereby depriving the Employer of due process. In seeking to have the lower court set aside the election, the Employer asserted that it would be futile to first exhaust administrative remedies by awaiting Board action on the matter and, further, the Employer would suffer irreparable harm if the relief requested was not immediately available.

On March 4, 1996, the superior court found that it had jurisdiction and granted the relief requested by the Employer, including the staying of any further Board proceedings, thereby effectively invalidating the election.

Board's Appeal Of Superior Court Decision

The Court of Appeal for the Fifth Appellate District reversed the decision of the superior court, holding that the superior court was without jurisdiction to interfere with the Board's orderly processes and directed the court to vacate its order. While not directly deciding the merits of the Employer's challenge to the election itself, the appellate court ruled that the Board had not violated a "clear and unambiguous" statutory provision, as the • Employer had asserted, and that the Board's interpretation of the disputed statutory language was reasonable, thereby effectively upholding the election.

Employer's Recognition Of Union

On December 20, 199S, shortly following issuance of the decision of the court of appeal, the Employer advised the Union that it was prepared to bargain for the purpose of negotiating a collective bargaining agreement.

Board Decision On Refusal To Bargain

After the superior court vacated its order, Respondent waived the holding of an evidentiary hearing on the pending unfair labor practice charge and agreed to submit the matter directly to the Board. The only question before the Board was that of an appropriate remedy for Respondent's admitted failure or refusal to bargain in good faith in violation of section 1153(e) and (a) of the Act. The Board issued the standard remedies applicable to such cases and, in addition, a majority of the Board awarded the bargaining makewhole remedy for the period commencing with Respondent's filing of the superior court action until Respondent formally recognized the Union. They reasoned that Respondent's rejection of the normal "technical refusal to bargain" process and its ill-fated foray into the superior court was based on such unreasonable grounds that the Board could infer its sole purpose was simply to delay the bargaining obligation. As Chairman Stoker disagreed, with the majority's reasoning, he would not have granted the makewhole remedy.

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