STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARTESIA DAIRY, A Sole Proprietorship,	)	Case No. 07-CE-28-VI
	)	
Employer,	)	33 ALRB No. 6
	)	(33 ALRB No. 3)
and	)	(32 ALRB No. 3)
	)	
UNITED FARM WORKERS OF AMERICA,	)	(December 27, 2007)
	)	
Petitioner.	)	

DECISION AND ORDER

This is a technical refusal to bargain case that comes before the Agricultural Labor Relations Board (ALRB or Board) on a Stipulation of Facts under which the parties agreed to waive their rights to a hearing provided by Labor Code section 1160.2.[1] In addition, there are disputed facts and exhibits offered by Artesia Dairy (Employer). These facts and exhibits, discussed below, relate to air quality and fugitive dust emission mitigation requirements. They are offered in support of the Employer's position on the voting eligibility of John Flores. While the parties have waived objections concerning foundation of the disputed exhibits, the General Counsel and the United Farm Workers of America (UFW) object to the admissibility of the facts and exhibits on the basis of relevance and on the basis that this evidence was not introduced or litigated in the hearing on challenged ballots.

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

A petition for certification in the above-entitled case was filed on February 28, 2006, and the election was held on March 7, 2006. The initial tally of ballots showed 25 votes for Petitioner UFW, 24 votes for "No Union," and 15 unresolved challenged ballots. As the number of challenged ballots was outcome determinative, the Regional Director (RD) conducted an investigation, which resulted in a challenged ballot report issued on June 12, 2006. The Employer filed exceptions to the report. On August 2, 2006, the Board issued a decision (*Artesia Dairy* (2006) 32 ALRB No. 3) sustaining two challenges, overruling one, and setting twelve for hearing.

During the hearing, the parties stipulated that David Rose and Victor Vera are supervisors whose challenges should be sustained. On January 10, 2007, the Investigative Hearing Examiner (IHE) issued his decision on the remaining challenges. In addition to the two stipulated sustained challenges, the IHE recommended that the challenge to John Verkaik be sustained. He recommended that the remaining nine challenges be overruled.[2] The Employer filed an exception to the overruling of the challenge to Jesus Mesa Martinez. The UFW filed exceptions regarding the other eight challenges overruled by the IHE. No exceptions were filed regarding John Verkaik.

In *Artesia Dairy* (2007) 33 ALRB No. 3, the Board made the following findings and conclusions. The Board affirmed the IHE's recommendation to overrule the challenges to Jesus Mesa and Rosa Pacheco, finding that Mesa would have worked but for his work-related injury and that Pacheco performed a regular and substantial amount

[2] The Board earlier affirmed the Regional Director's recommendation to overrule the challenge to the ballot of Alfredo Rodriguez, as there was no exception filed to that recommendation in the Regional Director's Challenged Ballot Report. (See *Artesia Dairy* (2006) 32 ALRB No. 3.)

of her work for the Employer's farming operation. The Board sustained the challenges to Hector Vera and Sergio Rey, finding that the former was a part-time supervisor and the latter a full-time supervisor. The Board sustained the challenges to Kevin, Kasey, and Kannen Avila, nephews and foster children of the owners of the dairy, finding that they were the functional equivalent of the owners' children during the time in question and thus ineligible under Regulation 20352.[3] The Board sustained the challenge to Angelita Pacheco, finding that she is primarily a domestic worker for the Employer/owner, a sole proprietorship, who did not spend a substantial amount of her time engaged in agricultural work. The Board sustained the challenge to John Flores, finding that he solely performed decorative landscaping work without any operational connection to the dairy and, thus, his work did not constitute secondary agriculture because it was not incidental to or in conjunction with the farming operation. As a result of the Board's decision, in conjunction with its earlier decision at 32 ALRB No. 3, of the original 15 challenged ballots, 3 were overruled and 12 were sustained.

On May 14, 2007, the RD issued a revised tally of ballots, showing 27 votes for the UFW and 25 votes for No Union. On the same date, the Executive Secretary issued a certification of representative making the UFW the exclusive bargaining representative of the agricultural employees of the Employer. Also on May 14, 2007, the Employer's counsel sent a letter addressed to the Executive Secretary, the General Counsel, the RD, and the UFW announcing the Employer's intent to engage

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

in a technical refusal to bargain in order to seek judicial review of the underlying Board decision reported at 33 ALRB No. 3.

The Board, after consideration of the stipulation of the parties and their briefs, issues this Decision and Order. Specifically, the Board finds no basis for reconsidering its decision in *Artesia Dairy* (2007) 33 ALRB No. 3. In addition, for the reasons set forth below, the Board finds that the bargaining makewhole remedy is not appropriate in this case.

DISCUSSION

Relitigation of Matters Determined in Representation Proceedings

This Board has consistently followed the practice of the National Labor Relations Board (NLRB) in proscribing the relitigation in unfair labor practice proceedings of matters previously resolved in representation proceedings, absent a showing of newly discovered or previously unavailable evidence, or other extraordinary circumstances. (*San Joaquin Tomato Growers, Inc.* (1994) 20 ALRB No. 13; *Limoneira Company* (1989) 15 ALRB No. 20; *Pleasant Valley Vegetable Co-op* (1986) 12 ALRB No. 31; *Adamek & Dessert, Inc.* (1985) 11 ALRB No. 8; *Ron Nunn Farms* (1980) 6 ALRB No. 41.)

In asking the Board to reconsider its decision in 33 ALRB No. 3, the Employer argues that the Board erred in resolving several close questions of fact and law. Simply arguing that the previous case was wrongly decided does not present "extraordinary circumstances." If this were true, it would be the proverbial "exception that swallowed the rule." In the rare instances where the Board has reconsidered an underlying representation

decision based on extraordinary circumstances it has been where the Board finds a manifest error in the prior decision. (See *T. Ito & Sons Farms* (1985) 11 ALRB No. 36.) In this instance, we continue to find our previous decision to be based on sound factual findings and conclusions of law.

The Employer also offers new evidence regarding the eligibility of John Flores. In 33 ALRB No. 3, the Board concluded that Mr. Flores, who mowed a large lawn area on the dairy property (as well as a smaller area in front of the dairy owners' home), was not an agricultural employee. There was no evidence introduced at the hearing that the lawn area served any operational purpose at the dairy, or was anything other than decorative. Citing pertinent provisions of the Code of Federal Regulations defining "agriculture" under section 3(f) of the Fair Labor Standards Act (FLSA), [4] the Board found that the work, while on a farm, was not "incidental to or in conjunction with" the dairy operations.

The Employer now offers exhibits which purportedly show that the lawn area was "incidental to or in conjunction with" the dairy operations because it was used to control dust pursuant to air pollution control requirements. As a preliminary matter, we note that the exhibits fail to reflect whether the purpose of the lawn area is to comply with air pollution mitigation requirements. More importantly, the date of the exhibits reflects that they all were available to the Employer prior to the hearing in the representation case. Nor is there any showing that the exhibits were newly discovered. Obviously, if the purpose of the lawn area

[4] The definition of "agriculture" in section 1140.4, subdivision (a) of the ALRA is identical to that in section 3(f) of the FLSA, and subdivision (b) specifically binds the Board to the section 3(f) definition.

was to mitigate dust, the pertinent regulatory requirements were known to the Employer at the time of hearing. Lastly, we note that the provisions of the Code of Federal Regulations relied on in determining that the evidence did not show that the lawn area was "incidental to or in conjunction with" the dairy operations were in existence for many years prior to the hearing. Thus, there can be no claim of new authority or an intervening change in law.

Having found no basis for relitigating any of the issues resolved in the underlying representation proceeding, the Board finds that the Employer's admitted refusal to bargain is a violation of Labor Code section 1153, subdivisions (e) and (a). Consequently, a cease and desist order and standard notice remedies are appropriate and are set forth in the Order below. The remaining issue is the appropriateness of the bargaining makewhole remedy.

The Appropriateness of the Bargaining Makewhole Remedy

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.

Rarely is there direct evidence of good or bad faith in the pursuit of a technical refusal to bargain. In this case, we find some evidence of good faith in the Employer's early notification to both the UFW and the Board that it would engage in a technical refusal to bargain. (Cf. *Pleasant Valley Vegetable Co-op* (1986) 12 ALRB No. 31.) There is no countervailing evidence in the record. We therefore have no basis for concluding that the technical refusal to bargain has been pursued in bad faith. We now turn to the reasonableness of the Employer's litigation posture.

In applying the test set forth in the *Arakelian* decision, quoted above, the Board has found the bargaining makewhole inappropriate where the case involves novel issues or close questions the resolution of which is determinative of whether the election was conducted in a way that protected the employees' right of free choice. (*Limoneira Company* (1989) 15 ALRB No. 20; *S & J Ranch, Inc.* (1986) 12 ALRB No. 32.) However, in light of the substantial evidence standard of review of the Board's factual findings[5], it should be noted that in the Board's view a close factual question does not in and of itself provide a reasonable litigation posture. While well grounded in the record and in applicable legal principles, the Board's underlying representation decision in the

[5] Labor Code section 1160.8.

present case posed several legal issues requiring a clarification or extension of existing law.

Specifically, the case involved the novel question of whether foster children were the functional equivalent of children, and thus ineligible to vote under Regulation 20352. In addition, the case involved a clarification of the analysis to be applied in determining whether maintenance workers who worked at both the dairy and in the private residences of the owners of the dairy were "agricultural employees." Lastly, the case clarified that to be an "agricultural employee" a gardener's work must have some operational connection to the farm in order to be "incidental to or in conjunction with" the farming operation and, thus, constitute secondary agriculture. The resolution of these issues determined the eligibility of five of the challenged voters that are the subject of the Employer's technical refusal to bargain. Though the Board does not doubt the validity of its conclusions on these issues, they are the type of issues, in light of the margin of victory of only two votes in the election, upon which it is reasonable to seek judicial review. Therefore, we find this is not an appropriate case for awarding the bargaining makewhole remedy.

ORDER

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

1. Cease and desist from:

(a) Failing or refusing to meet and to bargain collectively in good faith, as defined in section 1155.2(a) of the Agricultural Labor Relations Act (Act), with the United Farm Workers of America (UFW) as the certified exclusive bargaining representative of its agricultural employees; and

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

(b) 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;

(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) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when directed by the Regional

Director, to all agricultural employees employed by Respondent during the period from May 14, 2007, until May 13, 2008**;**

(e) 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;

(f) 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 non-hourly employees in order to compensate them for time lost at this reading and during the question-and-answer period; and

(g) 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. Upon request of the Regional Director, provide any records necessary to verify compliance with the terms of this Order.

IT IS FURTHER ORDERED that, for the purpose of the certification bar to an election, the certification of the United Farm Workers of America (UFW) as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year beginning on the date on which Respondent commences to bargain in good faith with the UFW.

DATED: December 27, 2007

IRENE RAYMUNDO, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. The Board found that we did violate the Agricultural Labor Relations Act (Act) by refusing to bargain in good faith with the United Farm Workers of America regarding a collective bargaining agreement.

The ALRB has told us to post and publish this Notice. We shall do what the ALRB has ordered us to do.

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

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the ALRB;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT interfere with, restrain or coerce employees from exercising the rights listed above.

WE WILL bargain in good faith with the United Farm Workers as your collective bargaining representative about a contract governing your wages, hours, and conditions of employment.

DATED: _____ ARTESIA DAIRY, A Sole Proprietorship

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 1642 West Walnut Avenue, Visalia, California. The telephone number is (559) 627-0985.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

ARTESIA DAIRY, a sole proprietorship
(United Farm Workers of America)

33 ALRB No. 6
Case No. 07-CE-28-VI

Background

An election was held on March 7, 2006. The initial tally of ballots showed 25 votes for the Petitioner, United Farm Workers of America, 24 votes for "No Union," and 15 unresolved challenged ballots. As a result of an earlier Board decision (*Artesia Dairy* (2006) 32 ALRB No. 3) on review of the Regional Director's challenged ballot report two challenges were sustained, one was overruled, and twelve were set for hearing. During the hearing, the parties stipulated that two challenged voters were supervisors whose challenges should be sustained. The Investigative Hearing Examiner (IHE) issued a decision recommending that one challenge be sustained and the remaining nine challenges be overruled. The Employer filed an exception to the overruling of one challenge. The UFW filed exceptions regarding the other eight challenges overruled by the IHE. The Board affirmed the IHE's recommendation to overrule the challenges to Jesus Mesa and Rosa Pacheco. The Board sustained the challenges to Hector Vera, Sergio Rey, finding them to be supervisors, to Kevin, Kasey, and Kannen Avila, nephews and foster children of the owners of the dairy, finding that they were the functional equivalent of the owners' children during the time in question and thus ineligible under Regulation 20352, to Angelita Pacheco, finding that she is primarily a domestic worker for the Employer/owner, a sole proprietorship, who did not spend a substantial amount of her time engaged in agricultural work, and to John Flores, finding that he solely performed decorative landscaping work without any operational connection to the dairy and, thus, his work did not constitute secondary agriculture. As a result of the Board's decision, in conjunction with its earlier decision at 32 ALRB No. 3, of the original 15 challenged ballots, 3 were overruled and, thus, were opened and counted, and 12 were sustained. The final tally of ballots showed 27 votes for the UFW and 25 votes for No Union. The Employer engaged in a technical refusal to bargain, precipitating the present unfair labor practice complaint, in order to seek judicial review of the Board's decision at 33 ALRB No. 3.

Board Decision

Consistent with its practice of not relitigating underlying representation decisions in unfair labor practice cases, the Board refused to reconsider its earlier decision and found that the Employer unlawfully refused to bargain with the UFW. The Board rejected the Employer's offer of new evidence regarding John Flores, finding that the proffered evidence was not newly discovered or previously unavailable. Finding that the challenges to the three Avila nephews, Angelita Pacheco, and John Flores presented novel legal issues requiring a clarification or extension of existing law, the Board determined that the bargaining makewhole remedy was not appropriate in this case.

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