

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JOAQUIN TOMATO)	Case No.	93-CE-38-VI
GROWERS, INC.,)		(20 ALRB No.13)
)		(38 ALRB No. 4)
Respondent,)		(38 ALRB No.12)
)		
and)	39 ALRB No. 14	
)		
UNITED FARM WORKERS)	September 13, 2013	
OF AMERICA,)		
)		
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 (the period during which the Respondent refused to bargain). (*San Joaquin Tomato Growers, Inc.* (1994) 20 ALRB No. 13.) The General Counsel 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 General Counsel'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 General Counsel'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 on Makewhole Specification (38 ALRB No. 4)

After reviewing the exceptions to the ALJ's decision filed by both parties and the General Counsel, and following a de novo review of the record, the Board issued its Decision and Order in *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 4 on May 30, 2012. 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 contract as a comparable contract. The Board reversed the ALJ's conclusion that the General Counsel's contract averaging methodology was unreasonable on its face. The Board found the General Counsel's contract averaging approach to be reasonable under the circumstances of this case. The Board noted that Board precedent clearly permits alternate methods for calculating makewhole amounts when there are no comparable contracts available. (*San Joaquin Tomato Growers, Inc.*, *supra*, 38 ALRB No. 4 at p.15 citing *Hess Collection Winery* (2005) 31 ALRB No. 3; *Adam Dairy* (1978) 4 ALRB No. 24; *Abatti Farms, Inc.* (1990) 16 ALRB No. 17.)

Notwithstanding acceptance of the contract averaging approach, the Board found that certain assumptions regarding vacation and benefits were not supported by the evidence and modified the methodology accordingly. Specifically, the Board eliminated a 5 percent increase for miscellaneous fringe benefits (vacation, etc.) that was not supported by a review of the contracts that showed typical provisions requiring hundreds of hours worked and/or some number of years of continuous service to qualify. The Board also added five contracts that had not been included in the initial calculation with

effective dates overlapping with the makewhole period to the list of those to be averaged. In addition, the Board found that the General Counsel made errors in the application of the methodology to the earnings of workers during the makewhole period, 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 are: Medical \$0.86; Pension \$0.09. With respect to paid holidays, the Board, based on terms of a typical provision in the contract sample, directed that where it could be verified that a worker worked 5 days in the two weeks preceding either the July 4 or Labor Day holiday, that worker would be given the equivalent of 8 hours pay. With respect to interest, the Board found in light of the unique circumstances of this case, the award of interest would be contingent on the employees being located. (See *San Joaquin Tomato Growers, Inc.*, *supra*, 38 ALRB No. 4 at pp. 20-21.)

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 General Counsel issued her revised makewhole specification. The Respondent issued its answer to the specification on November 5, 2012. Upon reviewing the revised specification and answer, the Board found that it was unable to issue a final Decision and Order. Rather, the Board remanded the revised specification back to the General Counsel with instructions to conform it to the discussion in *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 12.

First, the Board found that a new adjusted average medical benefit amount of \$0.88 per hour was appropriate. Therefore, the Board ordered the General Counsel to recalculate the specification using the \$0.88 per hour figure. Second, the Board found that the General Counsel was incorrect in calculating the interest based on 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 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 Board therefore remanded the revised makewhole specification for calculation of interest pursuant to *E. W. Merritt Farms* (1988) 14 ALRB No. 5 and ordered that the makewhole principal amount and interest amount be clearly listed as two separate figures for each employee.

The Board also noted the following misstatement by the General Counsel in her 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 ordered the entire makewhole principal be collected from the employer, and full interest be collected and awarded as employees are located.

Board's Order Remanding Second Revised Makewhole Specification

On January 15, 2013, the General Counsel issued a second revised makewhole specification pursuant to the Board's December 12, 2012 Decision and Order. Upon reviewing the second revised makewhole specification, the Board was satisfied that the makewhole principal was calculated in accordance with the Board's approved methodology; however, the Board found that it could not issue a final Decision and Order because it appeared that the interest on the makewhole principal owed was calculated incorrectly. Therefore, the Board issued Administrative Order No. 2013-12 on February 27, 2013, remanding the matter again for calculation of interest pursuant to *E. Merritt Farms, supra*, 14 ALRB No. 5, i.e. simple interest calculated quarterly using the short term Federal rate. The Board requested that a spreadsheet showing complete quarterly interest calculations for all workers be attached to the third revised specification.

Third Revised Makewhole Specification

The General Counsel issued her Third Revised Makewhole Specification on July 16, 2013. Exhibit A of the Third Revised Makewhole Specification shows that for the full makewhole period of July 12, 2013 through September 8, 1994, the total makewhole principal owed is \$231,875. This amount was calculated in accordance with the makewhole methodology adopted by the Board in *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 4 as revised by *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 12. Exhibit B shows the makewhole principal amount and interest amount owing to each eligible employee listed as two separate figures for each employee as

ordered by the Board in *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 12.

Finally, Exhibit C is a spreadsheet showing complete quarterly interest calculations for all workers from the beginning of the makewhole period through June 30, 2013. Exhibit D is a declaration by Kenneth L. Creal (Creal), Certified Public Accountant, in which he states that he calculated interest due to each worker by first determining the Federal short term interest rate for each quarter from the beginning of the makewhole period through June 30, 2013, and then by applying each quarter's interest rate to the makewhole principal owed to each worker. Creal states that he calculated simple interest.

The Respondent filed its answer to the General Counsel's Third Revised Makewhole Specification on August 5, 2013. Respondent points out that the Exhibit C spreadsheet includes interest calculations on the 1994 portion of the makewhole principal through September 30, 2016. Therefore, Respondent questions the accuracy of the total amount of interest due. While a careful examination of the Exhibit C spreadsheet does show interest calculations for quarters June 30, 2013 through September 30, 2016, the total amounts of interest shown in Exhibit A do not appear to include the extra years' calculations. Moreover, the stated amount of total interest in Exhibit A is of little relevance to the actual total amount of interest Respondent will actually be ordered to pay. As the Board has clearly directed, the award of interest will occur as employees are located. Accordingly, while each located employee shall be made whole with both principal and full interest owed, as to each individual employee, the amount of interest due will be calculated as of the time the employee is located and Respondent's further liability for interest will cease when the employee is made whole.

Respondent also takes issue with Creal's statement in Exhibit D that Creal was hired by the General Counsel "to analyze payroll records ... for the purpose of developing a specification of the amounts owed to each worker consistent with the Board's Decision and Order 20 ALRB No. 13." Respondent appears to be questioning whether Creal had a hand in developing a distinct makewhole methodology without the benefit of evidentiary review. This is not the case. The methodology adopted by the Board is reflected in *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 4 as revised by *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 12. Creal simply applied that methodology to the payroll records to calculate the amount of makewhole owed.

Finally, Respondent takes issue with the fact that the makewhole calculations do not identify federal and state tax withholdings and state tax related deductions that are required for each individual within the July 1993 to September 1994 makewhole period. It is not necessary to calculate tax withholdings and deductions at this point in the process. When a worker is awarded his or her makewhole amount, Respondent will be responsible for determining proper tax withholding and deductions and for submitting proper tax payments and reports to tax authorities as well as for providing tax reports to that individual to use in filing his/her income tax returns. Nonwage elements of the makewhole award, such as interest are not subject to withholding of payroll taxes.

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 reflected in *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 4, and as revised by *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 12 in the amount of \$231,875 for the period, July 12, 1994 to September 8, 1994. Interest will be awarded and collected as employees are located.

DATED: September 13, 2013

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

CASE SUMMARY

SAN JOAQUIN TOMATO GROWERS, INC.
(United Farm Workers of America)

39 ALRB No. 14
Case No. 93-CE-38-V1
(20 ALRB No. 13)
(38 ALRB No. 4)
(38 ALRB No. 12)

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, 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 no money 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 Tomato 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 made modifications to the methodology, namely by eliminating a 5 percent increase for miscellaneous fringe benefits (vacation, etc.) and by adding five 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 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. With respect to paid holidays, the Board directed that where it could be verified that a worker worked 5 days in the two weeks preceding either the July 4 or Labor Day holiday, that worker would 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 GC's revised makewhole award was \$229,663.00 with interest in the amount of \$294,027.00. The GC included changes based on re-examination of three of the contracts which increased 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. 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. 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 Board found that *Kentucky River Medical Center* did not apply to the interest calculation in this case as it had been in compliance since 1994. 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 also ordered that the makewhole principal amount and interest amount be clearly listed as two separate figures for each employee.

Board's Order Remanding Second Revised Makewhole Specification

On January 15, 2013, the General Counsel issued a second revised makewhole specification pursuant to the Board's December 12, 2012 Decision and Order. Upon reviewing the second revised makewhole specification, the Board was satisfied that the makewhole principal was calculated in accordance with the Board's approved methodology; however, the Board found that it could not issue a final Decision and Order because it appeared that the interest on the makewhole principal owed was calculated incorrectly. Therefore, the Board issued Administrative Order No. 2013-12 on February 27, 2013, remanding the matter again for calculation of interest pursuant to *E. W. Merritt Farms, supra*, 14 ALRB No. 5.

Decision on Third Revised Makewhole Specification

The General Counsel issued a Third Revised Makewhole Specification on July 16, 2013. For the full makewhole period of July 12, 2013 through September 8, 1994, the total makewhole principal owed is \$231,875. The Board found that this amount was calculated in accordance with the makewhole methodology adopted by the Board in *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 4 as revised by *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 12. Therefore, the Board ordered that Respondent, pay bargaining makewhole to the employees set forth in the Third Revised Makewhole Specification. The Board also ordered that interest will be awarded and collected as employees are located.

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