STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

THE HESS COLLECTION WINERY, Respondent, and UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1096, FRESH FRUIT & VEGETABLE WORKERS, AFL-CIO & CLC, Charging Party.	Case No. 99-CE-23-SAL 27 ALRB No. 2 (February 26, 2001)

DECISION AND ORDER

This is a technical refusal to bargain case that comes before the Agricultural Labor Relations Board (ALRB or Board) with a Stipulation and Statement of Facts under which the parties agreed to waive their rights to a hearing pursuant to Labor Code section 1160.2.[1] The parties have stipulated that the following documents constitute the entire record in this case: letter dated May 21, 1999, from Charging Party attorney David A. Rosenfeld to Respondent attorney Randolph C. Roeder; letter dated May 25, 1999, from Respondent attorney Randolph C. Roeder to Charging Party attorney David Rosenfeld; letter dated March 31, 2000, from Respondent president Clement J. Firko to Charging

[1] All code section references in this decision are to the California Labor Code unless otherwise indicated.

Party organizer, Jacinto Roy Mendoza; Charge No. 99-CE-23-SAL dated July 22, 1999; Complaint issued by the Salinas Regional Director, dated August 3, 2000; Respondent's answer to Complaint dated August 14, 2000; and the entire record in ALRB Case No. 99-RC-1-SAL, including the record of proceedings which culminated in the Board's decision and order in *The Hess Collection Winery* (1999) 25 ALRB No. 2.

The Board, after consideration of the record, including the stipulation of the parties and their briefs, issues this decision and remedial order.

Background

On March 22, 1999,[2] the United Food and Commercial Workers Local 1096, Fresh Fruit and Vegetable Workers, AFL-CIO & CLC (UFCW or Union) filed a Petition for Certification seeking to represent the agricultural employees of The Hess Collection Winery (Employer or Respondent). An election was held on March 29, among all of the Respondent's agricultural employees in the State of California. The Tally of Ballots showed 63 votes in favor of the Union and two votes in favor of "no union." There were no challenged ballots.

On April 5, the Employer filed six election objections with the Executive Secretary who dismissed them on April 8

[2] All dates referenced in this decision are to 1999 unless otherwise indicated.

because they failed to constitute a prima facie case in support of setting aside the election. On April 19, the Employer filed a request for review of the dismissal. On May 12, the Board denied the request for review, affirmed the Executive Secretary's dismissal of the election objections, and issued a Certification of the UFCW as the exclusive bargaining representative of the Employer's agricultural employees.[3]

By letter dated May 21, the Union requested bargaining, but the Employer refused by letter dated May 25, based on its stated intention of challenging the certification in court. The Union filed a charge on July 22, alleging that the Employer was refusing to bargain. This charge resulted in the issuance, on August 3, 2000, of a complaint by the General Counsel seeking a bargaining makewhole remedy. By letter dated March 31, 2000, the Employer stated its intention to drop the challenge to the underlying certification and bargain with the Union.

The Employer's Brief

The brief timely filed by the Employer is limited to the argument that the bargaining makewhole remedy is not appropriate in this case. Citing *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, Respondent asserts that, in determining whether to impose makewhole, the primary issue before the Board is whether

[3] See *The Hess Collection Winery* (1999) 25 ALRB No. 2.

the Employer's challenge to union certification was made in good faith. Respondent acknowledges that an additional element of the analysis is whether the Employer's challenge is reasonable, but argues that makewhole should not be imposed if an employer has a good faith belief that the election was not properly conducted. As evidence of its good faith, Respondent points to its willingness to recognize the Union for purposes of discussing changes in past practices and also to the fact that it abandoned its pursuit of judicial review after ten months.

Respondent urges the Board to find that its position was reasonable, based on its contention that its election objections were supported by law and fact. Specifically, Respondent states that the presence of its pro-union supervisors in the polling area tainted the election and that the contrary finding by the Board merely illustrates that "reasonable minds may differ." Respondent cites *Pleasant Valley Vegetable Co-op* (1986) 12 ALRB No. 31, *and Limoneira Co.* (1989) 15 ALRB No. 20, as examples of close cases where the Board held that the makewhole remedy was not appropriate and urges the Board to find that this, too, is a close case.

Respondent's final argument against awarding makewhole is that the amount would be purely speculative since the makewhole period would be limited to a period of ten months. According to Respondent, there is no way that the Board could

determine "what would have been agreed to during those 10 months."

The General Counsel's Brief

The General Counsel agrees with Respondent that the sole issue for review is whether the makewhole remedy is warranted and concludes in the affirmative. As evidence that the Employer acted unreasonably, the General Counsel contends that every election objection not only failed to establish a prima facie case of objectionable conduct but also contravened well established Board precedent. As a contrast to this case, the General Counsel cites *High and Mighty Farms* (1980) 6 ALRB No. 30 as an example of a technical refusal to bargain case where the Board rejected a bargaining makewhole remedy because the employer had raised a novel legal issue in its pursuit of judicial review.

As evidence that the Employer did not act in good faith, the General Counsel points to the absence of any evidence in support of the objections and the failure to raise any novel legal issues. The General Counsel concludes that Respondent had no good faith belief that the election was improper.

Analysis

Labor Code section 1160.3 provides, in relevant part, that the Board has the authority to order a makewhole remedy "when the board deems such relief appropriate." A bargaining

makewhole remedy gives employees the salary differential between what they were actually earning and what they would have earned in wages and fringe benefits under a contract resulting from good faith bargaining between their employer and their union.

In *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, the California Supreme Court disapproved of the Board's previous practice of awarding makewhole in every case where it found a violation based on a technical refusal to bargain. The Court found that such a per se approach improperly discourages employers from exercising their right to judicial review in cases where the Board has rejected a meritorious challenge to the integrity of an election. (*Id.* at p. 34.) Moreover, the Court found that the language of section 1160.3 requires that the Board evaluate each case to determine if the makewhole remedy would effectuate the policies of the Agricultural Labor Relations Act (ALRA or Act). (*Id.* at pp. 39-40.) The Court set forth the following standard:

> [T]he Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. (*Id.* at p. 39.)

In *George Arakelian Farms, Inc. v. ALRB* (1985) 40 Cal.3d 654, the Court approved the Board's post-*J.R. Norton* test for determining the propriety of imposing the bargaining makewhole remedy for a technical refusal to bargain 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. The analysis, as articulated by the Board, in determining whether to award makewhole in technical refusal to bargain cases, includes consideration of "any available direct evidence of good or bad faith, together with an evaluation of the reasonableness of the employer's litigation posture." (*Scheid Vineyards and Management Company* (1993) 19 ALRB No. 1, p. 13.) As stated by the *Arakelian* court, the reasonableness of the litigation posture is determined by:

> [A]n objective evaluation of the claims in the light of legal precedent, common sense, and standards of judicial review and the Board must look to the nature of the objections, its own prior substantive rulings and appellate court decisions on the issues of substance. Pertinent too, are the size of the election, the extent of voter turnout, and the margin of victory. (*Id.* at pp. 664-665.)

Under the above-cited controlling legal precedents, we examine Respondent's action under both the standards of good faith and reasonableness.

Employer's Good Faith

In a technical refusal to bargain case there is rarely direct evidence of good or bad faith. Frequently, there is no evidence at all on this issue. As evidence of its good faith in the present case, Respondent offers its willingness to discuss changes in working conditions with the UFCW and its decision not to pursue judicial review. However, as discussed below, we do not find these factors to be probative of the issue of good faith.

In *Gerawan Ranches* (1992) 18 ALRB No. 16, the Board made it clear that an employer has a duty to negotiate before making changes in terms and conditions of employment even if it is otherwise engaged in a technical refusal to bargain, and that such negotiations do not constitute a waiver of the right to seek judicial review of the underlying certification.[4] By fulfilling its legal duty to negotiate before making changes in terms and conditions of employment, Respondent has simply avoided committing additional unfair labor practices.

Similarly, Respondent's decision, after ten months, to drop its pursuit of court review offers no insight into its earlier motivation in refusing to bargain. An inquiry into the motivation of the employer must focus on the relevant time

[4] The Board had earlier held that an employer that engaged in full contract negotiations for several months could not later decide to refuse further bargaining in order to test the certification. (*Grow-Art* (1983) 9 ALRB No. 67.)

period which, in this case, is the time period during which the Employer decided to pursue a judicial remedy and initially refused to bargain with the Union. As to that relevant time period, Respondent has proffered no evidence of good faith.

In sum, we find Respondent's evidence of good faith unpersuasive. In any event, under the standard set forth in *J.R. Norton, supra,* Respondent's litigation posture must also be reasonable.

Reasonableness of Election Objections

In *The Hess Collection Winery* (1999) 25 ALRB No. 2, the Board upheld the decision of the Executive Secretary dismissing all of the election objections and certified the UFCW as the exclusive collective bargaining representative of all agricultural employees of the Employer in the State of California. Upon reviewing the Employer's objections again, we find that the Employer's continuing assertion of these objections in litigation does not meet the test of reasonableness required by the Court in *J.R. Norton, supra.*

OBJECTION NO. 1: SCOPE OF THE BARGAINING UNIT

The Regional Director designated the geographical scope of the bargaining unit to be all of the Employer's agricultural employees in the State of California. The Employer's objection is based on its alleged agreement with the

Union that the bargaining unit would be all of the Employer's agricultural employees in Napa County.

Labor Code section 1156.2 provides that the bargaining unit shall consist of all of the agricultural employees of the employer except that, in cases where the employees work in two or more noncontiguous geographical areas, the Board has discretion to determine multiple units. Under Regulation 20365(c)(1)[5] the Employer was required to include with its objection a detailed statement of facts and law supporting the objection. Here, the Employer did not submit any supporting information, any supporting legal authority, or even any assertion that it has agricultural employees outside of the Napa Valley. It is unreasonable to expect the Board or any court to disregard the mandatory provisions of the law based solely on an alleged agreement between the parties and in the absence of any evidence that the designated unit was improper.

OBJECTIONS NOS. 2 AND 3: COERCION BY SUPERVISORS

The Employer alleges that two of its vineyard managers unlawfully coerced workers into supporting the Union and voting for the Union in the election. The Employer also asserts that these managers entered the voting area where 20 to 30 employees were waiting to vote, remained in the area for about five

[5] California Code of Regulations, title 8, section 20365(c)(1).

minutes speaking to some of the employees waiting in line, and attempted to vote themselves.

This Board follows the rule of the National Labor Relations Board (NLRB) in determining whether an election will be set aside due to pro-union activity by supervisors. (*Bright's Nursery* (1984) 10 ALRB No. 18.) That rule is articulated in *Wright Memorial Hospital v. NLRB* (8th Cir. 1985) 771 F.2d 400 as follows:

> Supervisory support for the union will invalidate a union's majority *only when* the supervisor's activities (1) cause the employees to believe the supervisors are acting on behalf of the employer and that the employer favors the union; or (2) led the employees to support the union because they fear future retaliation by the supervisors. (Emphasis added.)

The critical question we must ask is whether the supervisors' actions were so coercive as to deprive the employees of free choice in casting their votes. (*Lonoak Farms,* et al. (1991) 17 ALRB No. 19.) The declarations submitted by Respondent do not allege any facts indicating coercive conduct or statements by the supervisors, nor do they allege that the employees would reasonably believe from the conduct of the supervisors that the Employer supported the Union. The mere presence of the supervisors in the polling area is insufficient to establish coercion. (*Ibid.*)

It is well established in the Board's regulations[6] and precedent that objections to an election must be supported by declarations containing facts within the personal knowledge of the declarant and that, if uncontroverted or unexplained, would constitute sufficient grounds for setting aside the election. It is unreasonable to base a judicial challenge on objections to the election which raise no novel legal issues and lack the required declaratory support.

OBJECTION NO. 4: BOARD AGENT MISCONDUCT

The Employer alleges that the Board agents at the election tainted the process and destroyed "laboratory conditions" by allowing the two vineyard managers to enter the voting area and speak to the 20 to 30 workers lined up to vote.[7] One declarant stated that, after about five minutes, the supervisors asked for ballots but, when the Board agent found out who they were, the supervisors were told they could not vote.

The NLRB no longer strictly follows the laboratory conditions standard and this Board has consistently declined to follow this standard. (See, e.g., *Sakata Ranches* (1979) 5 ALRB No. 56.) This Board has stated that in cases where one of its

[6] California Code of Regulations, title 8, sections 20365(c)(2) and (c)(2)(b).

[7] The "laboratory conditions" standard requires that elections be conducted "under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." (*General Shoe Corp.* (1948) 77 NLRB 124.)

agents engages in misconduct that would compromise the agency's neutrality, the election may be set aside. (*Triple E Produce Corporation* (1991) 17 ALRB No. 15.) In the instant case, however, the evidence does not indicate that Board agents at the election engaged in any misconduct. Rather, it appears that the Board agents promptly excluded the supervisors when they became aware of their status. The fact that the two supervisors were in the voting area for a brief period of minutes does not demonstrate misconduct on the part of the Board agents.

It is not reasonable to base a judicial challenge to the Union's certification on an objection which misstates the applicable legal standards and lacks the required declaratory support.

OBJECTION NO. 5: THE UNION AND THE BOARD AND THEIR AGENTS INTERFERED WITH A FAIR ELECTION

The Employer contends that the Union and its agents and supporters and the Board and its agents engaged in concerted conduct that interfered with the fair operation of the election. While not entirely clear, it appears that Respondent is arguing that the cumulative effect of the conduct alleged in the prior objections requires setting aside the election.

It is well established under both NLRB and ALRB case law that there is no need to consider the cumulative effect of incidents described in election objections if the incidents are

not coercive or unlawful by themselves. (*NLRB v. Monark Boat Co.* (8th Cir. 1986) 800 F.2d 191.) In *G H & G Zysling Dairy* (1993) 19 ALRB No. 17, this Board rejected an employer's argument that the cumulative effect of conduct alleged in its individual objections should be considered at a hearing even though the objections individually failed to state a prima facie case. The Employer was not reasonable in choosing to litigate this objection since it is contrary to established legal precedent.

OBJECTION NO. 6: THE UNION IS NOT A LABOR ORGANIZATION UNDER THE ALRA

Respondent alleges that the Union is not a labor organization within the meaning of the Act because it represents nonagricultural employees who are under the jurisdiction of the NLRB.[8] The term "labor organization" is defined in section 1140.4(f) as:

> ... any organization ... in which employees participate and which exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work for agricultural employees.

The only reasonable interpretation of the above language is that a labor organization need not represent agricultural employees exclusively. Indeed, it is not uncommon for a union

[8] We note that in the stipulation, which is part of the record in this case, the parties agree that "The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 1140.4(f) of the Act."

representing agricultural employees to also represent workers who are not agricultural employees. Not surprisingly, Respondent has cited no legal authority in support of its objection. Given this lack of case law and the plain language of the statute, this objection can be characterized as frivolous and without merit.

In sum, election objections that would require that the Board disregard mandatory provisions of the ALRA with regard to bargaining unit designations, that lack the required declaratory support, that are based on misstatements of applicable legal standards, and that completely lack legal support to the point of being frivolous, do not constitute a reasonable good faith basis for seeking judicial review of a certification.

Whether the Makewhole Remedy Would be Too Speculative

It is true, as the Employer argues, that the bargaining makewhole remedy is of necessity speculative. However, we disagree that this fact should influence our decision on whether the remedy is warranted in this or any other case. This issue has been addressed and settled by the California Supreme Court in *George Arakelian Farms, Inc. v. ALRB* (1989) 49 Cal.3d 1279. The *Arakelian* II Court[7] compared

[7] The case is denominated *Arakelian* II to distinguish it from *George Arakelian Farms, Inc. v. ALRB* (1985) 40 Cal.3d 654, which is cited earlier in this decision.

technical refusal to bargain cases with surface bargaining cases as follows:

> In surface bargaining cases, the employer can produce evidence of the actual negotiations between the parties to prove that they would not have entered into a collective bargaining agreement despite the employer's wrongful conduct. In technical refusal cases, on the other hand, the evidence that the parties would not have entered into an agreement even if they had negotiated in good faith is necessarily speculative because there is no bargaining history between the parties. (*Id.* at p. 1293.)

We strongly reject Respondent's assumption that its delay of at least ten months in bargaining is without consequence. Any delay undermines the Act and employee free choice at a critical period and postpones the Union's ability to negotiate a contract on behalf of the employees in the bargaining unit. (*J.R. Norton Co.* v. *ALRB* (1979) 26 Cal.3d 1, 30-31.)

Conclusion

We find, upon review of the stipulated record and the briefs submitted by the parties, that Respondent has not raised "important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice." (*J.R. Norton, supra,* 26 Cal.3d 1, 39.) We further note that the results of the election were overwhelmingly in favor of the Union. From any perspective, this was not a close case that merits judicial oversight. (*George Arakelian Farms, Inc., supra,* 49 Cal.3d 1279.) Thus, there is no basis for this

Board to find that Respondent held a reasonable, good faith belief in its litigation posture. Since Respondent has not met the criteria outlined in *J.R. Norton*, *supra*, and its progeny, we find that bargaining makewhole is an appropriate remedy.

We impose makewhole from May 26, 1999, until at least March 31, 2000, which is the date of the Employer's letter to the Union announcing its intention not to test the certification by judicial review and to bargain collectively with the Union. [9] A review of Board precedent does not reveal a consistent pattern with regard to the proper beginning date of the makewhole period. Precedent may be cited which fixes the beginning at the date of the union's demand to bargain, the date the demand is received, or the date the employer announces its refusal to bargain in order to test the certification. In our view, the date the demand to bargain is received is the most appropriate date because it is at that time that the employer's duty to bargain comes into existence. Therefore, we adopt the general rule that the bargaining makewhole period shall begin upon the employer's receipt of the certified union's demand to bargain, and if the demand is by mail and the actual date of receipt is

[9] The stipulation of the parties does not identify a specific makewhole period. However, even if the makewhole period had been included in the stipulation, the Board would not be bound to accept those dates. The Board has the ultimate authority to determine the appropriate remedy in a given case, and to draw its own legal conclusions, notwithstanding the relief requested by the General Counsel or other parties. (*Harry Carian Sales* v. *ALRB* (1985) 39 Cal.3d 209; *D. Papagni Fruit Co.* (1985) 11 ALRB No. 38.)

not known, as in this case, then the makewhole period shall begin three working days after the date of the demand letter. (Cf. *Robert J. Lindeleaf* (1983) 9 ALRB No. 35, p. 7.) Accordingly, the beginning date of the makewhole period in the present case is May 26, 1999.

The Board has consistently held that the makewhole period ends when the employer commences good faith bargaining. (See, e.g., *Ruline Nursery Co.* v. *ALRB* (1985) 169 Cal.App.3d 247.) The mere assertion by the Employer in its March 31, 2000, letter that it is ready to commence bargaining is not by itself dispositive of when the makewhole period ends. Good faith is a state of mind, and only through an examination of subsequent events, not revealed on this record, is it possible to determine if the Employer's good faith commenced on March 31, 2000, or on some date thereafter. Should the parties dispute the date on which good faith bargaining commenced, this issue shall be resolved in compliance proceedings.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent *The Hess Collection Winery*, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to meet and to bargain collectively in good faith, as defined in section 1155.2(a) of the Agricultural Labor Relations Act (Act), with the United Food and Commercial Workers Local 1096, Fresh Fruit & Vegetable Workers, AFL-CIO & CLC (UFCW) as the certified exclusive bargaining representative of its agricultural employees; and

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the 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) Meet and bargain collectively in good faith with the UFCW, as the exclusive collective bargaining representative of its agricultural employees and, if agreement is reached, embody such agreement in a signed contract;

(b) Make whole its agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFCW, 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 May 26, 1999, until March 31, 2000, unless it is determined that Respondent commenced good faith bargaining on

a later date, in which case the period shall end on such later date.

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

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

(e) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purposes set forth in this Order;

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when requested by the Regional Director, to all agricultural employees in its employ at any time during the period from May 26, 1999, until May 25, 2000;

(g) Post copies of the attached Notice, in all appropriate languages, for 60 days, in conspicuous places on its

property, the exact period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed. Pursuant to the authority granted under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of the attached Notice;

(h) Arrange for a representative of Respondent or Board agents 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(s) shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all piece-rate employees in order to compensate them for time lost at this reading and during the question-and-answer period; and

(i) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

IT IS FURTHER ORDERED that, for the purpose of the certification bar to an election, the certification of the United Food And Commercial Workers Local 1096, Fresh Fruit & Vegetable Workers, AFL-CIO & CLC (UFCW) as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year commencing on the date on which Respondent commences to bargain in good faith with the UFCW.

DATED: February 26, 2001

GENEVIEVE A. SHIROMA, Chairwoman

GLORIA A. BARRIOS, Member

HERBERT O. MASON, Member

Member Ramos Richardson, Concurring and Dissenting:

I concur with my colleagues' decision, with the exception of the beginning date of the bargaining makewhole period. I would begin the makewhole period on May 25, 1999, the date of the Employer's letter announcing its intention to refuse to bargain in order to seek judicial review of the certification. In my view, this is the proper date because an employer's actual refusal to bargain is the legally significant act, not the receipt of the union's demand to bargain. Until the employer refuses to bargain, there can be no unfair labor practice. While it is true that the Board over its history has not been consistent on identifying the trigger for the onset of the makewhole period, I note that the most recent Board decisions, and therefore the most authoritative, have utilized the date of the employer's refusal to bargain as the beginning

date of the makewhole period. (*Scheid Vineyards, Inc.* (1993) 19 ALRB No. 1; *Ace Tomato Co., Inc.* (1994) 20 ALRB No. 7; *San Joaquin Tomato Growers* (1994) 20 ALRB No. 13.)

Moreover, absent undue delay in responding to the union's request to bargain, using the date of the refusal better recognizes the common sense realities of an incipient bargaining relationship. For example, it is to be expected that an employer who receives a demand to bargain would consult with its counsel before responding, even where the employer is ready and willing to begin bargaining. An employer who is considering engaging in a technical refusal to bargain would not only consult with counsel before responding but would most likely refer the demand to the attorney for response. I believe a rule that recognizes these realities better meets the tests of fairness and common sense that should inform all Board decisions. In this case, the Employer evidenced its intent to refuse to bargain in a letter dated May 25, 1999, just four days after the date of the Union's demand letter. This response was unusually prompt and caused no unreasonable delay in initiating the technical refusal to bargain process. Therefore, I would begin the makewhole period on that date.

DATED: February 26, 2001

IVONNE RAMOS RICHARDSON, Member

CASE SUMMARY

The Hess Collection Winery (UFCW)	27 ALRB No. 2 Case No. 99-CE-23-SAL

Background

Following an election in which the UFCW was selected as the exclusive representative of the Employer's agricultural employees, the Employer filed election objections alleging: improper designation of the bargaining unit; coercion of employees by supervisors; misconduct by board agents; cumulative interference with a fair election by the union and by the board agents; and UFCW's lack of status as a labor organization under the ALRA. The Board dismissed the objections without a hearing, for failure to establish a prima facie case. After the Board issued a certification of the UFCW, the Employer refused to bargain in order to test the certification by judicial review. Thereafter, General Counsel filed a complaint alleging that the Employer had refused to recognize or bargain with the UFCW and seeking a bargaining makewhole remedy to compensate the employees for economic losses suffered as a result of their employer's refusal to bargain. On March 31, 2000, the Employer announced its intention to drop the challenge to the certification and to bargain with the UFCW.

The case came before the Board by a Stipulation and Statement of Facts under which the parties agreed to waive their right to a hearing.

Board Decision

The Board found that the Employer's willingness to discuss changes in working conditions with the UFCW during the course of its technical refusal to bargain, which was the Employer's legal duty, and the Employer's decision, after ten months, not to pursue judicial review, were not probative of the Employer's good faith at the time it technically refused to bargain with the Union.

The Board also found that the Employer's election objections were not a reasonable basis to challenge the Union's certification in court. The objection to the scope of the bargaining unit was unreasonable given the mandatory provisions of the law and the absence of evidence that the designated unit was improper. The objections alleging

coercion of employees by supervisors were unreasonable because, although the evidence shows that supervisors were briefly in the voting area, the Employer failed to provide evidence of coercive conduct. The objection alleging Board agent misconduct was unreasonable because the Employer's evidence shows that the Board agents acted properly in excluding supervisors from the polling area once they became aware of their status. The objection alleging that the Union and the Board agents interfered with a fair election is not reasonable because it is well-settled law that there is no need to consider the cumulative effect of election objections which, individually, fail to state a prima facie case. The objection that the UFCW is not a labor organization under the ALRA is unreasonable because the ALRA definition of "labor organization" is not limited to unions that represent agricultural workers exclusively.

The Board rejected the Employer's argument that the bargaining makewhole remedy would be too speculative because, under well-established law, this remedy may be imposed in technical refusal to bargain cases despite the lack of bargaining history between the parties. The Board emphasized that any delay in bargaining undermines employee free choice.

After analyzing the parties' arguments in light of the relevant case law, the Board concluded that the Employer had not raised important issues concerning whether the election was conducted in a manner that protected employee free choice nor had the Employer raised any novel legal issues. The Board concluded that since the Employer's litigation posture was not reasonable within the meaning of *J.R. Norton Co. v. ALRB*(1979) 26 Cal.3d 1 and its progeny, a bargaining makewhole remedy should be included in its remedial Order.

The Board clarified its position with regard to the beginning of the makewhole period in a technical refusal to bargain case. Makewhole shall begin on the date the employer receives the union's request to bargain or, in the case of a written request where the date of receipt is unknown, three working days after the mailing of the request. Consistent with its normal practice, the Board ended the makewhole period on the date that good faith

bargaining commences. Accordingly, in the present case, the Board ordered that the makewhole period extend from May 26, 1999, until March 31, 2000, unless it is determined that the Employer commenced good faith bargaining on a later date.

Concurrence and Dissent

Member Ramos Richardson concurred in the decision of the Board, with the exception of the beginning of the makewhole period. Member Ramos Richardson would begin the makewhole period on May 25, 1999, the date of the Employer's letter announcing its intention to refuse to bargain in order to seek judicial review of the certification. In her view, this is the proper date because an employer's actual refusal to bargain is the legally significant act, not the receipt of the union's demand to bargain. In addition, she believes that, absent undue delay in responding to the union's request to bargain, using the date of the refusal better recognizes the common sense realities of an incipient bargaining relationship.

***