Tracy, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,	)	Case No. 2012-CE-030-VIS (40 ALRB No. 3)
Respondents,	)	
and	)	
UNITED FARM WORKERS OF AMERICA,	)	41 ALRB No. 6
Charging Party.	)	(September 10, 2015)

DECISION AND ORDER

On April 29, 2015, Administrative Law Judge Douglas Gallop (the "ALJ") issued the attached supplemental decision in this matter. Respondents Arnaudo Brothers, LP and Arnaudo Brothers, Inc. ("Arnaudo") and charging party United Farm Workers of America (the "UFW") filed exceptions to the supplemental decision along with supporting and reply briefs. Agricultural Labor Relations Board's General Counsel (the "General Counsel") also filed a reply brief to Arnaudo's exceptions.[1]

[1] Arnaudo argues in its exceptions that makewhole should not be awarded because the parties would not have agreed to a contract calling for higher wages even absent Arnaudo's unlawful refusal to bargain. (See *William Dal Porto & Sons, Inc. v. ALRB* (1987) 191 Cal.App.3d 1195.) The "*Dal Porto*" defense is irrelevant under the facts of this case because it is applicable only to cases where surface bargaining has occurred. Contrary to the concurring and dissenting opinion, the ALJ's dicta regarding compliance and liability are just that – dicta. Accordingly, this issue is not before us, and our affirmance of the ALJ is of his holding, not his dicta.

The Agricultural Labor Relations Board (the "Board") has considered the supplemental decision and the record in light of the exceptions and briefs and and has decided to affirm the ALJ's rulings, findings and conclusions in full[2], and to issue the attached Order.

ORDER

The Agricultural Labor Relations Board adopts the recommended order of the administrative law judge as stated in the April 29, 2015 Supplemental Decision of the Administrative Law Judge and orders that the Respondents, Arnaudo Brothers, LP and

[2] Arbitration is "part and parcel" of the collective bargaining process. (See the "Steelworkers Trilogy" cases (*United Steelworkers v. American Mfg. Co*. (1960) 363 U.S. 564; *United Steelworkers v. Warrior & Gulf Navigation Co*. (1960) 363 U.S. 574; *United Steelworkers v. Enterprise Wheel & Car Corp*., (1960) 363 U.S. 593) confirming the strong public policy favoring arbitration of labor disputes and describing arbitration in the labor relations context "the substitute for industrial strife." (*Warrior & Gulf Navigation Co*., *supra*, 363 U.S. 574, 578).) Interest arbitration is well-accepted as an adjunct for bargaining. (See William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?* (2009) 70 La. L.Rev. 1, 17, fn 52; *Chattanooga Mailers Local 92 v. Chattanooga News-Free Press* (6th Cir. 1975) 524 F.2d 1305, 1315; *Winston-Salem Printing Pressmen Local 318 & Assistants' Local 318 v. Piedmont Publ'g Co*.(4th Cir. 1968) 393 F.2d 221, 227; *A. Seltzer & Co. v. Livingston* (S.D.N.Y. 1966) 253 F. Supp. 509, 513, aff'd, (2d Cir. 1966) 361 F.2d 218; *Builders Ass'n of Kan. City v. Kan. City Laborers* (8th Cir. 1964) 326 F.2d 867, 869, cert. denied, (1964) 377 U.S. 917.) In enacting Mandatory Mediation and Conciliation (MMC), the Legislature stated that it established MMC "in order to ensure a more effective collective bargaining process . . ." (Sen. Bill No. 1156 (2001-2002 Reg. Sess.) § 1.) Therefore, under the circumstances of this case, the ALJ properly found that the date of the first MMC mediation session was the appropriate cut off point for the makewhole period because this statutory dispute resolution system is an extension of the bargaining process itself.

Arnaudo Brothers, Inc., their officers, agents, successors, and assigns, shall take the actions set forth in the order.

DATED: September 10, 2015

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

MEMBER RIVERA-HERNANDEZ, concurring and dissenting

I agree with my colleagues in affirming the supplemental decision of the Administrative Law Judge ("ALJ") rejecting the claim of respondents Arnaudo Brothers, LP and Arnaudo Brothers, Inc. ("Arnaudo") that charging party United Farm Workers of America (the "UFW") disclaimed interest in representing the bargaining unit in this case. I also agree with my colleagues that an award of bargaining makewhole under Labor Code section 1160.3 ("makewhole") is appropriate under the facts and circumstances of this case. I write separately to explain why I believe that an award is appropriate in this case on additional grounds not discussed by the ALJ or my colleagues. I also write concerning my colleagues' adoption of the ALJ's decision to cut off the makewhole period as of the date of the parties' first Mandatory Mediation and Conciliation ("MMC") session. Finally, I write to address the issue of the application of the "*Dal Porto*" defense to the facts of this case.

I. The Appropriateness of Makewhole

I agree with the ALJ and my colleagues that an award of makewhole is appropriate in this case. The ALJ correctly determined, for the reasons stated in the supplemental decision, that the public interest in Arnaudo's disclaimer claim is outweighed by the employees' interest in collective bargaining. (*F&P Growers Assoc.* (1983) 9 ALRB No. 22, affd. *sub nom. F&P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667.) The ALJ, however, did not discuss Arnaudo's defenses to the refusal to bargain allegations other than the disclaimer defense. I write separately to explain why I believe that the public interest in those other defenses does not outweigh the employees'

interest in collective bargaining, which further supports the conclusion that makewhole is appropriate in this case.

One of Arnaudo's principal defenses was its claim that the UFW "abandoned" the bargaining unit. As the Board has previously stated, "it is well-established that the Union's absence alone does not constitute a waiver of [bargaining] rights." (*Arnaudo Brothers, LP, et al*. (2014) 40 ALRB No. 3, p. 9.) Arnaudo's assertion of this defense, the invalidity of which is a matter of well-established Board law, does not further the policies and purposes of the Act. Assertion of the defense directly undermines the stated legislative policy of protecting employee free choice in the designation of bargaining representatives and elimination of employer interference with that choice. (See Lab. Code, § 1140.2.) Arnaudo argues that its position furthers the policies and purposes of the Act because it presents "novel issues" of "long term" union inactivity. Existing Board precedent confirms that union inactivity, even for a prolonged period, does not constitute a defense to the duty to bargain. (*San Joaquin Tomato Growers, Inc*. (2011) 37 ALRB No. 5, p. 3; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, p. 6.) The Board's precedent on abandonment is consistent with appellate precedent on the continuing duty to bargain under the ALRA. (See *F&P Growers Assoc. v. ALRB, supra,* 168 Cal.App.3d 667, 676-677; *Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1, 29-30.) Therefore, the issue is not a novel one. Furthermore, although Arnaudo questioned the UFW's status based on its abandonment theory in 2012, it simultaneously engaged in bad faith tactics, purporting to be willing to schedule bargaining dates, but ultimately failing to agree to any such dates.

Arnaudo's remaining defenses were that its own and the UFW's negotiators were unavailable for bargaining, and that the UFW did not have an employee bargaining committee and could not bargain without one. There is no public policy interest in the advancement of these defenses that would outweigh the employees' interest in collective bargaining. In particular, the ALJ found that, not only did Arnaudo fail to introduce any evidence to substantiate its claim that the UFW could not negotiate without a bargaining committee, to the extent that the UFW was having difficulty forming a committee, this problem was due to Arnaudo's unlawful failure to respond to the UFW's information requests.

Accordingly, I would find makewhole to be appropriate on these bases, in addition to the basis discussed by the ALJ.

II. The Makewhole Period

The UFW excepted to the ALJ's conclusion that the makewhole period should terminate on May 24, 2013, which is the date of the parties' first MMC session, arguing that, despite attending MMC sessions, Arnaudo did not bargain in good faith during the MMC process. Ordinarily, a makewhole period terminates when the employer engages in good faith bargaining with the union. (See, e.g., *D'Arrigo Bros. Co. of California* (2006) 32 ALRB No. 1, p. 24 (makewhole award "continues to apply until the Respondent has shown to have commenced good faith bargaining.").) Other than citing the parties' initial MMC session, the ALJ did not state any reason for cutting off makewhole on May 24, 2013.

In affirming the ALJ, my colleagues cite authorities for the proposition that MMC proceedings are akin to "interest arbitration," that interest arbitration is an accepted adjunct to bargaining, and that the Legislature enacted MMC to secure a more effective collective bargaining process. They also cite authorities stating that there is a strong public policy favoring arbitration of labor disputes and that arbitration is "part and parcel" of the collective bargaining process. These propositions are clearly correct. However, given that MMC is an adjunct to the duty to bargain, and that the bargaining duty continues in force during the MMC process, it is not clear why the commencement of MMC would terminate a makewhole obligation that would otherwise continue until such time as the employer bargained in good faith. There is not, however, sufficient evidence in the record to determine whether good faith bargaining occurred on May 24, 2013 or thereafter.

III. The "*Dal Porto*" Defense

With respect to Arnaudo's assertion of a "*Dal Porto*" defense, my colleagues state their adoption of the decision of the ALJ.[3] However, in response to Arnaudo's argument that makewhole could not be awarded because the parties would not have reached agreement even absent Arnaudo's refusal to bargain, the ALJ ruled that Arnaudo "will have the opportunity to show this in compliance proceedings if they wish."

[3] Under *William Dal Porto & Sons, Inc. v. ALRB* (1987) 191 Cal.App.3d 1195, a showing that an employer unlawfully refused to bargain in good faith creates a presumption that the parties would have agreed to a contract calling for higher wages in the absence of the refusal to bargain. Under certain circumstances, the employer may rebut this presumption by proving that "no agreement calling for higher pay would have been concluded in the absence of the illegality." (*Id*. at 1208.)

My colleagues state that the "*Dal Porto*" defense is "irrelevant under the facts of this case." Thus, it is unclear whether my colleagues are upholding the ALJ or reversing him.

In any event, the Board's prior case law makes clear that an argument that makewhole should not be awarded (as opposed to an argument that the amount of makewhole should be reduced), including, specifically, a "*Dal Porto*" defense, must be established by the employer at the liability stage. (*Hickam* (1991) 17 ALRB No. 7; *Abatti Farms, Inc*. (1990) 16 ALRB No. 17.) Assuming that my colleagues are correct in terminating the makewhole period on May 24, 2013, then the *Dal Porto* defense may not be asserted under the facts of this case because no bargaining occurred during the makewhole period. Accordingly, "what might have occurred during the course of bargaining to legitimately prevent agreement cannot be determined" and "[a]ny evidence offered to prove that the parties would have reached impasse had they bargained in good faith is too speculative to be considered relevant and substantial evidence under the law." (*Abatti Farms, Inc*., *supra*, 16 ALRB No. 17, p. 10; and see *George Arakelian Farms, Inc. v. ALRB* (1989) 49 Cal.3d 1279, 1293.)

DATED: September 10, 2015

Cathryn Rivera-Hernandez, Member

CASE SUMMARY

ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.
(UFW)

Case No. 2012-CE-030-VIS
41 ALRB No. 6

Background

On September 26, 2013, an Administrative Law Judge ("ALJ") for the Board found Respondents Arnaudo Brothers, LP and Arnaudo Brothers, Inc., liable for unfair labor practices ("ULPs") in violation of sections 1153(a) and 1153(e) of the Agricultural Labor Relations Act ("Act"). Specifically, the ALJ found that Respondents had failed to provide the Charging Party, the United Farm Workers of America ("UFW"), with requested information relevant to bargaining, and had also refused to meet with the UFW in collective bargaining negotiations. Respondents excepted to the ALJ's decision, with one exception being that the ALJ had prevented them from introducing evidence that the UFW had disclaimed interest in representing Respondents' employees.

On April 4, 2014, the Board, in its decision in 40 ALRB No. 3, ordered that the record be reopened, so that Respondents could present evidence on the issue of disclaimer. The UFW requested and received permission from the Board to brief the issue of bargaining makewhole, and the Board instructed the ALJ to make legal conclusions. Additional proceedings were conducted, and on April 29, 2015, the ALJ issued a Supplemental Decision on the issues of disclaimer and makewhole.

ALJ's Supplemental Decision

The ALJ found that there was no disclaimer by the UFW, and that statements allegedly made to Respondents' president by UFW representatives did not clearly and unequivocally establish any disclaimer. The ALJ reaffirmed his conclusion that Respondents had committed ULPs in violation of the Act. Regarding makewhole, the ALJ rejected Respondents' argument that the Mandatory Mediation and Conciliation ("MMC") process pursuant to section 1164 of the Act, in which both parties engaged, rendered the issue of makewhole moot. The ALJ explained that the MMC mediator's report was not retroactive to the date of any unlawful refusal to bargain, and that under section 1164, the mediator has no power to find ULPs, to remedy them, or to issue a makewhole award. The ALJ stated that Respondents could, during compliance proceedings, attempt to show that no contract for higher wages and benefits would have been reached even if Respondents had engaged in good faith bargaining. The ALJ concluded that a makewhole award was proper in this case, and that the makewhole period began on September 27, 2012 (when Respondents ignored the UFW's requests for bargaining and instead chose to challenge the UFW's status as the bargaining representative), and ended on May 24, 2013, the date of the first MMC mediation session. The ALJ's recommended order instructed Respondents to cease and desist from failing to provide information and refusing to bargain, awarded makewhole to all bargaining unit

members for the makewhole period, and also directed Respondents to post, mail, and read a notice to all Respondents' employees regarding Respondents' ULPs in this matter.

Board Decision

The Board affirmed all the ALJ's findings and conclusions in full, and adopted the ALJ's recommended order. The Board concluded that Respondents' defense, raised in their exceptions to the ALJ's Supplemental Decision, that the parties would not have agreed to a contract even absent Respondents' unlawful refusal to bargain (the *Dal Porto* defense) was irrelevant to this case, as that defense is only applicable to cases where surface bargaining occurred. The Board clarified that the ALJ's statement that Respondents could be allowed, during compliance proceedings, to present evidence that no contract for higher wages and benefits would have been reached, was dicta. The Board explained that the ALJ properly found that the makewhole period ended with the first MMC mediation session because this statutory dispute resolution system is an extension of the bargaining period itself.

Member Rivera-Hernandez's Concurrence and Dissent

Member Rivera-Hernandez wrote a concurring and dissenting opinion. She agreed, on the whole, with the Majority's affirmation of the ALJ's decision. She further agreed with the Majority that makewhole was appropriate and that the public interest in Arnaudo's disclaimer defense did not outweigh the employees' interest in collective bargaining. However, she also stated that evaluation of Arnaudo's "abandonment" and other defenses, which were not discussed by the ALJ or the Majority, also supported the conclusion that makewhole was appropriate. With respect to the Majority's decision to end the makewhole period as of the parties' first MMC session, Member Rivera-Hernandez stated that it was unclear why the commencement of MMC would terminate a makewhole period that would otherwise continue until the employer bargained in good faith when there was not sufficient evidence in the record to reach a conclusion as to whether or when good faith bargaining occurred. Finally, Member Rivera-Hernandez stated that, assuming the correctness of the Majority's makewhole cut-off date, no "*Dal Porto*" defense would be available because no bargaining occurred during the makewhole period, although Member Rivera-Hernandez clarified that such a defense must be established by the employer at the liability stage, rather than the compliance stage, as the ALJ stated.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARNAUDO BROTHERS, LP, and ARNAUDO BROTHERS, INC., Respondents, and UNITED FARM WORKERS OF AMERICA, Charging Party.	))))))))))	Case No. 2012-CE-030-VIS (40 ALRB No. 3) (Admin. Order No. 2014-30)

Appearances:

Robert K. Carrol
Nixon Peabody LLP
San Francisco, California
For Respondents

Mary Mecartney and Aida L. Sotelo
Martinez, Aguilasocho & Lynch APLC
Bakersfield, California
For the Charging Party

Abdel Nassar
Visalia ALRB Regional Office
For General Counsel

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: On September 26, 2013, the undersigned issued a Decision in the above-captioned matter, finding that Respondents, Arnaudo Brothers, LP and Arnaudo Brothers, Inc., violated sections 1353(a) and (e) of the Agricultural Labor Relations Act (Act) by refusing to furnish the Charging Party, United Farm Workers of America with requested information, and by refusing to meet in collective bargaining negotiations. Only the Respondents filed exceptions. Among those exceptions was the allegation that the undersigned "prevented" them from presenting evidence showing that the Charging Party disclaimed interest in representing the bargaining unit employees.

On April 4, 2014, the Agricultural Labor Relations Board (Board) issued its Decision in (2014) 40 ALRB No. 3, ordering that the record be reopened, so that Respondents could offer additional evidence on the disclaimer issue. Subsequent to the issuance of the Board's Decision, the Charging Party filed a motion to "brief" the issue of bargaining makewhole. Inasmuch as the complaint did not seek this remedy, neither the Charging Party nor General Counsel had requested it prior to the Board's Decision, and the Board's Decision had already issued, the undersigned denied the motion as untimely. On October 15, 2014, the Board granted the Charging Party's request for special permission to appeal this ruling. The Board granted the request to brief the bargaining makewhole issue, and directed the undersigned to render conclusions of law thereon.

On October 14, 2014, in Tracy, and on March 10, 2015,[1] in Indio, California, additional testimony was given in this proceeding, and more exhibits were introduced

[1] The delay was primarily occasioned by health issues being experienced by General Counsel's witness.

into evidence. Subsequent to the hearing, the parties filed briefs, 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.

SUPPLEMENTAL FINDINGS OF FACT

Respondents called Steven J. Arnaudo and Dante John Nomellini as witnesses. Arnaudo is Respondents' President, and Nomellini was their attorney throughout collective bargaining negotiations, until 1981 or 1982. Arnaudo was Respondents' management representative during the original hearing in this matter, and sat next to his attorney, Robert K. Carrol, throughout that proceeding. Respondents did not call Arnaudo as a witness, and the undersigned did not prevent them from doing so.[2] Nomellini was not named as a potential witness by Respondents at the prehearing conference in this matter, and he did not appear at the initial hearing.

As noted in the original decision, the Charging Party was certified as the exclusive bargaining representative for the agricultural employees of "Arnaudo Bros." in San Joaquin County, on January 14, 1977. The Charging Party and Arnaudo Brothers

[2] Carrol testified at the original hearing. As will become apparent, he was not a percipient witness to the alleged disclaimer of interest. The undersigned did sustain some objections to his testimony, such as his usual practice in conducting collective bargaining negotiations, particularly since he did not represent Respondents in the negotiations discussed herein. The undersigned continues to maintain that Carrol's testimony was irrelevant, since, as reiterated in the Board's Decision, Board law clearly establishes that inactivity by a collective bargaining representative does not result in loss of representative status. Furthermore, the undersigned acknowledged the Charging Party's inactivity in his original Decision herein.

negotiated for four or five years, without reaching agreement. According to Nomellini, they were far apart on economic issues when negotiations ended.[3]

On leading questions by counsel, Arnaudo placed the final negotiating session on October 21, 1981. Arnaudo testified that the meeting took place at a State office building in Stockton. Among those present were Nomellini and two negotiators for the Charging Party, whose names he does not know. According to Arnaudo, one of the negotiators asked him, "You don't like unions, do you?" Arnaudo responded, "Yeah, I'm okay with unions. I just don't like, particularly, your union. So, I have no problems with unions, just you." The representative replied, "We don't like you either. We're through with you." Arnaudo told him, "So, great, I'm over with you."

Respondents submitted two identical declarations from Arnaudo, executed in June and July 2013, in support of motions to review the Visalia Regional Director's decision to block a decertification election, and in support of Respondents' motion for summary judgement in this case. The declarations contend that the negotiator told Arnaudo he no longer wanted anything to do with Respondents. The undersigned denied the motion for summary judgment, without comment, because the undersigned believed, and continues to believe, that the statements, if made, do not establish a disclaimer of interest.

[3] According to Arnaudo, the original election took place in 1975, and involved the agricultural employees of A & M Farms, which was a joint venture between Arnaudo, his brother and Ted Mancuso. Mancuso died in 1975, and the Arnaudo brothers assumed total control of the business. Arnaudo testified that the parties normally negotiated between May and October, Respondents' peak season. It appears the parties met a total of 20-25 times over a four- or five-year period.

The declarations place the meeting in May 1982, and allege that the representative making the statement was Mack Lyons. Arnaudo is now aware that this identification was incorrect.[4] On cross-examination, Arnaudo was clearly flustered by his misidentification. Nevertheless, he steadfastly adhered to his version of what took place during the exchange.

Dante Nomellini initially testified that the last negotiating session between Respondents and the Charging Party took place in about October 1981. Nomellini, however, then testified he did not "think" there were any negotiations after that date. In response to a leading question, Nomellini later testified there were no further negotiations after October 21, 1981. Nomellini, however, acknowledged that after October 1981, the Charging Party alleged unfair labor practices by Respondents, not involving bad faith bargaining. Nomellini did not state whether the Charging Party filed unfair labor practice charges containing such allegations. Nomellini identified the final union negotiators as Arturo Rodriguez and Luciano Crespo. Nomellini testified that he did not hear either of the negotiators tell Steven Arnaudo they did not want to have anything further to do with him, at the final bargaining session.

Luciano C. Crespo, a former representative of the Charging Party, initially testified that he was assigned to negotiate with Respondents in early 1982, but on cross examination changed this to 1981. Crespo stated he only attended one collective bargaining session with Respondents, which took place in the spring of 1982,

[4] The evidence, including Nomellini's testimony, establishes that Lyons was only briefly involved in these negotiations, near their outset.

corroborating Arnaudo's declarations, but contradicting Arnaudo's and Nomellini's testimony. Contrary to Arnaudo, Crespo testified that the meeting took place at the Stockton Public Library.

According to Crespo, he was the Charging Party's sole negotiator at the meeting, although he was accompanied by two of Respondents' workers. Crespo testified he spoke only with Nomellini at the meeting, because Nomellini made it clear he was Respondents' representative, and Arnaudo avoided eye contact with him. He further stated that the workers attending the meeting said nothing to either Arnaudo or Nomellini. Crespo testified that all that took place at the meeting was that he introduced himself and handed proposals to Nomellini. Nomellini stated he would review the proposals with Arnaudo, and the two then left.

Crespo testified that after the meeting, he sent a letter to Nomellini, suggesting additional dates for collective bargaining sessions. Crespo believes he also called Nomellini, and left a message when told he was not present. According to Crespo, Nomellini did not respond to either the letter or message. Nomellini, in his testimony, denied receiving any further requests for negotiations after the last meeting. Crespo made no further attempts to continue negotiations, because he was occupied with matters of higher priority, and was transferred to a different position, in late 1982. No one else from the Charging Party contacted Respondent, until the bargaining and information requests discussed in the original decision herein, more than 30 years later.

The testimony, and lack thereof, presents several potential credibility analyses. Arnaudo's allegations could simply be discredited, based on the inconsistencies between

his declarations and his testimony, his misidentification of who made the statements, the lack of corroboration by Nomellini and Crespo's denial. Nevertheless, it is difficult to find that the colorful exchange so earnestly related by Arnaudo was spun out of whole cloth. While Nomellini was present during these negotiations, the testimony fails to pin down whether he was in a position to hear the alleged exchange.

Furthermore, while the undersigned does not believe that Luciano Crespo was the one who made the alleged statements, it is not so clear that he was present if and when they were made. Crespo appeared certain the meeting he attended took place at the library, while Arnaudo appeared equally certain that the exchange took place at a State office building. Arnaudo and Nomellini both appeared certain that two Charging Party representatives were present at the final bargaining session, while Crespo also appeared certain he was the only representative present at the one meeting he attended. If, in fact, the exchange took place in October 1981, Crespo may well not have been present, and if this incident took place in May 1982, he may have simply forgotten that Arturo Rodriguez was also there, and if so, did not hear the statements.

Finally, neither General Counsel nor the Charging Party called Arturo Rodriguez as a witness, and no explanation was given for such failure. The undersigned takes judicial notice that Rodriguez is currently employed by the Charging Party as its President. (See, for example, www.ufw.org.) There was ample time available for arrangements to have been made for him to testify. Under these circumstances, it would be justifiable to infer that had Rodriguez been called as a witness, and testified truthfully,

he would have admitted making the statements alleged by Arnaudo, or having heard another negotiator make the statements.

Given the state of the record, and the impressions given by the witnesses, the undersigned will make no credibility findings as to whether the exchange took place, or whether Crespo wrote and/or called Nomellini to request further negotiations. As discussed below, no such credibility resolutions are needed.

ANALYSIS AND CONCLUSIONS OF LAW

The Alleged Disclaimer of Interest

In its Decision herein, the Board adopted the test used by the National Labor Relations Board (NLRB) to determine whether a union has disclaimed interest in representing the bargaining unit employees. The union's conduct must be clear, unequivocal, not in bad faith, and not inconsistent with its subsequent conduct. *United Steel Workers of America, Local 14693, AFL-CIO (Skilbeck, P.L.C., Inc.)* (2005) 345 NLRB 754 [178 LRRM 1049); *Conkle Funeral Home, Inc.* (1983) 266 NLRB 295 [112 LRRM 1321]; cf. *Vaughn & Sons, Inc.* (1986) 281 NLRB 1082 [124 LRRM 1098]. The Board has already ruled that an alleged statement, that the Charging Party "no longer wanted a contract," did not establish a clear and unequivocal disclaimer of interest. *Arnaudo Brothers, LP, and Arnaudo Brothers, Inc.* (2015) 41 ALRB No. 3, adopting Admin. Order No. 2014-12, and citing *Vaughn & Sons, Inc.*, supra. That statement, if anything, is more akin to a disclaimer of interest than the allegation made by Arnaudo in his testimony.

Assuming a representative told Steven Arnaudo that the Charging Party wanted nothing to do with "you," this was not a clear and unequivocal disclaimer of interest in representing Respondents' employees. First of all, it is unclear whether the statement referred to Arnaudo personally, or Respondents' as business entities. Secondly, the statement said nothing about not representing the employees. More likely, the statement, if made, simply reflected the frustration of bargaining for four or five years, without being able to obtain the economic provisions the Charging Party was seeking.

As noted above, the Board, in its Decision herein, stated that mere inactivity does not amount to a disclaimer of representative status.[5] The undersigned does not believe that such inactivity can be used to clarity an otherwise ambiguous and equivocal statement, so as to create a disclaimer. Rather, evidence must be produced showing conduct, in itself, which clearly and unequivocally establishes such a disclaimer. **Then,** evidence of subsequent conduct inconsistent with the disclaimer may be considered to show it was unintentional or made in bad faith.

Based on the foregoing, the disclaimer defense is rejected, and the undersigned adheres to his previous conclusion, that Respondents' conduct violated sections 1153(a) and (e) of the Act.

[5] This is why it is unnecessary to determine whether the evidence shows that, after the alleged disclaimer, the Charging Party requested additional bargaining, prior to 2012, or pursued unfair labor practice allegations involving Respondents.

Bargaining Makewhole

In *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4,[6] the Board ordered bargaining makewhole as a remedy where the employer refused to bargain, primarily relying on an extended period of inactivity by the union, comparable to that established herein. The Board analyzed the issue as follows: (Footnotes omitted.)

> Bargaining makewhole is authorized by Labor Code section 1160.3 which states that the Board may enter orders in unfair labor practice cases "making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain." (Lab. Code § 1160.3.) In *J.R. Norton*, the California Supreme Court held that the Board may not automatically award makewhole in cases where an employer refuses to bargain in order to challenge the validity of an election. The court held that the Board must "determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted." (*J.R. Norton Co. v. Agricultural Labor Relations Bd., supra*, 26 Cal.3d 1, 39.)
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> In *F&P Growers Assoc*., [1983] 9 ALRB No. 22, the Board clarified that the *J.R. Norton* "reasonableness and good faith" analysis does not apply outside of the context of an employer's refusal to bargain for the purpose of seeking court review of a certification election. When an employer refuses to bargain "but neither the conduct of the election nor the agency's decision to certify the union is at issue, the 'reasonableness' of the employer's litigation posture and the employer's 'good faith' do not control our decision as to whether to impose makewhole." (*F&P Growers Assoc., supra,* 9 ALRB No. 22, p. 7; affirmed at *F&P Growers Ass'n v. Agricultural Labor Relations Bd., supra*, 168 Cal.App.3d 667.) Instead, the Board is to "consider on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain." (*Id.* at 7-8.) Except in cases where the employer's position furthers the policies and purposes of the ALRA, "the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain." (*Id*. at 8.)

[6] The California Court of Appeal, Fifth Appellate District, has granted a writ of review in that case. The court's decision is pending.

> Here, because the Employer is not seeking review of a certification election, *F&P Growers* applies, rather than *J.R. Norton*. The issue, therefore, is whether the public interest in the Employer's position outweighs the harm done to employees by its refusal to bargain. The position taken by the Employer is based principally on its contention the UFW forfeited its certification by abandoning the bargaining unit. As discussed above, this position is contrary to over 30 years of Board precedent holding that abandonment is not a defense to the duty to bargain. Accordingly, the Employer's position cannot be said to further the policies and purposes of the ALRA. (See *Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra*, 12 ALRB No. 8, p. 9-10 (ordering makewhole where Employer raised defenses that had already been rejected under existing case law).

Based on the foregoing, it appears clear that the Board would find Respondents' disclaimer defense to be outweighed by the employees' interest in collective bargaining. While the Board had not, until its Decision herein, adopted the NLRB's test for establishing a disclaimer of interest, that test has been in place for decades. Therefore, the only "novel" issue potentially presented would be whether the Board would adopt the National Board's precedent.

Section 1148 of the Act provides that the Board shall follow applicable precedents of the National Labor Relations Board. Respondents have presented no arguments as to why the NLRB's precedents on the disclaimer issue are inapplicable under the Act. It is concluded that Respondents' interest in having this limited issue litigated is outweighed by the employees' interest in collective bargaining.

On February 1, 2013, the Charging Party filed a petition for mandatory mediation and conciliation under sections 1164(a)(1) and 1164.11 of the Act, which was granted by the Board on February 13.[7] The Charging Party first renewed its bargaining request by

[7] Admin. Order No. 2013-08.

letter dated August 7, 2012. Since the Charging Party could have requested mandatory mediation and conciliation within 90 days of that request, Respondents' dilatory tactics likely delayed the MMA filing. In any event, the workers were entitled to the timely commencement of negotiations, irrespective of the availability of mandatory mediation.

Respondents argue that bargaining makewhole is inappropriate herein because the intent of mandatory mediation and conciliation is to furnish that remedy. Respondents cite the California Senate and Assembly Bill Analyses for Senate Bill 1156, dated August 30, 2002. A review of those analyses discloses that **proponents** of the bill, inter alia, contended that the ALRB was not enforcing the obligation of agricultural employers to bargain with their employees' unions, **not** that this was **the** reason the bill was passed. It is settled law that, absent an unfair labor practice finding, bad faith bargaining cannot be presumed.

Section 1164 of the Act, providing for mandatory mediation and conciliation, does not contain any language indicating that it is intended to be a substitute for bargaining makewhole, and does not require a finding of bad faith bargaining as a prerequisite for its implementation. *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5. Furthermore, there is nothing in section 1164 which would make a mediator's report retroactive to the date of any unlawful refusal to bargain. To the contrary, the contract proposed by the mediator becomes effective when the time to request review by the Board expires, or when the Board accepts the contract, on appeal. See, eg. *Arnaudo Brothers, LP, and Arnaudo Brothers, Inc.* (2015) 41 ALRB No. 3. More specifically, the mediator's contract between the parties became effective when the Board rejected Respondents' objections.

Respondents also contend that any bad faith bargaining issues are resolved in the mediation process, and that to order makewhole, the Board would be duplicating the mediator's award, and interfering with it. Section 1164 does not give a mediator the authority to find unfair labor practices, or to remedy them. Specifically, section 1164 does not authorize the mediator to issue a makewhole award, as apparently contended by Respondents. Respondents fail to explain how, by remedying a refusal to bargain unfair labor practice, the Board would hinder the mediator's ability to perform his duties. In any event, the mediator has issued his reports, which say nothing about bargaining makewhole.

Respondents further argue that the mediator's reports bar or render moot the issue of bargaining makewhole in this case. Since the reports do not contain any bargaining makewhole findings, the issue clearly is not moot. Since there is no statutory authority for the claim that mandatory mediation is the exclusive makewhole remedy, or that it is even authorized to remedy bargaining violations, those provisions do not bar bargaining makewhole in related unfair labor practice proceedings.

The issuance of the reports do not establish that the parties, absent Respondents' unlawful refusal to bargain, would not have reached agreement to a contract with higher wages and/or fringe benefits. The presumption, in fact, is to the contrary. The decision in *Paul W. Bertuccio v. ALRB* (1988) 202 Cal.App. 3d 1369 [249 Cal.Rptr. 473], cited by Respondents, states that once the Board finds a bargaining violation, it is the respondent's burden to show that no contract containing higher wages and benefits would have been

reached. Respondents will have the opportunity to show this in compliance proceedings, if they wish. Therefore, Respondents' arguments are rejected.

Based on the foregoing, it is concluded that bargaining makewhole is an appropriate remedy in this matter. The makewhole period shall commence on September 27, 2012, the date Respondents' counsel ignored the Charging Party's requests for information and bargaining, and instead, challenged its representative status. The parties stipulated that the first mediation session took place on May 24, 2013, which shall be the ending date for bargaining makewhole.

Accordingly, the undersigned issues the following revised Order and Notice to Agricultural Employees:

ORDER

Pursuant to Labor Code section 1160.3, Respondents Arnaudo Brothers, LP and Arnaudo Brothers, Inc., their officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Failing and refusing to timely provide United Farm Workers of America (Union) with information relevant to the performance of its duties as the collective bargaining representative of their agricultural employees.

(b) Failing or refusing to bargain collectively with the Union, for the purposes of negotiating a collective bargaining agreement.

(c) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed in section 1152 of the

Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the purposes of the Act:

(a) Upon request, promptly make available to the Union the information it requested on August 7, 2012 and January 10, 2013, to the extent they have not already done so.

(b) Make the bargaining unit members whole for all losses in wages and fringe benefits they reasonably suffered as the result of Respondents' refusal to bargain, for the period September 27, 2012 to May 24, 2013, plus interest to be calculated in accordance with the Board's Decision in *H & R Gunland Ranches, Inc.* (2013) 39 ALRB No. 21.

(c) Sign the Notice to Agricultural Employees attached hereto, and after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) Post copies of the Notice in all appropriate languages at conspicuous places on Respondents' property, including places where notices to employees are usually posted, for sixty (60) days, the times and places of posting to be determined by the Regional Director. Respondents shall exercise due care to replace any copies of the Notice which may be altered, defaced, covered or removed.

(e) Arrange for a Board agent or representative of Respondents to distribute and read the attached Notice, in all appropriate languages, to its employees then employed in the bargaining unit on company time and property, at the times and places to be determined by the Regional Director. Following the reading, a Board agent shall be

given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employee rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondents to all non-hourly employees to compensate them for lost work time during the reading and the question-and-answer period.

(f) Mail copies of the Notice in all appropriate languages, within 30 days after this Order becomes final, to all agricultural employees employed by Respondents at any time during the period September 27, 2012 to September 26, 2013, at their last known addresses.

(g) Provide a copy of the Notice to each agricultural employee hired to work for Respondents during the twelve-month period following the issuance of a final order in this matter.

(h) Notify the Regional Director in writing, within thirty days after this Order becomes final, of the steps Respondents have taken to comply with its terms. Upon request of the Regional Director, Respondents shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of the final order in this matter.

Dated: April 29, 2015

_____

Douglas Gallop
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed by United Farm Workers of America (Union), in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by failing and refusing to timely furnish the Union with information to which it was entitled under the Act, and by failing and refusing to meet in collective bargaining negotiations.

The ALRB has told us to post and publish this Notice.

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

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

Because you have these rights, we promise that:

WE WILL NOT fail or refuse to timely provide the Union with information necessary for it to fulfill its duties as the collective bargaining representative of our agricultural employees.

WE WILL NOT fail or refuse to meet in collective bargaining negotiations with the Union.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees from exercising their rights under the Act

WE WILL make all bargaining unit members whole for the losses in wages and fringe benefits they reasonably suffered, for the period September 27, 2012 to May 24, 2013, as the result of our refusal to bargain with the Union.

DATED:

ARNAUDO BROTHERS, LLP and
ARNAUDO BROTHERS, INC.

By _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1642 W. Walnut Ave., Visalia, California. Telephone: (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE