Modesto, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JOAQUIN TOMATO GROWERS, INC., A California Corporation, Respondent, and UNITED FARM WORKERS OF AMERICA, Charging Party.	)	Case No. 93-CE-38-VI (20 ALRB No.13) 38 ALRB No. 4 (May 30, 2012)

DECISION AND ORDER

Introduction and Background

On August 11, 1989, a representation election was conducted among the agricultural employees of San Joaquin Tomato Growers, Inc. (Respondent) to determine whether they wanted to be represented by the United Farm Workers of America (UFW). Several years of litigation over election objections and challenged ballots followed, and the UFW was certified as the collective bargaining representative of Respondent's employees in San Joaquin and Stanislaus Counties on May 3, 1993. The UFW then requested bargaining with Respondent, but Respondent engaged in a technical refusal to bargain in order to seek court review of its claim that the election was invalid. Unfair Labor Practice charge number 93-CE-38-VI was filed by the UFW, and the Agricultural Labor Relations Board (Board) ultimately found that the Respondent had violated the Agricultural Labor Relations Act (ALRA or Act) by unlawfully refusing to bargain with

the UFW. As a remedy for the violation, the Board ordered that bargaining makewhole[1] 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.) Respondent filed a petition for review of this decision in the California Court of Appeal, which summarily denied the petition on June 8, 1995. On July 25, 1995, after the time for further appeals had expired, the staff of the Agricultural Labor Relations Board's Visalia Regional Office (the Region) was informed that the case was released for compliance. As a result, efforts to seek compliance with the Board's decision, including the preparation of a makewhole specification, could begin.

The Board's order contained provisions that Respondent "preserve and make available to the Board and its agents… 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." A Board agent contacted Respondent's counsel by letters dated February 29 and March 19, 1996, and requested information relevant to the creation of the makewhole specification including payroll and personnel records. By letter dated March 25, 1996, Respondent's counsel replied, but did not provide payroll records, stating that no makewhole was due because during the period in

[1] Bargaining makewhole is intended to compensate agricultural employees for the lost wages and other benefits they would have received had the employer bargained in good faith.

question Respondent paid tomato pickers $0.475 per bucket, which was the highest rate paid for the harvest of fresh tomatoes "anywhere in the world."

After additional requests from Regional staff to provide evidence supporting the position that no makewhole was owed, on December 12, 1996, Respondent provided payroll check stubs for six workers showing the $0.475 per bucket rate. On September 3, 1997, Regional staff requested the UFW's position on Respondent's contention that no makewhole was due because $0.475 per bucket was the highest wage rate paid in the industry. A second letter was sent to the UFW on July 28, 1999, asking the UFW to provide its position by September 1, 1999. There is no evidence that the UFW responded to these requests.

In April 2001, the case was transferred from the Visalia Regional office to General Counsel Headquarters in Sacramento.[2] In May 2002, Board Counsel Robert Murray, who was on loan to the General Counsel in order to assist with the development of a more expeditious method of computing makewhole amounts, issued a memo to the General Counsel recommending that a "contract averaging" method be used in cases where there are no comparable contracts available.[3] This memo was accompanied by a

[2] The ALJ mistakenly stated that the "Board" transferred the case to Sacramento. In fact, the order transferring the case, which was signed by the Visalia Regional Director, expressly transferred the matter to the headquarters office of the General Counsel pursuant to Board Regulation section 20245, subdivision (a), which allows the General Counsel to transfer cases from one region to another. The Board's regulations are codified at Title 8, California Code of Regulations, section 20100, et seq.

[3] Mr. Murray thereafter recused himself from any matter coming before the Board involving Respondent or the employer in a similar case, Ace Tomato Company.

report from Dr. Philip Martin, a professor of agricultural economics at U.C. Davis, which included a survey of 22 UFW contracts in effect between 1992 and 1994. Professor Martin calculated that the average wage increase for agricultural employees covered by these contracts was 2.4 percent in the first year of the contract, and 3 percent in the second year. The average fringe benefit gain as a percentage of wages was calculated to be 19.7 percent.

Regional staff evaluated the 2002 memo and report. When the Region again asked the Respondent to provide payroll records, the Respondent informed the Region that it no longer had the records. On November 9, 2005, the Region informed the Board that the lack of payroll data made it impossible to complete the calculations recommended by the memo.[4] Several more years passed, and on May 15, 2009, the Regional Director filed a motion requesting that the Board close the case without full compliance. The Regional Director ultimately filed a request to withdraw the motion to close which was granted by the Board in Admin. Order 2010-15.

The Makewhole Specification

On November 17, 2009, at a prehearing conference related to the Motion to Close, the UFW announced that it had located pertinent payroll records. The records were then provided to the Region. On April 5, 2011, the General Counsel issued a makewhole specification. The methodology that Regional Staff used to calculate

[4] The Board could not act on this memo as there was no formal motion before the Board at this time. Furthermore, the matter was still under the General Counsel's purview and was not before the Board.

makewhole was based on Dr. Martin's contract averaging method as applied to 1993 and 1994 payroll information. Under this approach, Regional Staff calculated an average wage increase of 4.3 percent, plus a 5 percent increase for holidays, vacation and miscellaneous benefits, and an increase of 10.5 percent to 17.7 percent (depending on wage rate) for medical insurance and pension contributions. This calculation gave rise to a makewhole principal amount of $375,407.00, plus $443,697.00 in interest for a total of $819,104.00.

Administrative Law Judge Decision

On July 19 and 20 and August 15, 16 and 19, 2011, Administrative Law Judge (ALJ) Douglas Gallop conducted a compliance hearing in this matter. On January 10, 2012, the ALJ issued the attached recommended decision. The ALJ found the General Counsel's contract averaging methodology as expressed in the makewhole specification to be unreasonable for a number of reasons. (ALJ Dec. pp. 9-12.) Namely, the ALJ took issue with the fact that none of the contracts used was from Respondent's industry, few, if any of the employees covered by these contracts performed the same type of job duties as the tomato harvesters, many of the workers covered by the contracts were from different geographical areas, there were no data about the size of the other operations compared with Respondent, there was no evidence presented about whether any of the other employers relied on contractor employees, and finally, and perhaps most significantly to the ALJ, he assumed that virtually all of the contracts averaged were

successor agreements reflecting longstanding bargaining relationships rather than first contracts.[5]

The Respondent maintained that no makewhole was owed because workers were being paid the highest piece rate for tomatoes during the makewhole period. Alternatively, Respondent argued that a comparable contracts methodology should be used to calculate makewhole. Respondent's preferred "contract" was a 1998 agreement between Respondent and the Charging Party in which the UFW agreed to a $0.475 per bucket piece rate with no pension or health plan. As a second alternative, Respondent argued that two 1995 UFW contracts with Meyer Tomatoes were comparable. These contracts -- one covering tomato harvesters in Salinas/King City (Meyer/King City Salinas), and one covering pickers in Visalia (Meyer/Visalia) -- provided for a $.43 per bucket piece rate. The Meyer/Salinas King City contract provided for medical and pension contributions and vacation benefits, while the Meyer/Visalia contract provided no benefits.

The ALJ rejected the 1998 agreement between Respondent and the UFW as a comparable contract because it was preceded by Respondent's unlawful refusal to bargain, was reached too far outside the makewhole period and was unexecuted. (ALJ Dec. at p. 12.)

[5] The ALJ reached this conclusion because, with one exception, the contracts reflect UFW certifications from the 1970's and 1980's. While the passage of time does make it more likely that these are not first contracts, and several indicate that they are successor contracts, most do not indicate whether they are successor or first contracts.

The ALJ stated that the Board has, in its more recent cases, expressed a preference for using one comparable contract to using many agreements covering employees working in dissimilar conditions, and that the Board stated in Admin. Order No. 2009-15 in the instant case that the comparable contracts approach would be preferable. (ALJ Dec. at p. 9.)

The ALJ went on to find that the 1995 Meyer/Visalia contract was an appropriate comparable contract. (ALJ Dec. at pp. 12-13.) The ALJ reasoned that this contract covered employees in the same industry, same job classifications and similar wage rates. The ALJ recommended an increase of 2.5 percent of gross wages for the period 7/12/93-7/11/94, and an increase of 5.4 percent for the remainder of the makewhole period. (ALJ Dec. at pp. 16.) These figures were based on calculations of average wage statewide increases made by Respondent's proffered expert John McKean. The ALJ included no award for fringe benefits because the Meyer/Visalia contract did not include any benefits. The ALJ found the Meyer/King City Salinas contract was not a comparable contract, largely because it reflected a longstanding collective bargaining relationship and was from a more remote location.

The ALJ recommended calculating interest "as usual;" however, he also stated that if he had recommended that the principal to be paid was close to the amount in the 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. (ALJ Dec. at pp. 16-17.)

Summaries of Exceptions Filed by Respondent, UFW and General Counsel

Respondent, the UFW and the General Counsel all filed exceptions to the ALJ's Decision. They are summarized below:

A. Respondent's Exceptions to the ALJ's Decision:

Respondent reiterates its argument that no makewhole is owed because workers were being paid the highest piece rate for tomatoes during the makewhole period. If makewhole is found to be owed, Respondent argues that the 1998 agreement was indeed a contract, and it is an appropriate comparable contract. Respondent emphasizes that the 1998 agreement did include wage increases for some classifications. Respondent argues that if the 1998 agreement were used, there would be a modest amount of makewhole due. Respondent's next choice for a comparable contract is the 1995 Meyer/Visalia contract, and agrees with the ALJ that the Visalia contract provides the most appropriate comparison. However, the Respondent argues that just as the ALJ applied the benefits portion of that contract, he should have also applied the wage portion of that contract as well, which reflected wage rates lower than Respondent's.

Respondent argues that the interest assessment should be adjusted under the circumstances of this case. Respondent argues that it has been prejudiced financially by the ALRB's delay. Respondent denies contributing to the delay itself. Respondent claims that it was not asked for payroll records until 2004, and by that time they no longer had them and the farm labor contractor that provided most of the workers had gone out of business. Respondent agrees with the ALJ that 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. Respondent argues that it should not have to bear the burden of agency delay and attempts to distinguish *NLRB v. Rutter-Rex Manufacturing Co.* (1969) 396 U.S. 258. The court held in *Rutter-Rex* that the consequences of agency delay should not be borne by wronged employees. The Respondent argues that this case does not apply because in *Rutter-Rex* the delay was 5 years, while in this case the delay was 17 years.

In its reply to the UFW's and General Counsel's exceptions, Respondent argues that the makewhole specification was not reasonable. Principally, Respondent argues that Dr. Martin's 2002 Report on which the specification was based produced skewed results because it did not include the entire universe of contracts in existence during the relevant period, did not use all of the contracts available to Dr. Martin, and is based on contracts that were not comparable. Respondent introduced into evidence a number of other UFW contracts not included in the 2002 report, and argues that the data from these contracts should have been included to determine the average increases.

B. UFW's Exceptions to ALJ's Decision:

The UFW argues that the ALJ erred in concluding that the General Counsel's contract averaging approach was unreasonable. The UFW asserts that the ALJ never made the requisite findings that the General Counsel's calculations were inconsistent with the goals of the Act, therefore the General Counsel's methodology should be upheld. The UFW cites *Robert H. Hickam* (1983) 9 ALRB No. 6 and *Holtville Farms, Inc. v. ALRB* (1985) 168 Cal. App 3d 388 in support of this argument.

The UFW argues that the reasons the ALJ gave for rejecting the General Counsel's makewhole calculations are inconsistent with Board precedent, unreasonable,

or factually incorrect. The UFW argues that Board precedent clearly permits alternate formulas when there are no comparable contracts. (*Hess Collection Winery* (2005) 31 ALRB No. 3; *Adam Dairy* (1978) 4 ALRB No. 24: *Abatti Farms, Inc.* (1990) 16 ALRB No. 17.)

The UFW argues that the ALJ was incorrect in finding that the General Counsel's methodology omits at least four of the UFW contracts in effect during the makewhole period; rather, the UFW argues that only three contracts were omitted because Dr. Martin did not have them (the Respondent introduced additional contracts into evidence at the hearing). The UFW requests that makewhole be recalculated using the three omitted contacts with employers, Robert Hall, Crosetti Co. and Elwin R. Mann Co.

The UFW argues that it was improper for the ALJ to question whether the contractor's harvest employees would ever qualify for the pension plan. The UFW argues that this was inconsistent with the Board's statement in *Adam Dairy* that it would not delve into the minute details of what might have been negotiated between the parties. The UFW assumes that a contract with Respondent would have included shortened qualification requirements consistent with Respondent's short harvest period.

The UFW argues that it was improper for the ALJ to reject the General Counsel's methodology because "bankruptcy, rather than improved collective bargaining obligations would be the more likely result" of the proposed makewhole amount. (ALJ Dec. at p. 12.) The UFW argues that the potential financial impact on the Respondent is

not relevant to a makewhole award. The UFW cites *Robert H. Hickam, supra*, 9 ALRB No. 6 in support of this position.

The UFW argues that the ALJ erred in finding that the Meyer/Visalia contract was a comparable contract, citing Dr. Martin's testimony that Meyer Tomato was going out of business at the time, and that Visalia wages were lower than Stanislaus County wages. In addition, the UFW points out that the contract was achieved after a finding of unlawful surface bargaining. The Board has previously rejected the use of contracts reached after bad faith bargaining. In addition, the UFW argues that the Meyer/Visalia contract (1995) was outside of the makewhole period.

The UFW asserts that the ALJ erred in following Employer's witness John McKean's year-by-year breakdown of statewide wage increases. The UFW argues that the ALJ stated at the hearing that McKean was not qualified as an expert on bargaining makewhole, but then in his written decision inconsistently stated that McKean was "qualified as an expert in damage assessments." (ALJ Dec. at p. 7.)

Finally, The UFW argues that the Board should strike as dicta the ALJ's comments regarding cutting off interest based on agency delay.

C. General Counsel's Exceptions to the ALJ's Decision:

The General Counsel lists 44 separate exceptions to specific statements and findings in the ALJ Decision. However, in the General Counsel's brief in support of the exceptions, there are three main arguments and a number of sub-arguments. General Counsel's main arguments are summarized below:

The General Counsel argues that the ALJ did not follow Board precedent set forth in *Kyutoku Nursery Inc*. (1982) 8 ALRB No. 73, in which it was held that where the General Counsel has proposed a reasonable makewhole formula, that formula shall be adopted and may only be rejected or modified where the Employer proves the General Counsel's method is unreasonable, or the Employer presents another more appropriate method. The General Counsel argues that she has met her responsibility in establishing that the methodology was reasonable, and the Respondent did not meet its burden of showing that the General Counsel's methodology was unreasonable, arbitrary or inconsistent with Board precedent. Nor, the General Counsel argues, did Respondent present a more appropriate methodology.

The General Counsel argues that the ALJ arbitrarily rejected the General Counsel's methodology by applying a new heightened standard to evaluate the methodology, and concocted his own methodology by improperly relying on the Meyer/Visalia contract which was not comparable.

The General Counsel argues that the ALJ mischaracterized Board precedent as being hostile to the contract averaging approach even in the absence of comparable contracts. Rather, the General Counsel argues, Board precedent clearly permits alternate formulas when there are no comparable contracts.

The General Counsel argues that the ALJ improperly reduced the makewhole amount in order to reduce the amount of interest due. The General Counsel cites *NLRB v. Rutter-Rex Manufacturing Co., supra*, 396 U.S. at p. 264, for the

proposition that the consequences of agency delay should not be place on wronged workers to the benefit of wrongdoing employers.

The General Counsel argues that the ALJ failed to weigh expert testimony properly, and argues that Dr. Martin's testimony was unrebutted, and therefore, his methodology should be used. In addition, the General Counsel argues that the ALJ improperly rejected Employment Development Department reports which supported Dr. Martin's testimony. Further, the General Counsel argues that the ALJ improperly rejected Dr. Martin's testimony that the UFW's contracts with Meyer Tomatoes were not comparable contracts.

Finally, the General Counsel argues that Respondent's witness, McKean, should not have been allowed to testify because his testimony was untimely, as the Respondent missed its deadline to provide alternate makewhole methodologies.

Discussion and Analysis

A. Weight given to expert witness testimony

The General Counsel argues throughout her briefs that testimony of her expert witness, Dr. Martin, established that the makewhole specification was reasonable. However, Dr. Martin's status as an expert extends only to his extraction and analysis of data from the contracts and his explanation of the contract averaging method. Dr. Martin clarified in his testimony that he did not apply his 2002 report to the payroll records to create the specification—rather, this was done by Regional staff. His status as an expert witness does not require the Board to accept the General Counsel's specification as proffered.

As to the Respondent's witness, John McKean, the ALJ correctly allowed McKean's testimony to the extent that it reflects his statistical and accounting expertise, but not to his evaluation of various makewhole methodologies.

B. Analysis of Makewhole Methodologies

First, the Board rejects Respondent's claim that it owes nothing because it was paying the highest piece rate for tomato harvesters. The Board finds no merit in the argument that paying the highest rate in a geographic area means that nothing more would have been obtained as a result of good faith negotiations. Respondent's contention that it paid the highest rate was neither proven nor disproven, but is of little import. Even if this claim is accepted as true, effective collective bargaining may have achieved not only higher wages, but also benefits such as health insurance and pension contributions. While a makewhole specification must be a reasonable measure of what good faith bargaining would have achieved, Respondent's claim is not a supportable stopping point in estimating the amounts owing in this case.

Next, the Board rejects the ALJ's use of the 1995 Meyer/Visalia contract as a comparable contract. The ALJ should not have discounted Dr. Martin's testimony that Visalia area wages and Monterey County wages were generally lower than the geographical area where San Joaquin Tomato Growers operates, as this information is within his area of expertise. In addition, the Meyer/Visalia contract was executed after the employer was found to have engaged in unlawful surface bargaining. Nevertheless, the ALJ accepted this contract as a comparable contract in part because the Meyer Tomato case did not involve an outright refusal to bargain. We do not agree with the

ALJ's logic on this point, as surface bargaining undermines a union's bargaining position as much, if not more, than an outright refusal to bargain.

The Board finds that the ALJ was correct in rejecting Respondent's contention that the 1998 tentative agreement between San Joaquin Tomato Growers and the UFW is an appropriate comparable contract. This agreement was preceded by Respondent's unlawful refusal to bargain, was reached outside the bargaining makewhole period, and was unexecuted and nonbinding.[6] In *J.R. Norton* (1984) 10 ALRB No. 42, the Board rejected a subsequently negotiated contract as the proper measure of makewhole because such a contract was a questionable measure due to the weakened position of the union after the employer's bad faith delay in negotiations. Under the *Norton* decision, subsequently negotiated agreements such as the 1998 agreement are disfavored as compared to other available measures.

Finally, the Board reverses the ALJ's conclusion that the General Counsel's contract averaging methodology is unreasonable on its face. Board precedent clearly permits alternate formulas when there are no comparable contracts. (*Hess Collection Winery*, *supra*, 31 ALRB No. 3; *Adam Dairy*, *supra*, 4 ALRB No. 24; *Abatti Farms, Inc*. *supra*, 16 ALRB No. 17.)

As the Board held in *Hess Collection Winery*, *supra,* 31 ALRB No. 3, pp. 4-5, "it is important to note that the comparable contract approach was developed and

[6] In *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 2, the Board found that the contract was not binding because the understanding and intent of both parties was that the agreement would not be binding and enforceable until it was formalized and executed.

approved at a time when it was common to have numerous contracts negotiated by the same union that might be considered "comparable." It is also important to point out that the Board allows for alternative formulas where "comparable" contracts are not available, as 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."[7] It is also worth noting that, 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. (*Hess Collection Winery*, *supra*, 31 ALRB No. 3, citing *Holtville Farms, Inc. v. ALRB* (1985) 168 Cal. App.3d 388, 393.)

The Board finds that with the modifications explained below the General Counsel's contract averaging methodology is reasonable under the circumstances of this case. We find that in the absence of comparable contracts, it is reasonable to measure the average increase in wages as reflected in a broad sample of contracts involving the same union. While we do not know if the contracts included here reflect the entire universe of UFW contracts in effect during the bargaining makewhole period, they represent all such contracts that reasonable efforts have successfully obtained. We have included data from 24 contracts,[8] which in these circumstances is the most representative sample available.

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

[8] One contract, involving a Coca-Cola operation in Florida, has been omitted.

As stated above, in the absence of comparable contracts we must use a reasonable alternative. Moreover, the use of the average increase measure for wages significantly mitigates concern over the contracts not being comparable. With regard to benefits, we find concern over whether the contracts are "mature," rather than first contracts, to be overstated. In situations where benefits were not provided prior to the first contract, the initial economic value of those benefits would tend to be greater than the incremental increase in benefits in successive contracts. Therefore, while the averaging of benefits from the sampling of contracts is not a perfect measure, we find it to be reasonable in these circumstances.

Notwithstanding our acceptance of contract averaging generally as a reasonable alternative in the absence of comparable contracts, the Board finds that the assumptions made regarding vacation, holiday and other benefits in the original specification are not supported when applied to the circumstances of this case. Therefore, the Board will direct a new approach to this portion of fringe benefits as outlined below. The Board also finds it appropriate to add five UFW contracts introduced into evidence by Respondent to the list of contracts to be averaged.[9] Three of the five additional UFW contracts were those the UFW requested to be added in its exceptions. The addition of these contracts increases the sample size of UFW contracts

[9] The Board selected only the collective bargaining agreements which had effective dates overlapping the makewhole period.

in effect during the makewhole period.[10] In addition, the Board finds that there were errors in the application of the methodology to the payroll records and will make appropriate adjustments below.

C. Adjustments to the Application of the Makewhole Methodology[11]

The Region made mathematical errors when applying the methodology to the payroll records. First, it was incorrect to apply a 4.3 percent wage increase to the entire makewhole period, rather than the separate first and second year percentage increases to the 1993 and 1994 seasons, respectively. This improperly inflated the amount of wages due. Rather, based on the expanded list of contracts, a 2.52 percent increase for 1993 should be applied, and then a compounded 2.25 percent increase should be applied for 1994 wages.[12] In computing these figures, the Board averaged in zeroes where the contracts showed no wage increases.

[10] The contracts added are Robert Hall, Inc. (Respondent's exhibit 98), Crosetti Company (Respondent's exhibit 100), Elwin R. Mann Co. (Respondent's exhibit 102), Huntington Farms (Respondent's exhibit 103), and Filmore Corp. (Respondent's exhibit 106).

[11] At the end of this decision there is an appendix containing a chart titled "UFW Contracts Negotiated or in Effect During the Makewhole Period: July 12, 1993 to September 8, 1994." This chart shows the Board's adjustments to the Region's calculations concerning average wage increases for year one and year two as well as average cost per hour figures of medical and pension contributions.

[12] Respondent mistakenly refers to this error as one made by Dr. Martin in his methodology; however, the 4.3 percent composite figure was included in the 2002 report only for illustrative purposes. Dr. Martin included in his report the separate percentages for the first and second year and the record does not indicate that he instructed that the 4.3 percent figure be used as it was in the specification.

Given the evidence of the nature and timing of the work performed by the tomato pickers, the Board finds that the proposed 5 percent increase for vacation and miscellaneous benefits should be eliminated. We find that an award for miscellaneous benefits such as jury duty is unreasonable because it is too speculative to conclude that any particular employee would have benefited from such provisions. The vacation calculation in the specification was based on the assumption in Dr. Martin's 2002 Report that Respondent's employees would be eligible for half of the annual benefit at half the rate of a 15-year employee. Our review of the contracts revealed that typical provisions required as prerequisites hundreds of hours worked and/or some number of years of continuous service to qualify for paid vacation. Therefore, we find that it is too speculative to assume Respondent's employees would have qualified for vacation benefits.

The holiday component of the benefit was based on two holidays – July 4 and Labor Day. However, there was testimony at the hearing that the harvest season started after July 4 and it is otherwise unclear how many employees may have benefited from either paid holiday. Based on the terms of a typical provision in the contract sample, the Board directs that the payroll records be reviewed and where it can be verified that a worker worked 5 days in the 2 weeks preceding either the July 4 or the Labor Day holiday, that worker will be given the equivalent of 8 hours pay at the employee's assumed pay rate for that holiday.

With respect to the medical and pension benefits, Dr. Martin used only contracts with per hour contributions to the Robert F. Kennedy (RFK) Medical and Juan

DeLaCruz (JDLC) Pension plans, as the economic value of these provisions could be measured. We agree with this approach, as the other contracts either referenced company plans that could not be quantified or contained no medical or pension provisions. In the case of the former category no data were entered in the Board's calculations, and in the case of the latter category a "0" was factored into the averages. The adjusted medical and pension benefits as dollar per hour worked are as follows: Medical $0.86, Pension $0.09.

D. Interest

As exemplified by *NLRB v. Rutter-Rex Manufacturing Co., supra*, 396 U.S. 258, the courts will not disturb the National Labor Relations Board's (NLRB) judgment in refusing to toll interest: "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." The NLRB has been quite clear that it believes that innocent employees should not be penalized for agency delay.[13] (See, e.g., *Yorkaire, Inc.* (1999) 328 NLRB 286.) In that case, the NLRB explained that interest is not a penalty, but is the method of reimbursing victims for the time value of the money that they lost and that the employer had in the interim. (*Id*. at pp. 287-288.) Moreover, the logic of the underlying principle of placing the burden of delay on the wrongdoing employer rather than the innocent employees does not change based on the length of the delay. Accordingly, we are unwilling to penalize innocent employees for a delay for which they are in no way responsible.

[13] ALRA section 1148 requires this Board to follow applicable precedents under the National Labor Relations Act, as amended.

However, our review of cases has found no instances of enforcement delays of more than six years. Moreover, the history of this case is unique, involving a complex amalgam of agency inaction, employer recalcitrance and union indifference. In light of the unique circumstances presented here, we shall make the award of interest contingent upon the employees being located. The Board therefore directs that all employees who are located are entitled to the full bargaining makewhole principal and interest as normally calculated. Any principal amounts remaining by virtue of employees not being located, despite diligent efforts to do so, within two years of the date money is collected on their behalf shall be deposited, as required by ALRA section 1161, in the Agricultural Employee Relief Fund (AERF).

ORDER

The Agricultural Labor Relations Board (Board) hereby remands this matter to the Region for the issuance of a revised bargaining makewhole specification calculated in accordance with this Decision. 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

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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: May 30, 2012

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

APPENDIX

UFW Contracts Negotiated or in Effect at Some Time During the Makewhole Period:
July 12, 1993 to September 8, 1994

Company	original wage (general laborer)	Year one Increase effective date	New Wage Year One	Year two Increase effective date	New Wage Year Two	Year one % increase	Year two % increase	Medical Benefits as cost per hour worked	Pension Benefits as cost per hour worked
Airdrome Orchards	$5.20	11/1/1992	$5.30	__	__	1.90%	0	__	$0.15
Coachella Growers, Inc.	$27.00	9/3/1993	$27.54	9/3/1994	$28.09	2%	2%	$1.12	$0.10
Coachella Valley Citrus	$19.00	1992-1993	$19.65	1994-1995	$20.25	3.40%	3.10%	$0.90	$0.11
Conagra Turkey Company	$6.70	10/1/1992	$7.10	10/1/1993	$7.32	6%	3%	company plan (no cost data)	company plan (no cost data)
Crosetti Company	__	5/22/1994	$6.00	__	$6.12	__	2%	$0.85	$0.05
David Freedman and Co. Inc.	__	__	__	__	__	__	__	$0.77	0
Elwin R. Mann Co.	__	7/1/1994	$6.00	__	$6.12	__	2%	$0.85	$0.05
Filmore Corp.	$4.98	11/1/1990	$5.23	__	$5.48	5%	4.80%	company plan (no cost data)	0
General Vineyard Service	$7.83	__	$7.88	__	__	0.60%	__	$1.05	$0.12

The Symbol "--" in the table means there was insuffcient information. Zeroes in the chart were counted toward the averages. Where a company had its own medical plan, this did not count toward the average medical benefits figure.

UFW Contracts Negotiated or in Effect at Some Time During the Makewhole Period:
July 12, 1993 to September 8, 1994

HMS Corporation	$7.37	1994	$7.52	1995	$7.63	2%	1.50%	$1.16	$0.10
Huntington Farms	__	8/12/1991	$5.50	__	$5.55	__	0.90%	company plan (no cost data)	$0.05
J & L Farms, Inc.	$7.89	1994	$7.97	1995	$8.13	1%	2%	$0.92	$0.20
Montebello Rose Company	__	9/1/1992	$5.73	9/1/1993	$5.82	__	1.60%	$1.05	$0.18
Monterey Mushrooms, Inc.	$6.43	10/4/1992	$6.68	10/3/1993	$6.88	3.70%	3%	__	$0.06
Montpelier Orchards	$4.90	1/1/1992	$4.95	12/31/1993	$5.10	1%	3%	company plan (no cost data)	$0.10
Muranaka Farms	$4.95	10/1/1995	$5.05	10/1/1996	$5.15	2%	2%	0	0
Napa Farming Company	$8.51	2/1/1992	$8.89	2/1/1993	$9.34	4.50%	5%	$1.03	$0.15
Pacific Mushroom Farm	$7.38	11/5/1993	$7.68	11/4/1994	$8.03	4%	4.60%	company plan (no cost data)	company plan (no cost data)
Rancho Chualar Partners	$7.99	__	__	__	__	__	__	$1.03	$0.22
Robert Hall, Inc.	__	7/1/1994	$6.10	__	__	__	0	company plan (no cost data)	0

The Symbol "--" in the table means there was insuffcient information. Zeroes in the chart were counted toward the averages. Where a company had its own medical plan, this did not count toward the average medical benefits figure.

UFW Contracts Negotiated or in Effect at Some Time During the Makewhole Period:
July 12, 1993 to September 8, 1994

S & J Ranch, Inc.	$5.23	5/1/1994	$5.33	__	__	2%	__	company plan (no cost data)	0
Sun World, Inc.	$5.51	2/1/1989	$6.00	__	__	0	0	$1.16	$0.11
Travers Orchards	$6.00	7/1/1995	$6.12	__	__	2%	__	0	$0.05
Yo Iwai Nursery	$5.95	1/1/1993	$6.05	__	__	1.70%	__	$1.01	$0.11
Averages						**2.52%**	**2.25%**	**$0.86**	**$0.09**

The Symbol "--" in the table means there was insuffcient information. Zeroes in the chart were counted toward the averages. Where a company had its own medical plan, this did not count toward the average medical benefits figure.

CASE SUMMARY

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

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 Respondent maintained that no makewhole was owed because it claimed to have paid its workers the highest piece rate for harvest of tomatoes during the makewhole period. For numerous reasons, many years passed before 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. The calculation gave rise to a makewhole principle amount of $375,407.00, plus $443,697.00 in interest for a total of $819,104.00.

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 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.

Board Decision and Order

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. Finding that Board precedent clearly permitted the Board to used 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.), and by adding five 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. 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 5 days in the 2 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.

***

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	**Case No.** 93-CE-38-VI
	)	(20 ALRB No. 13)
SAN JOAQUIN TOMATO GROWERS, INC.,	)	
A California Corporation,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Charging Party.	)	

Appearances:

Spencer H. Hipp and Eric R. Ostrem
Littler Mendelson
Fresno, California
For Respondent

Mario Martinez and Aida L. Sotelo
United Farm Workers of America Legal Department
Bakersfield, California
For the Charging Party

Francisco T. Aceron, Jr.
Visalia ALRB Regional Office
For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I conducted a compliance hearing in this matter on July 19 and 20, and August 15, 16 and 19, 2011, at Sacramento and Modesto, California. San Joaquin Tomato Growers, Inc., a California Corporation (Respondent), the United Farm Workers of America (Charging Party) and the General Counsel of the Agricultural Labor Relations Board (ALRB, Agency or Board) appeared at the hearing. Respondent and the General Counsel presented testimony and submitted documentary evidence at the hearing. The parties filed briefs, the last of which was received on December 28, 2011,[1] which have been duly considered. Upon the entire record in this case, including the testimony, documentary evidence, briefs and oral arguments made by Counsel, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Background

On August 11, 1989, an election was conducted for Respondent's employees in San Joaquin and Stanislaus counties, to determine whether they wished to be represented by the Charging Party. Lengthy challenged ballot and objections litigation eventually resulted in the Charging Party being certified by the Board on May 3, 1993. Shortly thereafter, the Charging Party requested that Respondent commence collective bargaining negotiations but, on July 12, 1993, Respondent refused, claiming the election was invalid. This led to the charges herein being filed, and the Board's Order in (1994) 20 ALRB No. 13, finding that Respondent violated the Agricultural Labor Relations Act (Act), by

[1] General Counsel's brief, addressed to the undersigned, was received on that date. Delivery to the Executive Secretary was delayed, because that copy was lost in the mail.

refusing to bargain with the Charging Party. As part of the remedy, the Board held that bargaining makewhole should be paid to the unit employees. On September 8, 1994, Respondent and the Charging Party commenced contract negotiations. Respondent also appealed the Board's decision to the California Court of Appeal, which denied it on June 8, 1995. Respondent did not appeal that decision to the California Supreme Court.

Nearly nine months passed before a Board agent contacted Respondent regarding compliance in this matter, requesting information, including payroll records, an item specified as subject to disclosure by the Board. During the bargaining makewhole period, Respondent contracted with LCL Farms, Inc. (LCL) to harvest its tomatoes. More than nine months later, Respondent provided payroll records for only six out of hundreds of bargaining unit employees, claiming said records were irrelevant, other than to substantiate the claim that its employees were the highest paid in the industry, statewide.[2] A Board agent threatened to institute enforcement proceedings to obtain the payroll records, but this was never done.

As of April 20, 2001, the Visalia region had still not issued a makewhole specification in this matter. On that date, the Board transferred the case to General Counsel, in Sacramento. After consulting with Philip Martin, who testified at the hearing as an expert in makewhole methodologies, a Board Counsel proposed a makewhole methodology, and returned the case to the Visalia region. In December 2004, a Board

[2] Testimony at this hearing, that Respondent did not have the LCL payroll records in its possession, is singularly unimpressive. Obviously, Respondent had access to at least some of those records, and Respondent, at the time, did not inform the Agency of any difficulty in obtaining the remaining records from LCL.

agent informed Respondent that the Visalia Region had been directed to issue a makewhole specification, using the methodology urged herein. Respondent argued against the adoption of that methodology, and no specification issued. After another 3 1/2 years, the Visalia Regional Director, on May 15, 2009, moved to close the case without seeking makewhole compensation. The Board held that motion in abeyance.

The Board, in Administrative Orders 2009-12 and 2009-15, directed that a prehearing conference be conducted involving Respondent and another tomato grower with a similar procedural history. The undersigned conducted that conference, on November 17, 2009. At the prehearing conference, the Charging Party announced it had located payroll records for Respondent's bargaining unit employees. The Bargaining Makewhole Specification herein issued on April 5, 2011, over 20 years after the representation election.

The parties agree that the appropriate bargaining makewhole period is July 12, 1993 to September 8, 1994. The primary job classification was tomato harvester, and the majority of the workforce was paid a piecerate of $.475 per bucket picked.[3] At the prehearing conference, the parties stipulated that the employees did not receive any fringe benefits.

The specification proposes, as an appropriate makewhole methodology, the difference between the wages and fringe benefits paid to the bargaining unit employees during the makewhole period, and the average of wages and fringe benefits paid to

[3] The compensation rate for a number of employees could not be determined. These were added to the list of harvesters being paid at $.475 per bucket.

similar employees under the contracts negotiated by the Charging Party, and in effect during the makewhole period. After amending out about 25 employees, General Counsel, as of the hearing, sought $347,170.00 in principal, plus $410,494.00 interest for nearly 700 workers.

Respondent contends that no bargaining makewhole is appropriate in this case, because, during the makewhole period, it was paying the highest wage rates in its industry. Therefore, under any comparable contracts theory, there would be no bargaining makewhole. Respondent next contends that if this theory is rejected, only minimal makewhole is appropriate in this case, because it reached a collective bargaining agreement with the Charging Party in 1998, which contained minimal wage increases, and no fringe benefits beyond those required by law. In addition, Respondent cites the Agency's delay in processing compliance, and changes in position to support, at best, a minimal makewhole award, or that, at the least, interest should be limited.

Respondent further contends that the statewide contracts methodology is inappropriate. Respondent asserts that the most appropriate methodology, if the 1998 agreement is rejected as a comparable contract, is to use the Charging Party's contracts with Meyer Tomatoes, and to extrapolate makewhole figures by using them as a comparison. Respondent proposes additional alternate methodologies, should makewhole be awarded, and the Meyer Tomatoes methodology be rejected.

Testimony at the Hearing Regarding the Proposed Methodologies

Philip Martin, General Counsel's bargaining makewhole expert, testified that he and his assistants examined 21 or 22 of the Charging Party's collective bargaining

agreements that were in effect during the makewhole period. He converted the piecework wages into an hourly rate, based on the LCL timesheets, and averaged the wage increases under the contracts, paid to "general laborers." None of the agreements contained provisions for tomato harvesters. Since no fringe benefits were paid to Respondent's contractor employees, he gave 100% credit for the average premiums paid for medical and pension plans under the agreements, as well as a variety of other economic benefits, such as vacation, holiday and "miscellaneous" pay. Based on this analysis, Martin calculated a 4.3% average wage increase, 5% increase for holiday, vacation and miscellaneous benefits, and a 10.5% to 17.7% wage supplement, depending on the wage rate, for the average pension and medical premiums paid under the agreements. Based on this, the specification seeks makewhole of 19.3% to 27% of the gross wages earned during the makewhole period, with about 75% of the employees to receive 21.5% of their gross wages.

The 1998 collective bargaining agreement between Respondent and the Charging Party resulted from negotiations that commenced on September 8, 1994. Respondent and the Charging Party negotiated, on and off, until the Charging Party, on August 13, 1998, faxed a letter to Respondent stating it had accepted the last offer, and the agreement had been ratified by the bargaining unit employees. The letter stated the Charging Party would execute the agreement, but it did not respond to Respondent's requests that it do so. The parties have never executed a collective bargaining agreement.

The Charging Party recently filed for binding mediation with Respondent, under section 1164 of the Act. Respondent opposes binding mediation, on the basis that section

1164 only applies to initial agreements and, therefore, the 1998 agreement precludes utilization of binding mediation. The Charging Party disputes this contention, and the Board has set that issue for an evidentiary hearing. *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5.

As noted above, Respondent contends that a comparison with the Charging Party's collective bargaining agreements with Meyer Tomatoes is an appropriate methodology.[4] Respondent relies on two of these contracts, one of which covers tomato harvesters in the Salinas/King City area, and the other in the Visalia area. The agreements became effective July 20 and August 2, 1995, less than one year after the end of the makewhole period. John McKean, a Certified Public Accountant who qualified as an expert in damages assessments, but not in makewhole methodology, testified as to the effect of using these as comparable contracts. Since the Meyer contracts provided for a first-pick bucket piecerate of $.43 per bucket,[5] as opposed to Respondent's $.475 (for the bulk of the harvesters), he entered a minus 9.5% wage factor for bargaining makewhole. The Salinas/King City agreement provided for medical and pension fund contributions, and vacation benefits, while the Visalia agreement did not. McKean gave some credit for the pension/medical contributions, and .5% for vacation benefits. McKean calculated a

[4] Prior to the hearing, Respondent repeatedly denied there were any comparable agreements, other than the agreement reached between it and the Charging Party. Respondent contends this is because it was not aware of the Meyer contracts until mid-2011. On the other hand, General Counsel and G.C. representatives, in internal memoranda, have stated, on more than one occasion, that one or both of the Meyer contracts are, or might be comparable.

[5] The Meyer agreements provide for a piecerate of $.56 per bucket for Roma tomatoes, but these are not the type harvested by Respondent's employees.

makewhole principal of $10,645.00. If interest were deemed appropriate, it would be $12,096.00.

McKean also attempted to break down the wage increases from the Charging Party's collective bargaining agreements placed into evidence on a year-by-year basis. Most of these agreements had a duration of two years. McKean found that the average first-year wage increase was 2.5%, and the second year increases averaged an additional 2.9%, for a total second-year increase of 5.4%. McKean developed several alternative methodologies, which will not be detailed herein.

ANALYSIS AND CONCLUSIONS OF LAW

Bargaining makewhole is an attempt to compensate bargaining unit employees for the lost wages and other benefits they would have received under good faith collective bargaining, where an employer has deprived them of those improvements by its unfair labor practices. The makewhole award covers the period the employer failed to bargain in good faith. *Holtville Farms, Inc.* (1984) 10 ALRB No. 13, affd. *Holtville Farms, Inc v. ALRB* (C.A. 4, 1985) 168 Cal.App.3d 388 [214 Cal.Rptr. 241]. The most common instances where bargaining makewhole is ordered are refusals to bargain, in order to test the Board's certification of a labor organization as the bargaining representative, which is the case herein, and surface bargaining. There is always a degree of speculation as to the makewhole award, particularly in the case of a newly-certified representative.

The Board, in bargaining makewhole cases, initially averaged the wage increases for all of the Charging Party's post-certification California contracts, plus a set percentage for fringe benefits. *Adam Dairy dba Rancho Dos Rios* (1978) 4 ALRB No.

24. As the number of collective bargaining agreements increased, the Board, while not eliminating the methodology, moved away from this approach, in favor of using only collective bargaining agreements covering workers similar to those employed by the employer violating its bargaining obligation. Under this "comparable contracts" methodology, the more the employees work on the same crop, are represented by the same labor organization, and have similar job duties, work locations, tools, equipment, etc., the more significant are the collective bargaining agreements they work under, in determining what the employees would have received, had negotiations had proceeded as required. In the more recent cases, the Board has expressed a preference for using even one comparable contract, to using many agreements covering employees working under dissimilar conditions. *Holtville Farms, Inc.*, supra; *Kyutoku Nursery, Inc.* (1982) 8 ALRB No. 73. More specifically, the Board, in this case, has stated that the comparable contracts approach would be preferable. See Admin. Order No. 2009-15, in the above-captioned matter.

After reviewing the evidence, it is concluded that General Counsel's methodology, using the 21 or 22 statewide contracts in effect during the makewhole period, is unreasonable, based on the information contained in those agreements, and a number of problems encountered with how the methodology was implemented. These include:

1. None of the agreements covered employees working in Respondent's industry.

2. Virtually all of the agreements appeared to cover longstanding collective bargaining relationships, as opposed to initial contract negotiations.[6]
3. Few, if any of the employees covered by the agreements performed the same type of job duties as Respondent's tomato harvesters.
4. The wage and benefits comparison was between general laborers, paid at a much lower hourly rate, with primarily tomato harvesters, paid by piecerate, which converts to a much higher hourly rate. Additionally, the evidence fails to establish that general laborers and tomato harvesters are "similar employees," as contended by General Counsel.[7]
5. Many of the workers covered by the agreements worked in different geographic areas of the state.
6. There was no data presented comparing the size of these employers' operations, or the number of workers, compared with Respondent.
7. The record fails to disclose whether any of the employers used in the comparison exclusively, or virtually so, relied on contractor employees, as did Respondent.

[6] With one exception (Conagra Turkey Co.) all of the certifications issued in the 1970's or early 1980's. Several of the agreements refer to prior contracts.

[7] Dr. Martin speculated that the wage disparity was the result of LCL fabricating the payroll records. He provided no factual basis for this belief, and the undersigned believes the wage disparity was likely the result of differing job requirements and skills. For example, while the piecerate for Meyer Tomatoes harvesters was lower than Respondent's, their compensation was much closer to Respondent's harvesters than the statewide general laborers' compensation, especially since some of the Meyer workers received fringe benefits, while Respondent's did not.

8. Only five of the agreements provided the wage rates for the period preceding them. No explanation was given for how the remainder of the first year wage increase percentages were calculated. In addition, only Spanish-language versions of two of the agreements were placed into evidence, and another agreement is missing the wage appendix.
9. The record fails to disclose whether any of the employers already had pension or medical plans prior to unionization, or whether they had already provided other fringe benefits to their employees.
10. The comparison omits at least four of the Charging Party's collective bargaining agreements in effect during the makewhole period.
11. The wage comparison places the wage increases for the duration of the entire contracts into the first year of bargaining makewhole.
12. There is no evidence that any of these contractor employees would ever qualify for the pension plan while working in Respondent's fields, even if credited with an additional 14 months of credit toward eligibility.
13. The evidence fails to establish whether the employees would be required to make pension or medical plan contributions, or whether they would be subject to premiums, co-payments, deductibles or other out-of-pocket expenses for their medical plan.
14. General Counsel's methodology ignores the effect the staggering makewhole principal and interest would likely have on the parties' collective bargaining relationship. The Board reiterated this fundamental consideration in *The Hess*

Collection Winery (2005) 31 ALRB No. 3. Under General Counsel's methodology, bankruptcy, rather than improved collective bargaining relations, would be the more likely result.

Having rejected General Counsel's makewhole methodology, it is time to consider Respondent's. As a preliminary matter, Respondent's contention that its 1998 agreement with the Charging Party is an appropriate methodology is rejected. Not only was that agreement preceded by Respondent's unlawful refusal to bargain,[8] but it was reached far outside the bargaining makewhole period, and was unexecuted. While Respondent's counsel gave some testimony concerning the implementation of the unexecuted agreement,[9] it was insufficient to show full implementation, and counsel has since recanted one aspect of his testimony.

As noted above, Respondent argues that the Charging Party's collective bargaining agreements with Meyer Tomatoes constitute comparable contracts. The 1995 Visalia Meyer Tomatoes agreement was the first one negotiated with the Charging Party, while the 1995 Salinas/King City agreement was a successor. See *Robert Meyer, d/b/a Meyer Tomatoes* (1991) 17 ALRB No. 5 and (1991) 17 ALRB No. 17. Although the Visalia agreement went into effect about 11 months after the end of the bargaining

[8] See *J. R. Norton Company, Inc.* (1984) 10 ALRB No. 42, at pages 14-15.

[9] No foundation was laid as to his first-hand knowledge of Respondent's implementation, but no hearsay objections were raised to this testimony.

makewhole period, the undersigned considers this to be a comparable contract upon which to base bargaining makewhole.[10]

The Meyer Visalia agreement covers employees in the same industry, the same job classification and similar wage rates. It is a first collective bargaining agreement, as would have been the case with Respondent, absent its unfair labor practices. Although the Meyer office in French Camp is about 150 miles from the city of Visalia, both are in the California Central Valley.[11] The undersigned does not believe that wage and benefit conditions under union contracts would so drastically change in less than one year, so as to, in itself, disqualify this agreement from consideration. In addition, initial collective bargaining agreements are rarely negotiated in a day, and it is quite possible that a first agreement between Respondent and the Charging Party would have taken place after the date the Visalia Meyer Tomatoes agreement went into effect, even with good faith bargaining.

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[10] The Charging Party disputes the comparability of Meyer Tomatoes contracts, inter alia, based on its contention that Meyer no longer grows tomatoes in the United States. Even assuming this is true, the undersigned fails to understand how that would affect the comparability of such contracts in 1995, when such operations clearly were in place. Dr. Martin's testimony, that Meyer was, at that time, about to cease its California tomato operations, was given without any foundation for his knowledge of this and, even if correct, fails to show that Meyer would have agreed to different collective bargaining proposals for this reason.

[11] The Charging Party contends that the evidence also shows that the Meyer Visalia contract is not comparable, because wages are lower in Visalia than in Respondent's geographic area. Dr. Martin, without any quantification, testified that wages are "generally" lower in Fresno, than in Stanislaus County, the site of Respondent's operations. Martin acknowledged that the Meyer Visalia operations were located in Tulare County, and that he had not conducted a wage comparison for that County. He testified that wages "could" also be lower in Tulare County, again without any quantification. His testimony of this issue was speculative and lacking in sufficient detail to show any lack of comparability.

The Board, in *J. R. Norton Company, Inc.*, supra, rejected the employer's contention that a prospective agreement between the parties, to be executed, if ever, far outside the makewhole period would be appropriate as a comparable contract for bargaining makewhole purposes. The Board's decision issued seven years after the commencement of the makewhole period, with no such agreement between the parties. The Board noted that the ensuing contract might contain less favorable provisions, due to the weakened bargaining strength of the union, and that under the circumstances presented, the employer's position was unreasonable. The Board did not state that a subsequent agreement between the parties could never be considered in calculating bargaining makewhole.

The Meyer Tomatoes contracts proffered by Respondent also were executed after that employer was found guilty of bargaining-related unfair labor practices. The Meyer Tomatoes unfair labor practice case involved surface bargaining, rather than an outright refusal to bargain. The subsequent agreements were executed far closer to the makewhole period than the prospective agreement argued for in *J. R. Norton.* While it would, of course, be preferable to have an agreement effective within the makewhole period, and not preceded by unfair labor practices, this is the most reasonable methodology available.

On the other hand, even without the taint of prior bargaining violations, the Salinas/King City agreement does not constitute a comparable contract, or if it does, it presents a less accurate methodology. That agreement arose from a longstanding collective bargaining relationship, commencing with a 1975 certification. The difference in fringe benefits between the two Meyer agreements exemplifies the greater

comparability of initial agreements, when the employer subject to bargaining makewhole is also negotiating a first contract. Although King City and Salinas are not significantly more distant to French Camp than is Visalia, they are located in California's coastal region, which is distinct from the Central Valley.

Having found that the 1995 Visalia Meyer Tomatoes contract is the appropriate comparable contract, there will be no bargaining makewhole for fringe benefits, because that agreement contained none, beyond statutory requirements. On the other hand, the undersigned does not agree with Respondent's use of the methodology to find a negative factor for wages. The evidence fails to establish Meyer Tomatoes' previous wage history, which might show that the 1995 contractual piecerate was, in fact, an increase.

In any event, the fact that Respondent paid its harvesters at a higher piecerate than did Meyer Tomatoes does not mean the Charging Party could not have negotiated a wage increase, particularly in the absence of fringe benefits. The undersigned refuses to trivialize the effects Respondent's unfair labor practices were likely to have had on the collective bargaining process. It is well established that a bargaining representative normally wields its strongest bargaining power at the outset of negotiations, most notably, support for strike action by the unit employees.[12] Delays in the commencement of bargaining may well result in loss of such employee support, and employee turnover resulting in new workers who were not involved in the organizing campaign. Accordingly, Respondent's unfair labor practices do create an ambiguity as to whether a

[12] In this case, the strike threat was anything but speculative, since the employees went on strike in 1989, prior to the election.

wage increase would have otherwise been obtained, which shall be resolved in favor of the unit employees.

As to the amount of the award, the undersigned is satisfied with John McKean's year-by-year breakdown of the statewide wage increases, since they appear to generally comport with the agreements that did set forth the prior wage rates. Under these circumstances, the makewhole award will be an across-the-board 2.5% of gross earnings for employees set forth in the specification, as reduced by amendment at the hearing, for the first year of the makewhole period (July 12, 1993 to July 11, 1994), and 5.4% for the period July 12, 1994 to September 8, 1994, the end of the makewhole period.[13]

Respondent's argument, that makewhole is precluded by the delay and inconsistent actions by the Agency is rejected. With respect to the makewhole principal, it is undisputed that the bargaining makewhole period is set for a fixed period, rather than ongoing. Therefore, Respondent has been not prejudiced financially as to the principal makewhole award by the delay, and has demonstrated no other prejudice to its defense of this case, based thereon.

The issue of limiting interest on the makewhole principal presents a closer case. Interest is normally not considered damages, but compensation for the loss of use of money. Thus, Respondent has had the use of the funds that otherwise would have belonged to the workers. Nevertheless, the undersigned would have cut off interest at the

[13] These figures are higher than those compiled by the U.S. Department of Agriculture, California Department and Food and Agriculture, and EDD reports showing, according to Dr. Martin, a 1% wage increase for all agricultural workers from July 1993 to July 1994, and 3% from July 1994 to July 1995.

end of the second quarter, 1997, based on the Agency's delay and mixed signals regarding its intentions to proceed, if the amount of interest due even remotely approached what General Counsel seeks. This would be a little over two years after the Court of Appeal decision issued, which should have been enough time to complete compliance proceedings.

Although Respondent contributed to the delay by refusing to furnish complete payroll records, the blame therefor lies mostly with the Agency. It would be unreasonable to expect Respondent to anticipate or set aside the high amount of interest sought in the specification. Inasmuch as the makewhole award herein, and thus, the interest due, is substantially reduced, however, it is more appropriate for Respondent to bear the consequences of the delay than the employees. Accordingly, interest will be awarded as usual.

ORDER

It is hereby ordered that Respondent, San Joaquin Tomato Growers, Inc., pay bargaining makewhole to the employees set forth in the makewhole specification, as amended at the hearing, in an amount equal to 2.5% of their gross wages, while working at Respondent's operations, for the period July 12, 1993 to July 11, 1994, and 5.4% for the period, July 12, 1994 to September 8, 1994, plus interest.

Dated: January 10, 2012

_____

Douglas Gallop
Administrative Law Judge, ALRB