

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)
)		(38 ALRB No.12)
Respondent,)		(39 ALRB No. 14)
)		
and)		
)		
UNITED FARM WORKERS OF)	39 ALRB No. 15	
AMERICA,)		
)	(October 23 2013)	
)		
Charging Party.)		
_____)		

SUPPLEMENTAL DECISION AND ORDER AND ERRATUM

On September 26, 2013, Respondent San Joaquin Tomato Growers, Inc. (Respondent) filed a motion for reconsideration of the Board’s September 13, 2013 Decision and Order on the third revised makewhole specification in the above-captioned matter (*San Joaquin Tomato Growers, Inc.* (2013) 39 ALRB No. 14).

Respondent pointed out in its motion for reconsideration that there was a typographical error on page 9 of the Decision and Order, namely that the Order refers to a makewhole period July 12, 1994 to September 8, 1994, instead of July 12, **1993** to September 8, 1994.

Respondent also took issue with the following sentence on page 8 of the Board’s Decision:

“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.”

Respondent argues that if it paid the entire makewhole principal to the ALRB, and employees were located during the two-year period that followed, it would be a “physical impossibility” for Respondent to withhold state and federal withholdings and deductions for those employees because the ALRB would already have the money.¹

On October 4, 2013, the Board granted Respondent’s motion for reconsideration in order to further consider the issue of tax withholdings and deductions. The following is intended to supplement and clarify the Board’s statement in *San Joaquin Tomato Growers, Inc.* (2013) 39 ALRB No. 14 at page 8.²

It is not the responsibility of the General Counsel to determine the withholding amounts and include them in a specification, nor is it the Board's responsibility to include such figures in its decision. Rather, it is the Respondent’s responsibility to determine its responsibilities under state and federal tax laws and to comply with such laws and determining proper withholding amounts from the principal.

¹ Respondent’s original argument in its answer to the third revised makewhole specification was that the specification failed to set forth the tax amounts to be withheld. However, the current motion for reconsideration instead argues that the Board’s decision orders it to pay the entire principal, after which it would be impossible for Respondent to withhold taxes.

² The instant Decision and Order incorporates *San Joaquin Tomato Growers, Inc.* (2013) 39 ALRB No. 14, except as modified herein, and together these two documents represent the final Decision and Order of the Board in the above-captioned matter.

See for example the following excerpt from Internal Revenue Service Publication 15-A (2013):

Employer's Supplemental Tax Guide:

Back Pay

Treat back pay as wages in the year paid and withhold and pay employment taxes as required. If back pay was awarded by a court or government agency to enforce a federal or state statute protecting an employee's right to employment or wages, special rules apply for reporting those wages to the Social Security Administration. These rules also apply to litigation actions, and settlement agreements or agency directives that are resolved out of court and not under a court decree or order. Examples of pertinent statutes include, but are not limited to, the National Labor Relations Act, Fair Labor Standards Act, Equal Pay Act, and Age Discrimination in Employment Act. See Publication 957, Reporting Back Pay and Special Wage Payments to the Social Security Administration, and Form SSA-131, Employer Report of Special Wage Payments, for details.

The Board concedes that the sentence in question in 39 ALRB No. 14 at page 8 is ambiguous when it states "when the worker is awarded his or her makewhole amount..." Respondent seems to construe that phrase as requiring withholding after an employee is found and the total award is calculated, which would be after the principal has been paid to the ALRB. The Board agrees that this would create logistical problems. Therefore, consistent with the Board's past practice, Respondent is to withhold the proper amounts from the makewhole principal before remitting the net amount to the ALRB. The Board clarifies this section of its Decision, *San Joaquin Tomato Growers, Inc.* (2013) 39 ALRB No. 14 at page 9 as follows:

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 each individual to use in filing his/her income tax returns. It is Respondent's responsibility to withhold amounts required by law

from the makewhole principal before remitting the total net amount to the ALRB, with interest to be awarded and collected as employees are located. Nonwage elements of the makewhole award, such as interest are not subject to withholding of payroll taxes. The procedure for remitting the net makewhole principal will be determined by the Regional Office consistent with this Decision and Order and the Respondent is directed to provide the Regional Office with detailed information about net pay and appropriate tax withholding for each employee.

ERRATUM

The makewhole period in *San Joaquin Tomato Growers, Inc.*

(2013) 39 ALRB No. 14 at page 9 under the heading “ORDER” was stated as July 12, 1994 to September 8, 1994. This was an error. The correct date range is: July 12, **1993** to September 8, 1994.

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,

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less amounts required to be withheld by law, for the period, July 12, 1993 to September 8, 1994. Interest will be awarded and collected as employees are located.

DATED: October 23 , 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. 15

Case No. 93-CE-38-V1

(20 ALRB No. 13)

(38 ALRB No. 4)

(38 ALRB No. 12)

(39 ALRB No. 14)

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

After a conducting a compliance hearing, the Administrative Law Judge (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% of their gross wages for the period July 12, 1993 to July 11, 1994, and an increase of 5.4% 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% 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% increase for 1993 and a compounded 2.25% 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 (39 ALRB No. 14)

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 was \$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.

Respondent's Request for Reconsideration

On September 26, 2013, Respondent filed a motion for reconsideration of the Board's September 13, 2013 Decision and Order on the third revised makewhole specification. (*San Joaquin Tomato Growers, Inc.* (2013) 39 ALRB No. 14). Respondent pointed out in its motion for reconsideration that there was a typographical error on page nine of the Decision and Order, namely that the Order refers to a makewhole period July 12, 1994 to September 8, 1994, instead of July 12, 1993 to September 8, 1994. Respondent also took issue with the following sentence on page 8 of with the following sentence on page eight of the Board's Decision:

“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.”

Respondent argued that if it paid the entire makewhole principal to the ALRB, and employees were located during the two year period that followed, it would be a “physical impossibility” for Respondent to withhold State and Federal withholdings and deductions for those employees because the ALRB would already have the money.

Board’s Final Decision and Order (39 ALRB No. 15)

On October 4, 2013, the Board granted Respondent’s motion for reconsideration in order to further consider the issue of tax withholdings and deductions.

The Board issued an erratum correcting the typographical error on page nine, noting that the correct date range for the makewhole period is: July 12, 1993 to September 8, 1994.

The Board also clarified Decision and Order *San Joaquin Tomato Growers, Inc.* (2013) 39 ALRB No. 14 to order that the Respondent is to withhold the proper amounts from the makewhole principal before remitting the net amount to the ALRB.

The Board noted that the instant Decision and Order incorporates *San Joaquin Tomato Growers, Inc.* (2013) 39 ALRB No. 14, except as modified herein, and together these two documents represent the final Decision and Order of the Board in the above-captioned matter.

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