STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

THE HESS COLLECTION WINERY,	)	
	)	
Respondent,	)	Case No. 99-CE-23-SAL
	)	
and	)	31 ALRB No. 3
	)	(27 ALRB No. 2)
UNITED FOOD & COMMERCIAL	)	
WORKERS LOCAL 1096,	)	September 1, 2005
AFL-CIO & CLC,	)	
	)	
Charging Party.	)	
	)	

DECISION AND ORDER

On July 14, 2005, Administrative Law Judge (ALJ) Douglas Gallop issued a ruling in the above-referenced case, granting Respondent Hess Collection Winery's (Hess) Motion to Dismiss Makewhole Specification. The motion to dismiss was filed shortly after the prehearing conference, where the ALJ appeared to reject the methodology utilized in the specification. In his ruling, the ALJ found the General Counsel's bargaining makewhole specification to be punitive, arbitrary, and counter to the purposes of the Agricultural Labor Relations Act (ALRA). He therefore dismissed the specification, with leave to submit a new specification utilizing a more appropriate methodology. The General Counsel (G.C.) and the Charging Party, United Food & Commercial Workers Local 1096, AFL-CIO & CLC (UFCW), filed timely appeals of the dismissal.

DISCUSSION

The G.C. alleged in the specification that there are no comparable contracts, on the basis that the UFCW has no contracts with wine grape growers. This is based on the view that under Board precedent, namely, *J.R. Norton Company, Inc.* (1984) 10 ALRB No. 42, only contracts negotiated by the same union can be "comparable." Instead, the specification based makewhole on the difference between the averages of the parties' first two wage and benefit proposals. Calculations under this formula resulted in a figure owing of $476,000 for 72 employees. Hess objected to the formula and instead suggested using contracts negotiated by the United Farm Workers of America (UFW) with wine grape growers that it claims are comparable. Hess estimated that this would result in an amount owing of between $32,000 and $62,000.

The ALJ rejected the notion that the definition of "comparable contracts" includes only those negotiated by the same union. Without ruling whether the contracts submitted by Hess were indeed "comparable," the ALJ noted that their use would translate into an estimated 6 percent to 15 percent payment to the employees, which the ALJ found to be a reasonable expected one-year increase under a union contract.[1] In contrast, the ALJ pointed out that the figure sought by the G.C. would translate into a 50 percent to 120 percent payment, depending on job classification. In the ALJ's view, such a high figure would be punitive on its face given wages earned by similar employees in the region, and would exceed the remedial purpose of reimbursing employees for the losses they incurred as a result of delays in bargaining.

[1] The makewhole period in this case is ten months.

In addition, the ALJ found the G.C.'s formula to be arbitrary, stating that parties' opening positions on wages and benefits during negotiations frequently have little relation to what they actually plan to settle for. Lastly, the ALJ stated that the G.C.'s methodology, if accepted, would in the future discourage good faith bargaining by inducing unions to inflate their demands, and employers conversely to reduce their initial offers, with an eye toward their future use in a bargaining makewhole specification. The ALJ found that such incentives would be contrary to one of the primary functions of the ALRA, which is to foster good faith collective bargaining. In light of the above, the ALJ concluded that the specification was facially unreasonable and did not warrant conducting a hearing.

The G.C. contends that Board precedent requires using contracts negotiated by the same union when calculating bargaining makewhole, relying primarily on the following language from *J.R. Norton Company, Inc.*, *supra*, 10 ALRB No. 42 at fn. 9: "it is generally sufficient for General Counsel to present contracts negotiated by the same union and covering operations in at least some of the same commodities and location(s) as that of the respondent and in effect during the makewhole period." Further, the G.C. contends that contracts negotiated by other unions are not appropriate because different unions have different objectives and goals, as well as different approaches to achieving those objectives and goals.[2]

[2] UFCW's appeal mirrors General Counsel's argument that reliance on contracts negotiated by a different union is inappropriate. Charging Party also suggests that the dismissal of the specification in effect repudiates the mandatory mediation scheme provided by California Labor Code section 1164, et seq. However, this assertion is neither explained nor is its basis apparent, therefore it is not addressed in this decision.

The G.C. also states that the ALJ erred in not conducting a full evidentiary hearing before evaluating the merits of the formula used in the specification.

There is no question that Board precedent reflects that the preferred method of calculating bargaining makewhole is to utilize comparable contracts negotiated by the same union. This is reflected not only in *J.R. Norton Company, Inc.*, *supra*, 10 ALRB No. 42, but also in numerous other Board decisions. (See, e.g., *Martori Brothers* (1985) 11 ALRB No. 26; *Robert H. Hickam* (1983) 9 ALRB No. 6; *Kyutoku Nursery, Inc.* (1982) 8 ALRB No. 73.) While normally several comparable contracts, if available, are averaged in order to come up with a makewhole wage rate, the Board has approved the use of a single contract negotiated by the same union, to the exclusion of contracts negotiated by other unions, noting the differing goals and approaches of unions. (*Kyutoku Nursery, Inc.*, *supra*.) However, we do not believe that a fair reading of Board precedent, including the passage from *J.R. Norton* cited by the G.C., indicates that contracts negotiated by other unions would be inappropriate to consider, even where there are none to choose from negotiated by the same union.

It is important to note that the comparable contract approach was developed and approved at a time when it was common to have numerous contracts negotiated by the same union that might be considered "comparable."[3] It is also important to point out that the Board allows for alternative formulas where "comparable" contracts are not available, as

[3] In deciding to modify the Adam Dairy makewhole formula, and move from a wage-fringe benefit 78-22 percent ratio to a comparable contract approach for computing the value of fringe benefits, the Board cited the greater availability of comparable agricultural collective bargaining agreements. (*J.R. Norton, supra*, 10 ALRB No. 42 at p. 19.) The UFW was a party to approximately 175 contracts at that time, and the G.C. used the eight most comparable of the 30-35 agreements the UFW negotiated in the area with companies of varying sizes.

reflected in California Code of Regulations, title 8, section 20291, subdivision (b)(3), which states that a makewhole specification shall explain the basis for the calculation, including the "comparable contracts or other economic measures upon which it is based".[4] As recognized by the courts, the Board's task is to arrive at a reasonable approximation of what the employees lost as a result of the employer's refusal to bargain in good faith, not to arrive at a perfect calculation of the loss. (*Holtville Farms, Inc.* v. *ALRB* (1985) 168 Cal. App.3d 388, 393.) Consequently, it would not be inappropriate to consider contracts negotiated by other unions.

We hold, therefore, that in determining if a contract should be utilized in formulating a bargaining makewhole specification, whether the union at issue was a party to the contract may be weighed, along with the numerous other factors cited in previous decisions, such as geographic area, type of industry, the types of crops grown, nature of the work force, size of the employer, and time period when the contract was signed. Thus, while the fact that a different union was a party to the contract would be a factor to be considered, the numerous other relevant factors may be analyzed to determine if the contract nevertheless is comparable, particularly in the absence of contracts negotiated by the same union.[5]

[4] The Board's regulations are codified at Title 8, California Code of Regulations, section 20100, et seq.

[5] In so holding, the Board expresses no opinion on how the UFW contracts offered by Hess would fare in such an analysis.

As noted above with reference to California Code of Regulations, title 8, section 20291, bargaining makewhole calculations may be based on reasonable methodologies other than the comparable contract model. Therefore, there remains the question of whether the G.C.'s proffered formula is nonetheless sufficiently reasonable on its face to warrant a hearing. If the ALJ had granted the opportunity for a hearing, Hess would have had the burden of showing the formula to be arbitrary, unreasonable, or inconsistent with Board precedents, or that some other method of determining the makewhole amount is more appropriate. (*Kyutoku Nursery, Inc., supra,* 8 ALRB No. 73; see, also, Cal. Code Regs., tit. 8, §20292, subd. (b).) By his ruling, the ALJ has found this burden to have been carried as a matter of law, without the need for the resolution of any disputed factual issues. We find the ALJ's analysis on this point convincing.

We agree with the ALJ's observation that parties' early bargaining proposals may or may not bear any relation to what they might agree to at the conclusion of good faith negotiations. In addition, where the employer has been found to have bargained in bad faith or unlawfully delayed negotiations, there is another reason to question the propriety of utilizing the parties' bargaining proposals. In *J.R. Norton Company, Inc., supra*, 10 ALRB No. 42, the employer argued makewhole should be based on a subsequently negotiated agreement of the parties if and when one is entered into, and if no agreement is reached, then the Board should consider the parties' bargaining positions during negotiations. (*Id*., at p. 14). The Board found reliance on a subsequent agreement to be inappropriate and unreasonable, as the employer's bad faith bargaining or unlawful delay in bargaining likely would cause a union to suffer a loss of

support, and thus cause the union to bargain from a weakened position. Using proposals from such negotiations might allow employers to benefit from their unlawful act. In contrast, comparable contracts or other measures that were not tainted by bad faith bargaining would provide a more fair and equitable measure of what agricultural employees would have earned but for their employer's bad faith bargaining or unlawful delay in bargaining.

More importantly, we share the ALJ's fear that the use of bargaining proposals would discourage good faith bargaining in the future by providing an incentive for both sides to present extreme proposals at the outset of bargaining. In making a monetary assessment of makewhole "we must also strive to encourage the practice of collective bargaining since it is clear that employees lose far more than wages when there is no contract as a result of a refusal to bargain." (*Adam Dairy dba Rancho Dos Rios* (1978) 4 ALRB No. 24, at p. 9.) Thus, a fundamental goal in providing a remedy is to create an environment for future good faith bargaining and avoid further delays. Or, as stated in *J.R. Norton Company, Inc.*, *supra*, 10 ALRB No. 42, the Board views its mission in awarding makewhole to "foster the twin purposes of compensating employees for their losses and of encouraging the practice of collective bargaining." (*Id.*, at pp. 2-3.) A remedy that encourages parties to proffer extreme proposals with an eye toward the possible calculation of makewhole would not serve to effectuate the purposes of the ALRA.

In rejecting the G.C.'s methodology in this case it is important to acknowledge that the Board's prior cases have provided little guidance on the use of contracts negotiated by other unions. In addition, the decline in the number of contracts in the agricultural industry, coupled with the lack of any well-defined alternatives to the comparable contract methodology, has placed the regional offices in a difficult bind in formulating bargaining makewhole specifications.

ORDER

In accordance with the discussion above, the bargaining makewhole specification is hereby DISMISSED, with leave to file a new specification.

DATED: September 1, 2005

GENEVIEVE SHIROMA, Chair

CATHRYN RIVERA-HERNANDEZ, Member

DANIEL ZINGALE, Member

CASE SUMMARY

HESS COLLECTION WINERY
(UFCW, Local 1096)

31 ALRB No. 3
Case No. 99-CE-23-SAL

Background

On July 14, 2005, Administrative Law Judge (ALJ) Douglas Gallop issued a ruling in the above-referenced case, granting Respondent Hess Collection Winery's (Hess) Motion to Dismiss Makewhole Specification. The General Counsel (G.C.) alleged in the specification that there were no comparable contracts, on the basis that the Charging Party, United Food & Commercial Workers Local 1096, AFL-CIO & CLC (UFCW) has no contracts with wine grape growers. Instead, the specification based makewhole on the difference between the averages of the parties' first two wage and benefit proposals. Hess objected to the formula and instead suggested using contracts negotiated by the United Farm Workers (UFW) with wine grape growers that it claims are comparable. The motion to dismiss was filed shortly after the prehearing conference, where the ALJ appeared to reject the methodology utilized in the specification. In his ruling, the ALJ found the G.C.'s bargaining makewhole specification to be punitive, arbitrary, and counter to the purposes of the Agricultural Labor Relations Act. He therefore dismissed the specification, with leave to submit a new specification utilizing a more appropriate methodology. The G.C. and the Charging Party, UFCW, filed timely appeals of the dismissal.

Board Decision

The Board affirmed the dismissal of the specification, holding that in determining if a contract should be utilized in formulating a bargaining makewhole specification, whether the union at issue was a party to the contract may be weighed, along with the numerous other factors cited in previous decisions, such as geographic area, type of industry, the types of crops grown, nature of the work force, size of the employer, and time period when the contract was signed. Thus, while the fact that a different union was a party to the contract would be a factor to be considered, other relevant factors may be analyzed to determine if the contract nevertheless is comparable, particularly in the absence of contracts negotiated by the same union. While emphasizing that alternatives to the comparable contract model also might be reasonable, the Board agreed with the ALJ that the methodology chosen in this case was unreasonable on its face and did not warrant a hearing. In particular, the Board agreed with the ALJ's view that the use of bargaining proposals would discourage good faith bargaining in the future by providing an incentive for both sides to present extreme proposals at the outset of bargaining.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
THE HESS COLLECTION WINERY,	)	**CASE NO. 99-CE-23-SAL**
	)	**(27 ALRB No. 2)**
Respondent,	)	
	)	
and	)	**RULING ON RESPONDENT'S**
	)	**MOTION TO DISMISS**
UNITED FOOD & COMMERCIAL WORKERS LOCAL 1096, AFL-CIO & CLC,	)	**MAKEWHOLE SPECIFICATION**
	)	
Charging Party.	)	

The Agricultural Labor Relations Board (ALRB or Board) ordered, as part of the remedy in (2001) 27 ALRB No. 2, that Respondent make whole bargaining unit employees for loss in pay suffered as the result of Respondent's refusal to bargain with the Union. On November 6, 2003, the Board's Visalia Regional Director issued a Makewhole Specification. The parties have been unable to resolve the case, and it is currently set for hearing, commencing on July 19, 2005. A prehearing conference was conducted before the undersigned on July 5, 2005, wherein the issues presented were thoroughly discussed. Respondent subsequently filed a motion to dismiss the specification, and the Regional Director submitted a response. Based on the pleadings, the correspondence in the case file, and the parties' representations at the prehearing conference, the motion to dismiss is hereby granted.

The parties agree that the traditional methodology for calculating bargaining makewhole is the difference between the wages and benefits paid under comparable contracts and those paid by the respondent during the makewhole period. The makewhole specification alleges there are no comparable contracts, on the sole basis that the Union has not negotiated any such agreements. The Regional Director contends this is a requirement for comparable contracts, under the Board's decision in *J.R. Norton Company, Inc.* (1984) 10 ALRB No. 42, but cites no language in that decision establishing such a requirement.

Instead, the specification bases makewhole on the difference between the average of the Union's and Respondent's first two wage proposals during subsequent negotiations, as supplemented by fringe benefits, and the wages and benefits paid by Respondent. The specification originally sought about $476,000.00 in makewhole, for 72 employees. At the prehearing conference, however, the Regional Director stated his intention to expand the makewhole class to include employees of an alleged contractor of Respondent. It is undisputed that many other wage and fringe benefit proposals were made after those used to calculate makewhole.

Respondent contends that there are two comparable contracts, and potentially an additional five. The two agreements cited by Respondent are in its' immediate geographic area, in the same industry and cover employees performing the same type of work as the bargaining unit workers herein. These contracts were negotiated by the United Farm Workers of America, rather than the Union. At the prehearing conference, the Regional Director was unable to cite any reason for finding these contracts not

comparable other than having been negotiated by a different union. The Union's President generally alleged that the United Farm Workers may have "different" objectives, but did not, as contended in the Regional Director's brief, say he would have rejected the contracts submitted by Respondent.

Under the Board's traditional methodology of comparing the average wages and benefits of the comparable contracts with Respondent's wages and benefits during the makewhole period, Respondent estimates that the makewhole would be about $62,000.00. If the average percentage wage increase of the comparable contracts was used as the standard, the figure would be about $32,000.00. Respondent estimates that the above figures would represent from about 6% to 15% of the wages earned by unit employees during the makewhole period, depending on job classification, under the traditional formula, and about half that on an average wage increase comparison. The figures in the specification represent about eight times the wages vs. wages calculation. In the undersigned's opinion, the 6% to 15% figure is not an unreasonable one-year wage increase under a union contract, particularly since Respondent has a medical and pension plan for its' employees.

Makewhole relief is a compensatory remedy that reimburses employees for the losses they incur as the result of delays in the collective bargaining process. *George Arakelian Farms, Inc. v. ALRB* (1989) 49 Cal.3d 1279 [265 Cal.Rptr. 162]. It is not punitive in nature. The specification appears to be seeking payment of about 50% to 120% of the employees' wages during the makewhole period, depending on job classification. In any event, it is punitive on its' face, given the wages earned by similar

employees in Respondent's geographic area. The Regional Director's eleventh hour request to expand the makewhole class, an issue that could and should have been litigated in the underlying proceeding, bolsters the impression that this prosecution has become punitive.

The makewhole specification is also totally arbitrary, inasmuch the parties' opening positions on wages and fringe benefits during negotiations frequently have little to do with what they plan to settle for. If anything, one would think that the parties' last wage and fringe benefit proposals would be the closest to where they might reach agreement. Even so, in the absence of an agreement, the subsequent proposals would also represent a fictitious basis upon which to base makewhole.

Most importantly, however, the methodology serves to discourage good faith bargaining, thus running counter to an essential purpose of the Agricultural Labor Relations Act. If this standard is approved as an alternate to comparable contracts, agricultural employers will predictably reduce their wage offers in negotiations, and unions will inflate their demands, both looking over their shoulders for potential ramifications in makewhole proceedings. One of the primary functions of the Agricultural Labor Relations Act is to foster collective bargaining, and this methodology will clearly damage that process. Therefore, even if the Union's representation that it would not have accepted the terms of the United Farm Worker contracts was accepted, the undersigned would still reject the use of bargaining proposals as an appropriate methodology. If the Regional Director actually accepts this as a reason to reject the

contracts, he will still have to find a more appropriate methodology, absent Board approval of the existing makewhole specification.

While it would appear that the traditional wages vs. wages comparison, using comparable contracts, would be the most appropriate methodology, the undersigned is willing to consider other alternatives, given the facts of this case, but sees no purpose in conducting a hearing on the Regional Director's methodology until it is approved by the Board. Accordingly, the Makewhole Specification is hereby DISMISSED, with leave to submit a new specification utilizing a more appropriate methodology.

Dated: July 14, 2005

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DOUGLAS GALLOP
Administrative Law Judge, ALRB