STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JOAQUIN TOMATO GROWERS, INC.,	)	Case No. 93-CE-38-VI
	)	(20 ALRB No. 13)
Respondent,	)	(38 ALRB No. 4)
and	)	
	)	38 ALRB No. 12
UNITED FARM WORKERS OF AMERICA,	)	(December 12, 2012)
Charging Party.	)	

DECISION AND ORDER

Background

This case arises out of a technical refusal to bargain engaged in by San Joaquin Tomato Growers, Inc. (Respondent) to test the certification of the United Farm Workers of America (UFW) as the collective bargaining representative of Respondent's agricultural employees. In 1994, the Agricultural Labor Relations Board (ALRB or Board) found Respondent's refusal to bargain violated the Agricultural Labor Relations Act (ALRA), and the Board ordered that bargaining makewhole be paid to the employees for the period July 12, 1993, through September 8, 1994. (*San Joaquin Tomato Growers, Inc*. (1994) 20 ALRB No. 13.) The ALRB's General Counsel (GC) issued a makewhole specification on April 5, 2011. The methodology used to calculate the specification was based on a contract averaging approach developed by U.C. Davis Professor of Agricultural Economics, Philip Martin. ALRB Regional Staff applied Professor Martin's methodology to payroll records for workers employed during the makewhole period. The

calculation gave rise to a makewhole principal amount of $375,407, plus $443,697 in interest[1] for a total of $819,104.

Administrative Law Judge Decision

The Administrative Law Judge (ALJ) conducted a compliance hearing in this matter on July 19 and 20 and August 15, 16, and 19, 2011. On January 10, 2012, the ALJ issued his recommended decision. The ALJ found the General Counsel's (GC's) contract averaging methodology as expressed in the makewhole specification to be unreasonable for a number of reasons, and chose to use a comparable contracts approach to determine the makewhole remedy. The ALJ rejected the Respondent's preferred comparable "contract," a 1998 agreement between Respondent and the UFW, because it was preceded by Respondent's unlawful refusal to bargain, was reached too far outside the makewhole period, and was unexecuted. The ALJ went on to find that a 1995 contract between the UFW and Meyer Tomato in the Visalia area was an appropriate measure of makewhole. The ALJ recommended that the workers receive an increase of 2.5 percent of their gross wages for the period July 12, 1993 to July 11, 1994, and an increase of 5.4 percent for the remainder of the makewhole period. The ALJ included no award for fringe benefits. The ALJ recommended calculating interest "as usual;" however, he also stated that if the principal to be paid was close to the amount in the

[1] As calculated through the first quarter of 2011. The makewhole specification issued on April 5, 2011, indicates that interest on the principal award was calculated in accordance with *E.W. Merritt Farms* (1988) 14 ALRB No. 5. That is, interest was applied to the makewhole award for each quarter using a simple interest formula.

GC's makewhole specification, interest should be cut off in 1997 based on the agency's mixed signals as to how it was going to proceed with the case.

Board Decision and Order (2012) 38 ALRB No. 4

The Board upheld the ALJ's rejection of the 1998 agreement between the parties as an appropriate comparable contract for the purpose of calculating makewhole; however, the Board rejected the ALJ's use of the 1995 Meyer Tomato/Visalia contract as a comparable contract. The Board reversed the ALJ's conclusion that the GC's contract averaging methodology was unreasonable on its face. Finding that Board precedent clearly permitted the Board to use alternate formulas for computing makewhole when there are no comparable contracts available (*Hess Collection Winery* (2005) 31 ALRB No. 3; *Adam Dairy* (1978) 4 ALRB No. 24: *Abatti Farms, Inc.* (1990) 16 ALRB No. 17), the Board found the GC's contract averaging approach to be reasonable under the circumstances of this case. The Board made modifications to the methodology, namely by eliminating a 5 percent increase for miscellaneous fringe benefits (holiday, vacation, etc.) because the contracts included in the averaging triggered such benefits only after more hours were worked than are contained in a season for hand-picked tomatoes, and by adding five additional UFW contracts to the list of those to be averaged. In addition, the Board found that the GC made errors in the application of the methodology to the payroll records, and made appropriate adjustments. Modified figures to be applied to the payroll records were as follows: a 2.52 percent increase for 1993 and a compounded 2.25 percent increase for 1994. Adjusted medical and pension benefits as dollar per hour worked were: Medical $0.86; Pension $0.09. Based on the typical provision in the

contract sample, the Board also directed that, with respect to paid holidays, where it could be verified that a worker worked five days in the two weeks preceding either the July 4 or Labor Day holiday, that worker would be given the equivalent of eight hours pay. With respect to interest, the Board found in light of the unique circumstances presented by extraordinary delays, the award of interest would be contingent on the employees being located.

The Board remanded the matter back to the Region for the issuance of a revised makewhole specification calculated in accordance with the Board's order. Parties had an opportunity to file an answer to the revised specification, but the Board limited the claims that could be raised in any answer to claims that the revised specification did not fully or accurately reflect the Board's order and/or that mathematical errors were made in applying the Board's formula to the payroll records.

General Counsel's Revised Makewhole Specification and Respondent's Answer to Revised Makewhole Specification

The GC issued a revised makewhole specification on October 16, 2012, and the Respondent filed its answer to the specification on November 5, 2012. The GC's revised makewhole award is $229,663, with interest in the amount of $294,027 (as calculated through September 30, 2012).

Because of the issues identified below, the Board is unable to issue a final Decision and Order in this matter. Rather, the Board will remand the revised specification back to the GC with instructions to conform it to the discussion below:

1. Average medical benefit contribution

The GC argues that the Board's mathematical calculation with respect to the average medical benefit contribution was erroneous because the Board used the wrong figures from three of the collective bargaining agreements averaged. The GC argues that the mathematical errors reduced the makewhole award by $28,749, thus, the revised award should actually be $242,222 with interest in the amount of $310,187. The collective bargaining agreements (CBAs) in question are a) Coachella Valley Citrus (September 14, 1993); b) J&L Farms, Inc. (November 1, 1993); and c) Travers Orchards (July 1, 1994).

The Board has carefully reviewed all three contracts, which were submitted as exhibits during the hearing, and finds as follows:

With respect to the Coachella Valley Citrus contract, the Board agrees that the medical benefit cost per hour worked should be $1.16 as the GC proposes. This contract was renewed for the period 1993-1996, but figures reflecting the medical benefits from the previous contract remained in the document, and the Board mistakenly used the previous contract's benefit amount. The Board will re-average the medical benefit contribution using $1.16 instead of $0.90 for the Coachella Valley Citrus contract.

The Board finds that Article 29 on page 24 of the J&L Farms, Inc. contract indicates that the company agreed to contribute $0.92 per hour, which is the figure used by the Board in its decision, and not $0.98 as the GC claims. We therefore dismiss this recommended adjustment by the GC.

With respect to the Travers Orchards contract, the GC argues that the figure of $0.85 for medical benefit contributions should have been averaged into the Board's calculations, while the Board used zero. The Board averaged in a figure of zero for the medical benefit in this contract because the $0.85 contribution applies only to employees who have achieved "Master Seniority Status" (see page 23, Article 29, section A. 1 of the CBA). Master Seniority is explained in Article 4 B, section 3 of the CBA. Master Seniority applies to permanent workers who work continuously through the company's three operating seasons (pruning, thinning and picking), and is acquired after the employee has worked fourteen (14) days in his or her third consecutive operating season. No amount was shown for a medical benefit in the Board's decision in *San Joaquin Tomato Growers, Inc*. (2012) 38 ALRB No. 4 because it was highly speculative as to whether any of the tomato harvesters at SJTG would have obtained the necessary seniority status during the makewhole period. We therefore dismiss this recommended adjustment by the GC.

The new adjusted average medical benefit amount, using $1.16 from the Coachella Valley Citrus contract is $0.88. Since the GC provided only an alternate specification using an average medical benefit of $0.94 per hour, a revised specification using the $0.88 per hour figure will need to be calculated.

2. Respondent argues that GC invented a "new methodology"

On page eight of its response, the Respondent argues that the GC has "invented a new methodology without the benefit of evidentiary review." Specifically, the Respondent refers to the GC's explanation on page six of the revised specification

that the GC has departed from the original specification by eliminating the use of wage classifications and "total compensation multipliers." We find that although the GC used a modified approach in calculating the amounts owed in light of the adjustment ordered by the Board, this was not unreasonable under the circumstances, and did not have the effect of creating a new methodology as the Respondent claims.

The multipliers in the original specification were calculated by adding together the percent wage increase, the vacation and miscellaneous percentage increase, the holiday pay percentage increase and the medical and pension benefits increase. Because the medical and pension contribution was a set dollar per hour amount, and there were seven different wage rates, when medical and pension benefits were converted to a percentage there was a range of figures for medical and pension as a percentage increase. This resulted in seven different "total compensation multipliers" that were applied to groups of workers in each of the seven different wage rate categories.

The Board's order eliminated the vacation and miscellaneous percent increase and the across the board holiday pay increase. With respect to the holiday benefit, the Board directed that payroll records be reviewed and where it could be determined that a worker worked five days in the two weeks preceding either the July 4 or Labor Day holiday, that worker would receive the equivalent of eight hours pay. In light of these adjustments ordered by the Board, it is reasonable that the GC calculated the makewhole amount due to each worker on an individual basis relying on his or her actual earnings during the makewhole period.

Moreover, the Board found in its previous Decision and Order that the GC had erroneously applied a 4.3 percent wage increase to the entire makewhole period, and directed that a 2.52 percent wage increase be applied to 1993, and then a compounded 2.25 percent increase should be applied to 1994 wages. This is another reason why the use of wage classifications and "total compensation multipliers" from the original specification was not feasible in calculating the revised specification.

Therefore, the Board finds that the Respondent's claim that the GC invented a new methodology in calculating the revised specification is without merit.

3. Wage Increase for 1993 and 1994

The Respondent contends that the GC made a mathematical error in calculating the two-year cumulative wage increase, and argues that this improperly inflated the revised specification. Specifically, the Respondent argues that the GC miscalculated the compounded percentage increase for 1994 as 4.83 percent when it should have been 4.77 percent (the sum of 2.52 percent and 2.25 percent). The Respondent is incorrect.

On page seven of the revised specification, the GC states that a 2.52 percent wage increase for 1993 and a compounded 2.25 percent increase was applied for 1994. As the GC correctly explains, if a worker earned $100 in 1993, that worker would be owed an additional $2.52 in makewhole for 1993 for total of $102.52. To calculate the amount owed to that worker in 1994, if the worker earned $100 again, then 2.25 percent would be applied to $102.52 to account for the 1993 increase for a makewhole amount of $2.31. Therefore the compounded amount for 1994 is indeed 4.83 percent.

$100 x .0483 = a $4.83 increase in 1994. The Respondent's argument that the GC improperly calculated the wage increases is rejected.

4. Interest Calculation

On page 11 of the revised specification, the GC indicated that in calculating the interest owed to each worker the GC departed from the interest calculation used in the original 2011 specification, and used a calculation consistent with the National Labor Relations Board's (NLRB) decision in *Kentucky River Medical Center* (2010) 356 NLRB No. 8. In this decision, the NLRB adopted a new policy under which interest on backpay would be compounded on a daily basis, replacing the simple interest method previously used. The NLRB also noted in this decision that the new policy would be "applied retroactively in this and all pending cases…given the absence of any 'manifest injustice' in doing so." (*Id.* at p. 21.) Therefore, in the revised specification, the GC calculated interest compounded on a daily basis retroactively to the beginning of the makewhole period.

While the GC is correct that the ALRB in the past has followed NLRB precedent with respect to calculation of interest on monetary awards, the GC failed to note the NLRB's subsequent clarifications about when and to which cases the new interest policy applies. In *Rome Electrical Services, Inc.* (2010) 356 NLRB No. 38, the NLRB clarified that the new policy announced in *Kentucky River Medical Center, supra*, 356 NLRB No. 8, does not apply to cases that were already in the compliance phase on the date that decision issued. (*Rome Electrical Services, Inc., supra*, 356 NLRB No. 38, p. 1, fn. 2.) Again in *Classic Fire Protection, LLC* (2012) 359 NLRB No. 23, the NLRB

stated that it has declined to apply the new policy of daily compounding of interest in cases already in the compliance phase. (*Id.* at p. 2, fn. 4.)

In the present case, the interest computation method was part of the remedy ordered by the Board following the liability stage of the matter and was fixed in 1994. The language from the original order is as follows:

"(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 (emphasis added). The makewhole period shall extend from July 12, 1993, until the date on which Respondent commences good faith bargaining with the UFW."

This case has been in the compliance phase since the Court of Appeal affirmed the Board's decision and order in 1995, so *Kentucky River Medical Center, supra*, 356 NLRB No. 8 clearly does not apply to the interest calculation in the revised makewhole specification.

Moreover, the GC exceeded her authority by applying *Kentucky River Medical Center* without first requesting that the Board adopt that case as binding authority pursuant to section 1148 of the ALRA. Should the GC wish to urge the Board to adopt the *Kentucky River Medical Center* rule, she should request it as a proposed remedy in a case that is still in the liability phase.

The revised makewhole specification therefore must be remanded for calculation of interest pursuant to *E. W. Merritt Farms*. As explained below, the Board ordered that interest be collected only for employees who are located. Therefore, in the further revised specification, makewhole principal amount and interest amount should be clearly listed as two separate figures for each employee.

5. Disposition of Unclaimed Funds

Included in the revised specification is a section entitled "Disposition of Unclaimed Funds," discussing the possible deposit of unclaimed funds in the Agricultural Employee Relief Fund (AERF). Pursuant to ALRA section 1161, where the Board has ordered monetary relief but employees cannot be located for two years after collection of monies on their behalf, those monies will go into the AERF and are distributed to employees in other cases where collection of the full amount owed to them is not possible. The inclusion of this section in the revised specification is curious and wholly unnecessary. The operation of the AERF relative to this case was not an issue remanded to the GC, nor is it an issue to be addressed in a makewhole or backpay specification generally. Rather, the operation of the AERF begins only after the Board has ordered and collected a monetary remedy and employees owed money are not located two years after the collection of the money.

More importantly, it must be noted that the GC's representation on page 11 that interest amounts that are owed to workers who cannot be located "will be given to [the Respondent]" instead of being deposited into the AERF is an incorrect stating of the Board's order. On page four of the revised specification, the GC makes a similar

incorrect statement: "the Board decided that all interest should be returned to the grower where the worker could not be found by the ALRB." The Board's order did not direct that interest on the entire principal be collected from the employer only to be returned should employees not be located. Rather, the Board clearly directed that the award of interest would be contingent upon employees being located. In other words, the Board ordered that the entire makewhole principal be collected from the employer, but that interest be awarded and collected only as employees are located.

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ORDER

The Agricultural Labor Relations Board (Board) hereby remands this matter to the Region for the issuance of a further revised bargaining makewhole specification calculated in accordance with this Decision regarding medical benefits and calculation of interest. Pursuant to California Code of Regulations, title 8, section 20292, the parties shall have the opportunity to file an answer to the specification, which also shall be filed with the Board in accordance with Regulation 20164. Any denials of the facts alleged in the revised specification shall be limited to claims that the specification does not fully or accurately reflect the Board's decision herein and/or that mathematical errors were made in applying the Board's approved formula to the payroll records. Thereafter, the Board shall issue a final order in this matter that is subject to review pursuant to Agricultural Labor Relations Act section 1160.8.

DATED: December 12, 2012

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

CASE SUMMARY

SAN JOAQUIN TOMATO GROWERS, INC. **38 ALRB No. 12**
(United Farm Workers of America) Case No. 93-CE-38-V1
(20 ALRB No. 13)
(38 ALRB No. 4)

Background
This case arises out of a technical refusal to bargain engaged in by San Joaquin Tomato Growers, Inc. (Respondent) to test the certification of the United Farm Workers of America (UFW) as the collective bargaining representative of Respondent's agricultural employees. In 1994, the Agricultural Labor Relations Board (ALRB or Board) found Respondent's refusal to bargain violated the Agricultural Labor Relations Act (ALRA), and the Board ordered that bargaining makewhole be paid to the employees for the period July 12, 1993, through September 8, 1994 (the period during which the Respondent refused to bargain). (*San Joaquin Tomato Growers, Inc*. (1994) 20 ALRB No. 13.) The General Counsel (GC) issued a makewhole specification in this matter on April 5, 2011. The methodology used to calculate the specification was based on a contract averaging approach developed by Dr. Philip Martin, a professor of agricultural economics at U.C. Davis. ALRB Regional Staff applied Dr. Martin's methodology to payroll records for workers employed during the makewhole period.

Administrative Law Judge Decision
The Administrative Law Judge (ALJ) conducted a compliance hearing in this matter on July 19 and 20 and August 15, 16, and 19, 2011. On January 10, 2012, the ALJ issued his recommended decision. The ALJ found the GC's contract averaging methodology as expressed in the makewhole specification to be unreasonable for a number of reasons, and chose to use a comparable contracts approach to determine the makewhole remedy. The ALJ rejected the Respondent's preferred comparable "contract," a 1998 agreement between Respondent and the UFW, because it was preceded by Respondent's unlawful refusal to bargain, was reached too far outside the makewhole period, and was unexecuted. The Respondent's position would have resulted in nothing being owed. The ALJ went on to find that a 1995 contract between the UFW and Meyer Tomato in the Visalia area was an appropriate measure of makewhole. The ALJ recommended that the workers receive an increase of 2.5 percent of their gross wages for the period July 12, 1993 to July 11, 1994, and an increase of 5.4 percent for the remainder of the makewhole period. The ALJ included no award for fringe benefits. The ALJ recommended calculating interest "as usual;" however, he also stated that if the principal to be paid was close to the amount in the GC's makewhole specification, interest should be cut off in 1997 based on the agency's mixed signals as to how it was going to proceed with the case.

First Board Decision and Order (38 ALRB No. 4)
The Board upheld the ALJ's rejection of the 1998 agreement between the parties as an appropriate comparable contract for the purpose of calculating makewhole; however, the Board rejected the ALJ's use of the 1995 Meyer/Visalia contract as a comparable contract. The Board reversed the ALJ's conclusion that the GC's contract averaging methodology was unreasonable on its face. The Board found the GC's contract averaging approach to be reasonable under the circumstances of this case. The Board made modifications to the methodology, namely by eliminating a 5 percent increase for miscellaneous fringe benefits (holiday vacation, etc.) because the contracts included in the averaging triggered such benefits only after more hours were worked than are contained in a season for hand-picked tomatoes, and by adding 5 additional contracts to the list of those to be averaged. In addition, the Board found that the GC made errors in the application of the methodology to the payroll records, and made appropriate adjustments. As a result modified figures to be applied to the payroll records are as follows: a 2.52 percent increase for 1993 and a compounded 2.25 percent increase for 1994. Adjusted medical and pension benefits as dollar per hour worked are: Medical $0.86; Pension $0.09. With respect to paid holidays, the Board directed that where it can be verified that a worker worked five days in the two weeks preceding either the July 4 or Labor Day holiday, that worker shall be given the equivalent of 8 hours pay. With respect to interest, the Board found in light of the unique circumstances presented by the extraordinary delay in enforcement, the award of interest would be contingent on the employees being located.

The Board remanded the matter to the ALRB Regional Office for the issuance of a revised makewhole specification calculated in accordance with its decision.

Decision on Revised Makewhole Specification (38 ALRB No. 12)
On October 16, 2012, the GC issued a revised makewhole specification. The Respondent issued its answer to the specification on November 5, 2012. In sum, the GC's revised makewhole award was $229, 663 with interest in the amount of $294, 027. The GC included mathematical changes based on re-examination of three of the contracts which then increase the medical benefit. The GC also changed the calculation of interest based on the National Labor Relations Board's (NLRB) decision in *Kentucky River Medical Center* (2010) 356 NLRB No. 8.

Upon reviewing the revised specification and answer, the Board found that it was unable to issue a final Decision and Order in this matter. Rather, the Board remanded the revised specification back to the GC with instructions to conform it to the discussion in 38 ALRB No. 12.

First, the Board found that the review of the three contracts showed one was incorrectly inputted and a new adjusted average medical benefit amount of $0.88 per hour was

appropriate. Therefore the Board ordered the GC to recalculate the specification using the $0.88 per hour figure. Second, the Board found that the GC was incorrect in calculating the interest consistent with the NLRB decision in *Kentucky River Medical Center* (2010) 356 NLRB No. 8. In this decision, the NLRB adopted a new policy under which interest on backpay would be compounded on a daily basis, replacing the simple interest method previously utilized. The Board found that in a subsequent decision, *Rome Electrical Services, Inc.* (2010) 356 NLRB No. 38, the NLRB clarified that the new policy announced in *Kentucky River Medical Center* did not apply to cases that were already in the compliance phase on the date that decision issued. The present case has been in the compliance phase since the Court of Appeal affirmed the Board's decision and order in 1995, so the Board found that *Kentucky River Medical Center* clearly does not apply to the interest calculation in the revised makewhole specification.

The Board therefore remanded the revised makewhole specification for calculation of interest pursuant to *E. W. Merritt Farms* (1988) 14 ALRB No. 5. The Board, in its previous decision, ordered that interest be collected only for employees who are located. Therefore, in the further revised specification, the Board ordered that the makewhole principal amount and interest amount should be clearly listed as two separate figures for each employee.

The Board also noted the following incorrect statement by the GC in the revised makewhole specification: "the Board decided that all interest should be returned to the grower where the worker could not be found by the ALRB." The Board emphasized that the Board's order did not direct that interest on the entire principal be collected from the employer only to be returned should employees not be located. Rather, the Board clearly directed that the award of interest would be contingent upon employees being located. In other words, the Board ordered that the entire makewhole principal be collected from the employer, but that interest be awarded and collected only as employees are located.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.