STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PERRY FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 76-CE-1-S 4 ALRB No. 25

DECISION AND ORDER

On March 10, 1977 Administrative Law Officer (ALO) Ronald M. Telanoff issued the attached Decision. The General Counsel and Respondent each filed exceptions and a supporting brief and the General Counsel filed a brief in opposition to Respondent's exceptions. By leave of the Board, the Western Grower's Association filed a brief amicus curiae regarding the Board's implementation of the make-whole remedy for refusal to bargain provided in Labor Code Section 1160.3, to which the General Counsel filed a brief in response.

The Board has considered the record and the attached Decision in light of the exceptions and briefs of the parties and the amicus brief, and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt his recommended Order as modified herein.

The complaint alleged, and the ALO found, that the Respondent, since on or about January 13, 1976, has failed and refused to bargain collectively in good faith, in violation of

Section 1153(e) and (a) of the Act, with the United Farm Workers of America, AFL-CIO, (UFW), by its failure to provide bargaining information requested by the Union and its refusal to meet with the Union for the purpose of bargaining, although requested to do so. The UFW had previously been certified as the exclusive representative of all of the agricultural employees of the Employer in San Joaquin County in Case Number 75-RC-2-S. The ALO found also that Respondent had independently violated Section 1153 (a) of the Act on August 30, 1975, by provoking a fight with a UFW organizer, by interfering with the organizer's attempts to communicate with workers and by damaging UFW property (authorization cards), all of which conduct occurred in the presence of agricultural employees. [1/]

In its answer to the complaint, Respondent raised, inter alia, the defense that there was no proper election conducted among its employees, that the certification was invalid, and that it was therefore under no duty to bargain with the Union. Although the ALO received a substantial amount of testimony with respect to representation issues, he concluded that the certification was not

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[1/] Respondent takes exception to these findings on the procedural ground that the events were not included in a charge or a complaint filed within the six-month limitation of Section 1160.2 of the Act. The law is clear, however, that the statutory limitation is not jurisdictional, but must be the subject of an affirmative defense. See, e.g., Chicago Roll Forming Co., 167 NLRB 961, 971, 66 LRRM 1228 TT9"67T7enf'd. 418 F.2d 346, 72 LRRM 2683 (7th Cir. 1969). Respondent failed to raise the defense at the hearing, and indeed, presented rebuttal witnesses concerning these incidents. The substance of this conduct was therefore fully litigated by the parties, was properly before the ALO for decision, and the Respondent's failure to raise the statutory limitation constituted a waiver of the defense. Shumate v. NLRB, 452 F.2d 717, 78 LRRM 2905, 2908 (4th Cir. 1971)1This portion of Respondent's exception is rejected. The substantive aspects of Respondent's exception are discussed infra.

subject to attack in this unfair labor practice proceeding. While we agree with the ALO's conclusion, we wish to clarify its rationale,

Under NLRB precedent, in the absence of newly discovered or previously unavailable evidence or extraordinary circumstances, a respondent in a refusal to bargain proceeding may not litigate matters which were or could have been raised in the prior representation proceeding. See, e.g., King's Markets, Inc., 233 NLRB No. 60 (1977) . This broad proscription against relitigation of representation issues in related unfair labor practice proceedings has been consistently supported by the courts since the earliest days of the NLRA. See Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162, 8 LRRM 425 (1941). We view this doctrine as also appropriate to proceedings under the ALRA. It expresses a proper balance between the statutory goals of achieving finality and stability in representation matters and the interest of the Board and the parties in assuring that there has been a full and fair opportunity for investigation of facts bearing on the propriety of the election and certification process. We shall hereafter apply it in our cases.

We take administrative notice that Respondent's objections to the election were dismissed, inter alia, because of its failure to comply with Section 1156.3(c) of the Act and Section 20365(a) of the Board's regulations, regarding the proper and timely filing, service and contents of objections. It is clear, however, that Respondent had the opportunity to file, and thereafter to litigate, proper objections to the conduct of the election and/or to conduct affecting its results. This is all that the law requires. That

the objections were ultimately dismissed on procedural as well as substantive grounds is immaterial. In either instance the Responder may not litigate the representation issues in a subsequent refusal to bargain proceeding. Deming Division, Crane Co., 218 NLRB 130, 89 LRRM 1638 (1975); Douglas County Electric Membership Coop., 148 NLRB 559, enf'd. 358 F.2d 125, 61 LRRM 2679 (5th Cir. 1964).

At the hearing the ALO granted the General Counsel's motion to amend the complaint to allege that Ernest Perry, Perry Farms, Inc., and Lathrop Farm Labor Center, Inc., (hereafter LFLC), constitute a single employer for the purposes of the Act. The ALO so found in his Decision. Respondent has taken exception on several grounds: (1) that the Board never acquired jurisdiction over either Ernest Perry as an individual or over LFLC, in that they were not served with a copy of the charge or the complaint; (2) that as a matter of law the ALO erred in his finding that the three entities were one for purposes of the ALRA. We find that neither of these exceptions has merit.

Upon the facts of this case, largely as admitted by Respondent at trial, it is clearly established that Ernest Perry, Perry Farms, Inc., and LFLC are a single integrated enterprise and comprise one employer for the purposes of this Act. Ernest Perry owns all stock in, and is President of, Perry Farms, Inc. Leonardo Loduca is its Vice-President. Perry and Loduca each own 50% of the stock of LFLC. Again, Perry is the President and Loduca the Vice-President. Both LFLC and Perry Farms, Inc., share the same address and same telephone number. Ernest Perry makes all of the material decisions for both entities. He controls and administers, and make

the labor relations decisions and policy for both. Perry also establishes and negotiates the deals in which the two corporate entities participate. The record discloses that one or the other of these entities variously functioned under Perry's personal direction during 1975 as an owner of growing crops, as a labor contractor, and as a custom farmer and harvester, and that it was Perry who determined in which capacity they functioned. At the time the petition herein was filed, for example, LFLC, which usually operates as a labor contractor according to Perry, was in fact harvesting tomatoes for its own account. It was therefore an agricultural employer within the meaning of the Act at that time.

On the basis of the above and the entire record herein, we adopt the ALO's finding that Ernest Perry, Perry Farms, Inc., and LFLC are a single integrated enterprise and constitute one employer for the purposes of the Act. See, e.g., Marsal Transport, Inc., 199 NLRB 689, 82 LRRM 1094 (1972); Barrington Plaza and Tragniew, Inc., 185 NLRB 962, 968-69, 75 LRRM 1226 (1970), enf'd. and modified on other grounds sub nom. NLRB v. Tragniew, 470 F.2d 669, 81 LRRM 2336 (9th Cir. 1972). Having established that the three entities are legally one, it follows that the failure to name as respondents, or to serve a charge and/or complaint upon, Ernest Perry or LFLC is not material herein, and we shall enter a remedial order which applies to all three. Barrington Plaza and Tragniew, Inc., supra; Esgro, Inc., and Esgro Valley, Inc., 135 NLRB 285, 49 LRRM 1472 (1962).

Respondent raises several exceptions going to the constitutionality of unfair labor practice proceedings under the

Act. The first is that the ALRA unconstitutionally confers judicial power upon this agency in violation of Article III, § 3 of the California Constitution. The second is that the review procedure set forth in § 1160.8 of the Act unconstitutionally limits the power of the courts to review the findings of the agency. As both of these contentions have recently been resolved in this agency's favor by the Fifth District Court of Appeal in Tex-Cal Land Management, Inc., v. Agricultural Labor Relations Board, 5 Civ. 3395 (2/21/78) we find these exceptions to be without merit.

Other § 1153(a) Violations

The ALO found that on August 30, 1975, Respondent, by Ernest Perry, violated the Act by provoking a fight with a Union organizer, by interfering with the Union's communication with workers, and by damaging or destroying union property. This conduct occurred in the presence of Respondent's agricultural employees. The ALO refused to find that the assault itself was a violation of the Act. The General Counsel has excepted to this conclusion, and to other language utilized by the ALO which he contends may create the impression that resort to law enforcement officials is an appropriate employer response irrespective of the circumstances in which it occurs.

As regards the latter issue, this Board has clearly indicated to the contrary in several cases. See, e.g., Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977); D'Arrigo Bros. Company, 3 ALRB No. 31 (1977). Unlawful employer interference with employee rights is not made lawful by the nature of the medium through which the violator chooses to act. Any inference to the contrary

which may be based on the ALO's language is hereby expressly rejected.

We agree with the General Counsel that the ALO ' s distinction between the Respondent's liability for provoking the fight and the fight itself is not a tenable one under the facts of this case. We find no merit in Respondent's argument that finding a violation requires a showing that the organizers were lawfully on the property.

In Tex-Cal Land Management, Inc. , supra , we held that the Act proscribes resort to violence of precisely the sort revealed in this case in the presence of agricultural employees. Only a showing of imminent need to take such action in order to protect tangible property interests or persons would justify such conduct. This holding was premised on our consideration of federal labor experience and on the special concern of the Legislature, as stated in the ALRA's preamble, that an end be made to the unstable and volatile condition which historically had existed in California's agricultural industry. Those principles apply here. Ernest Perry chose to vindicate his claims of right in this case by shouting at the organizers, pushing and shoving them, throwing their authorization cards on the ground, precipitating an altercation in which the organizer's mustache was partially pulled off, and displaying an axe handle in a threatening manner. This entire course of conduct, including the fight itself, was violative of the Act, and we so find. We shall therefore modify the remedial order accordingly.

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The Remedy

I. The Make-Whole Remedy for Refusal to Bargain

We have elsewhere reviewed the history and background of the make-whole remedy for refusal to bargain. See Adam Dairy, 4 ALRB No. 24 (1978), decided today. We adopt that discussion here and, most specifically, the conclusion that the ALRB has been granted the remedial power which the National Board determined it did not possess.

We turn next to a consideration of when the remedy should be applied. The statute directs that the Board may order a make-whole remedy when it "deems such relief appropriate." The ALO found that the make-whole remedy was appropriate on the facts of this case. The essence of his analysis and his failure to characterize the Respondent's refusal as, for example, "flagrant," "willful," or "frivolous" implies that he would apply the remedy wherever a refusal to bargain is made out. This is clearly the General Counsel's position as well. The Respondent and amicus, however, both argue that federal precedent limits the applicability of the remedy to only those cases where the employer's conduct can be shown to be "a clear and flagrant refusal to bargain for patently frivolous reasons."[2/]

In our view, the appropriateness of this remedy is ultimately to be determined by an analysis of the competing interests

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[2/] Respondent's additional argument is that the remedy cannot be applied without a finding that "but for" the employer's refusal to bargain a contract would have been signed. This position is erroneous. It elevates the Respondent's own unlawful conduct (the refusal to bargain) to the status of a virtual bar to any implementation of the remedy. Such a result has no basis in law or equity. See also the discussion on this point in Adam Dairy, supra, slip op. at 14-15.

affected and a balancing of their respective weights in light of the goals and policies of the Act. This process leads us to conclude that the make-whole remedy is appropriate whenever an employer has been found to have refused to bargain in violation of Section 1153 (e) and (a) of the Act and the employees have suffered losses of pay as a result. For the purpose of analysis at this juncture, the fact of loss to the employees may be presumed. Cf. NLRB v. Mastro Plastics Corp., 354 P.2d 170, 178, 60 LRRM 2578 (2nd Cir. 1965).

In the preamble to the Act, the Legislature set forth certain basic principles to which we must turn for guidance in our task of construing and implementing this law. The Legislature stated that by enacting the law the people of California sought to "ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations." Preamble, Section 1, ALRA. The statute was further designed, so the Legislature guides us, to " ... bring certainty and a sense of fair play" to the employer/employee relationship in agriculture. Preamble, Section 1.5, ALRA. Finally, in Section 1140.2 of the Act, we find the following statement of the intent of the legislation:

> It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.

The above principles show clearly that when an employer refuses to bargain with the certified representative of its employees it commits an act which strikes at the very heart of the system of labor-management relations which the Legislature sought to create. It has thereby deprived the employees of their statutorily created right to be represented by their Board-certified agent in the negotiation of the wages, hours, and other terms and conditions of their employment. The employees suffer this same loss whether the employer's refusal to bargain is designed solely to procure review in the courts of the underlying election issues or is of the flagrant or willful variety. This identity of harm is the crux of the question concerning when the remedy ought to be applied. As between the innocent employees and the employer which, having once had the full opportunity to litigate meritorious representation objections before the Board, now seeks a second review in the courts by a refusal to bargain, traditional principles of equity and the goals and policies of the Act require that the employer bear the actual burden of its own conduct. Where the employer's conduct is willful or flagrant, there can be no question that the same result must apply. [3/]

[3/] Respondent and the amicus argue that the make-whole remedy would be "punitive" in any case not of the "flagrant" or "willful" variety. The Supreme Court of the United States rejected a similar attempt to narrowly construe the back pay powers of a Federal District Court acting under Title VII of the Civil Rights Act of 1964, in a fashion which succinctly disposes of that contention herein: If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make-whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith."(Emphasis added). Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975).

A contrary conclusion would create a situation in which only the employer would be the ultimate beneficiary of its refusal to bargain regardless of the eventual result of its appeal. If it were found by the court to be under a valid bargaining obligation it would then simply be ordered to bargain with the union; an obligation which it had avoided during the pendency of the Board and court proceedings. In the end, it would likely face a union weakened by attrition and delay. If, on the other hand, its position is sustained by the courts, the employer would be relieved both of the duty to bargain and of any make-whole liability. Such a system contains great incentive for a refusal to bargain. It stands in contradiction of the statutory principles set forth above.

It is argued that because an employer can gain review of the Board's certification order only by precipitating a refusal to bargain charge and complaint [See, e.g., A. F. of L. v. NLRB, 308 U.S. 401, 5 LRRM 670 (1941); Nishikawa v. Mahony, 66 CA 3d 781 (1977)], the application of the make-whole remedy in "technical" refusals to bargain has the effect of penalizing the employer which seeks such review. However, in Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966), the Supreme Court of the United States rejected a similar contention regarding the application of compensatory remedies within the power of that agency by statute. In that case the Federal Maritime Commission had ordered the carrier to pay compensatory damages to a shipper which had been denied reasonable access to the carrier's vessels because of an invalid shipping arrangement with another party. The Commission had previously ruled similar shipping contracts unlawful. The Court

of Appeals had found the agency's imposition of a compensatory award inequitable, largely because the respondent might have believed in good faith that its conduct was not unlawful in view of the unsettled law on the issue. The Supreme Court, however, characterized the respondent's conduct as the product of a calculated gamble that precedent contrary to its position could be successfully distinguished. There was a substantial risk that it could not. The Court upheld the order for a compensatory award, holding that "[a]t any rate, it has never been the law that a litigant is absolved from liability for that time during which his litigation is pending." Id. at 624-25. The Court further noted that during the pendency of the appeal the respondent had been able to postpone the end of its unlawful conduct and the petitioner continued to suffer injury. [4/]

It is our conclusion, in the light of all of the above considerations, and in view of the record herein, that the Respondent be ordered to make its employees whole for the losses of pay incurred by them as a result of Respondent's refusal to

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[4/] Among the cases cited in this connection by the Court was NLRB v. Electric Vacuum Cleaner Co., Inc., 315 U.S. 685, 10 LRRM 501 (1942). In that case the NLRB had ordered, inter alia, that the employer reinstate and provide back pay to certain employees. There was a two year delay between the issuance of the complaint and the Board's final order, due largely to the Board's failure to enter an intermediate report. The Court nonetheless saw no ground for reducing the period for the award, concluding that "[w]e cannot penalize the employees for this happening." Id. at 698. In APW Products Co., Inc., 137 NLRB 25, 29-30, 50 LRRM 1042, enf'd. 316 F.2d 899, 53 LRRM 2055 (2nd Cir. 1963), the NLRB relied upon a similar analysis of competing interests in overruling its prior practice of excluding from backpay awards the period from the issuance of the Trial Examiner's decision finding no Section 8(a) (3) violation to the Board's decision reaching a contrary conclusion.

bargain with their certified bargaining representative.

We are, of course, applying the make-whole remedy only to the case now before us. Our concurring colleague, while not articulating his standard of application, agrees that the remedy is warranted on the facts of this case, but suggests that by our analysis of the make-whole provision we are rendering surplus the phrase "when the Board deems such relief appropriate." An analysis of the remainder of the pertinent language shows, however, that the make-whole provision is but one of several examples of affirmative action that the Board may order in a particular case:

> [the Board] ... shall issue ... an Order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees, with or without back pay, and making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the Employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part.

The implementation of this, or any remedial power, of course, first requires a finding that an unfair labor practice has been committed. We obviously cannot, and do not here, speculate about whether in some future case an Employer will be found not to have bargained in good faith, or if so whether the employees have lost pay as a result. As indicated previously, we also do not seek to deprive an Employer of "due process" in his testing of his legal obligations, but we do suggest that the Employer's right to seek such determinations should not be financed by his employees. In this case and in Adam Dairy, we have discussed at length the factors which have led us to our conclusion, not to prejudge future cases, but out of a desire to deal fully with the wide variety of contentions advanced by the parties and the amicus in their briefs and

exceptions, and because in this case of first impression, our public responsibility requires it.

While the concurrence emphasizes one precept of statutory construction, it ignores other principles of interpretation, equally vital, which buttress our construction of the make-whole provision. These rules were recently comprehensively reviewed by the Court in Steilberg v. Lackner, 69 C.A. 3d 780, 785 (1977):

> In construing a statute, the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law (Cossack v. City of Los Angeles (1974) 11 Cal. 3d 726, 732 [114 Cal. Rptr. 460, 523 P.2d 260]; Select Base Materials v. Board of Equal. (1959) 51 Cal. 2d 640, 645 [335 P.2d 672]). In determining the legislative intent, the court turns first to the words used in the statute (People v. Knowles (1950) 35 Cal.2d 175, 182 [217 P.2d 1]). The words, however, must be read in context, keeping in mind the nature and obvious purpose of the statute (Johnstone v. Richardson (1951) 103 Cal.App.2d 41, 46 [229 P.2d 9]), and the statutory language applied must be given such interpretation as will promote rather than defeat the objective and policy of the law (City of L.A. v. Pac. Tel. & Tel. Co. (1958) 164 Cal.App.2d 253, 256 [330 P.2d 888]). Statutes or statutory sections relating to the same subject must be construed together and harmonized if possible (Mannheim v. Superior Court (1970) 3 Cal.3d 678, 687 [91 Cal. Rptr. 585, 478 P.2d 17]; County of Placer v. Aetna Cas. etc. Co. (1958) 50 Cal.2d 182, 188-189 [323 P.2d 735]).Finally, in ascertaining legislative intent, the courts should consider not only the words used, but should also take into account other matters, such as the object in view, the evils to be remedied, the history of the times, legislation upon the same subject, public policy and contemporaneous construction (Alford v. Pierno (1972) 27 Cal.App.3d 682, 688]104 Cal. Rptr. 110]; Estate of Jacobs (1943) 61 Cal.App.2d 152, 155 [142 P.2d 454.

We have determined in Adam Dairy, 4 ALRB No. 24 (1978) that the term "pay" in the statute has a broad meaning, encompassing all of the elements of the compensation due the employee. We adopt

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that construction here.[5/] As in Adam Dairy, the record here discloses that the typical DFW contract contains a wide range of benefit provisions including health and medical coverage, pension benefits, social/educational services, as well as overtime, shift premiums, standby and travel pays, paid vacations and holidays. As all are species of employee compensation, we have the power to order that the Respondent's employees be made whole for their loss.

In implementing this remedy we are mindful of the basic remedial principles established under the national labor law and applicable to the ALRA as well. The Board has broad discretion to devise remedies, provided only that they effectuate the purposes of the Act. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 31 LRRM 2237 (1958). Particularly in the formulation of compensatory monetary remedies, this discretion has been accorded wide scope since the early days of the Wagner Act. See Phelps Dodge Corp. v. NLRB, 313 U.S. 177, at fn. 7, 8 LRRM 439 (1941); NLRB v. Seven-Up Bottling Co., supra. Because in making this award, we are venturing close to the collective bargaining process itself, we are also cognizant of other considerations which are relevant to its formulation. The Board is vested with the obligation to give "... coordinated effect to the policies of the Act." Seven-Up, supra. This requires us to consider and accommodate the parallel statutory directives that we make employees whole (Labor Code Section 1160.3), that we not compel party agreement to particular contract terms

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[5/] We therefore do not adopt the ALO's recommendation that the UFW be compensated for its loss of union dues during the make-whole period.

(Labor Code Section 1155.2(a)), and that whatever remedial course we follow be promotive of future collective bargaining between these parties (Labor Code Section 1140.2).

In Adam Dairy, supra, decided today, we have discussed in detail the considerations which have motivated our deliberations on the question of the calculation of this award. We will not repeat them here, though we incorporate that discussion herein by reference. The positions ascribed to the General Counsel, the Charging Party, and Respondent in that case are substantially identical to those presented in the record and briefs in this matter. Our ultimate resolution of these issues is the same. The evidence in this case concerns the same UFW contracts which were more extensively treated in the Adam Dairy litigation. For the calculation of the remedy herein, we have relied both upon the evidence regarding UFW contracts submitted to the ALO in this matter and our notice of the more extensive evidence regarding these same contracts in the Adam Dairy case.[6/] The specific sources upon which we rely will be indicated where appropriate, hereafter.

A. Calculation of the Basic Wage Rate

As noted in the Adam Dairy case, we have chosen to take a generalized approach to the calculation of the actual make-whole sum in order to avoid the complexities and delay attendant to a "costing-out" approach to this question using a typical UFW contract.

[6/] See NLRB v. Seven-Up Bottling. Co., supra, holding that "... in devising a remedy the Board is not confined to the record of a particular proceeding." 344 U.S. at 349. See also K. Davis, Administrative Law Text, Sections 15.02, 15.o3 (Third Ed. 1972).

on the basis of the evidence here, as in Adam, we have determined that the predictable effect of the UFW's representation in the first year of its contracts negotiated during the initial certification year at Respondent was the establishment of a uniform basic wage rate averaging $3.13 per hour. We take notice from the Adam record that in the second year of these contracts the average rate was $3.26 per hour.

B. Calculation of Fringe Benefits

As previously discussed, we construe the term "pay" broadly to include all elements of the total compensation paid to the employee. We must now turn to a calculation of the fringe benefit aspect of the make-whole award.

We begin by taking notice of the fully developed character the typical UFW contract. We rely upon the several introduced into evidence herein, our administrative notice of the evidence regarding the contracts in Adam Dairy, and our examination of 19 contracts on file with the Department of Industrial Relations. See Labor Code § 1151.5. These contracts typically provide for a wide range of benefits beyond the basic wage. These include overtime and shift premium pays, standby and travel time pays, vacation and holiday pays, paid bereavement and jury leaves, and payments to health/medical, pension and social/educational funds. They are all modes of compensation; in some instances directly paid to the workers, in others, diverted to a plan administered for the workers' benefit.

We are confronted with alternative approaches to calcuating the value of the fringe benefits in the make-whole award.

One approach would entail a comprehensive review of the Respondent's records in order to apply to that agricultural operation the provisions of a typical UPW contract. We have rejected that method in Adam Dairy and reject it here as well. It would involve lengthy post-decisional proceedings and would place the Board in the position of assessing various alternative contractual provisions and their applicability to Respondent's operations. In other words it would place the Board virtually at the heart of the collective bargaining process. This is not, in our judgment, the way to foster future negotiations between these parties.

We have chosen to proceed on a more generalized basis in reliance upon a recent Bureau of Labor Statistics publication showing the relative proportions which pay for straight-time worked and various fringe benefits occupy in relation to total employee compensation. See Adam Dairy supra, slip op. at 26-28.

Proceeding on the basis of this data, we weight the basic make-whole wage of $3.13 in 1976 at 78% of the total make-whole compensation received by Respondent's employees. The minimum make-whole wage per employee per hour in 1976 shall therefore be $4.01. This sum is produced in the following manner:

$3.13 = .78 X (where X equals the total compensation)

$$\frac{\$3.13}{.78} = X$$

$4.01 = X

Assuming a need to calculate make-whole for 1977, the second year, the minimum make-whole rate per employee per hour shall be $4.17, using the same calculation method.

We recognize that there may be numbers of Respondent's

employees who receive compensation above the basic wage rate because of seniority, job skills, etc. Rather than speculate about the make-whole wage for these persons, their make-whole compensation shall be calculated on the following basis. To the extent that Respondent, during the make-whole period described hereafter, pays any bargaining unit employee a wage in excess of its prevailing basic wage, that same percentage shall be reflected in the make-whole award. If, for example, an employee is paid 10% more than the Respondent's basic labor rate, his or her make-whole amount shall be increased proportionately to $3.44 per hour ($3.13 plus 10% of $3.13).

C. The Total Make-Whole Award

The record in this case establishes that Respondent Perry, acting either personally or through one or another of the entities he controls, was a custom farmer, a custom harvester, a grower, and perhaps a labor contractor during the year 1975. To the extent that this pattern occurs during the make-whole period, it is our present intent that the make-whole award shall not be applicable during those periods, to the extent Respondent was acting in the capacity of a labor contractor. If, for example, during a given period Respondent was simultaneously acting in relation to some employees as a labor contractor and in relation to others as an employer within the meaning of Labor Code Section 1140.4(c), then the award will have to be calculated in accord with the statutory design; the labor contractor period would be excluded, the non-contractor period included. If Respondent was acting solely as a labor contractor during a specific period, then that period should

be totally excluded from the calculation. [7/]

D. The Duration of the Make-Whole Period

The ALO found that the Respondent had failed and refused to bargain collectively with the UFW commencing on January 13, 1976, the date of the first demand to bargain after the effective date of the certification. The period of the make-whole award shall therefore be from January 13, 1976 until the Respondent commences to, and does bargain in good faith to contract or impasse. At the present time we foresee no need to adopt the General Counsel's proposal that the Respondent be required to continuously pay monthly make-whole amounts into an escrow fund during the actual bargaining process. The potentially harmful impact of this procedure on the collective bargaining process outweighs its benefits in our view. However, we remain open to the need in the future to modify our implementation of this remedy if circumstances warrant a sharper incentive to good faith bargaining

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[7/] The record in this case suggests that in some situations where the Respondent is functioning as a farmer, e.g., harvesting crops for its own account, the employees are paid on a piece-rate basis. We are aware that in many instances workers compensated on this basis may earn more than those compensated by the hour, when the total piece-rate compensation is converted into an hourly rate. No piece-rate data was presented in either this case or Adam Dairy. Our examination of UFW contracts filed with the Department of Industrial Relations indicates that these piece-rates are frequently complex. To the extent then, that our award here fails to make these piece-rate workers whole in a substantially just fashion, any party may make an appropriate motion to the Board for supplementary proceedings limited to evidence on this issue.

Conclusion

We shall therefore order that the Respondent make its bargaining unit employees whole for the loss of wages suffered by them as the result of the Respondent's refusal to bargain from January 13, 1976 to such time as the Respondent commences to bargain in good faith and does bargain to contract or impasse. The loss of wages shall be, at a minimum, the net difference between the total compensation per hour paid by the Respondent during the make-whole period (including the per hour value of the Respondent's contribution to fringe benefits, if any) and, in 1976, the sum of $4.01 per hour. In 1977 it shall be the net difference between what Respondent did pay and the make-whole rate of $4,17 per hour.

ORDER

Pursuant to Labor Code Section 1160.3 the Respondent, Ernest Perry, Perry Farms, Inc., and Lathrop Farm Labor Center, Inc., its officers, agents, successors and assigns is hereby ordered to:

1. Cease and desist from:

a. Interfering with, by means of assaults, threats, or intimidation, representatives of the United Farm Workers of America, AFL-CIO (UFW), in the presence of agricultural employees or in circumstances in which it is likely that agricultural employees will learn of such conduct.

b. Damaging property of the UFW in the presence of agricultural employees or in circumstances in which it is likely that agricultural employees will learn of such conduct.

c. Refusing to bargain collectively in good faith with

the UFW as the certified exclusive bargaining representative *of* its agricultural employees in violation of Labor Code Sections 1153 (e),(a) and 1155. 2 (a), and in particular by (1) refusing to meet at reasonable times and places with the UFW for the purpose of collective bargaining and (2) refusing to furnish the UFW with information requested by it and relevant to collective bargaining in good faith.

d. In any other manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code Section 1152.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

a. Upon request, bargain collectively with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, and if understanding is reached, embody such understanding in a signed agreement.

b. Furnish to the UFW the information requested by it relevant to the preparation for, and conduct of, collective bargaining.

c. Make its agricultural employees whole, in the manner specified in the portion of the foregoing Decision entitled "The Remedy," for all losses of pay sustained by them as the result of Respondent's refusal to bargain.

d. Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due its employees under

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the terms of this Order.

e. Execute the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereafter.

f. Post copies of the attached Notice for 90 consecutive days at places to be determined by the Regional Director.

g. Provide a copy of the Notice to each employee hired by the Respondent, when not engaged as a labor contractor with regard to that employee, during the 12 month period following the issuance of this Decision.

h. Mail copies of the attached notice in all appropriate languages, within 30 days from receipt of this Order, to all employees employed during the payroll period immediately preceding August 30, 1975.

i. A representative of the Respondent or a Board Agent shall read the attached notice in appropriate languages to the assembled employees of the Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by the Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question and answer period.

j. Notify the Regional Director in writing, within 30

days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

It is further ordered that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive bargaining representative of Respondent's agricultural employees is extended for a period of one year from the date on which Respondent commences to bargain in good faith with said union.

All allegations of the Complaint as amended at trial not found herein are hereby ordered dismissed.

DATED: April 26, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER MCCARTHY, Concurring:

On the facts of this particular case, I agree that it is appropriate for the Board to invoke the make-whole remedy. However, I cannot subscribe to the broad rule which underlies the majority's application of the remedy. The majority has announced that it will grant make-whole relief in all instances where there has been a refusal to bargain and employees have incurred losses of pay as a result. Rather than adopt such a broad rule, the Board should proceed on a case-by-case basis in the application of make-whole. I believe this to be not only a more sound approach, but also one that is required by the applicable language of the Act.

Section 1160.3 of the Act provides in pertinent part that a party found to have committed an unfair labor practice may be required by the Board "to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief

appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part." Had the Legislature intended for the make-whole remedy to be applied in all instances of refusal to bargain where loss of pay has resulted, it would not have added the qualifying phrase, "when the board deems such relief appropriate". If the qualifying phrase is removed, the statutory provision reads the same as the rule adopted by the majority. Under the majority's approach to make-whole, the qualifying phrase thus becomes superfluous. Such a result is contrary to a well-established rule of statutory construction. [1/]

By the terms of the statute, it is incumbent upon the Board to determine in each instance whether the facts warrant use of the make-whole remedy. To apply make-whole in every Section 1153(e) case, without regard to the basis or nature of the refusal to bargain and other relevant circumstances, might well be an abuse of our discretion.

A case-by-case approach to make-whole relief recognizes the importance of proceeding cautiously in a critical area where the Board lacks guidance in the form of precedent or empirical evidence. It recognizes that the make-whole remedy tends to establish terms of a collective bargaining agreement which,

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[1/] It will be presumed that every word, phrase and provision used in a statute was intended to have some meaning and perform some useful office; a construction making some words surplusage is to be avoided. Watkins v. Real Estate Commissioner, 182 C.A. 2d 397, 400 (1960); Moyer v. Workmen's Comp. Appeals Board, 10 C. 3d 222, 230 (1973); Van Nuis v. Los Angeles Soap Co.,36 C.A. 3d 222, 228 (1973); People v. Gilbert, 1 C. 3d 475, 480 (1969).

even in the absence of the refusal to bargain, might never have come into existence. It recognizes that the due-process rights of the employer who has a good faith doubt as to the validity of the certification might be adversely affected since his only means of obtaining judicial review is to incur a refusal-to-bargain charge. Finally, it recognizes that make-whole is, in effect, an equitable remedy, one that takes into account all of the circumstances of the refusal to bargain, and thereby increases the probability that fairness will prevail.

Dated: April 26, 1978

JOHN P. MCCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing at which all sides had the chance to present evidence and state their positions, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by assaulting and interfering with UFW organizers and by refusing to bargain about a contract with the UFW. The Board has ordered us to post this Notice and to take other action. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives farm workers these rights:

(1) to organize themselves;

(2) to form, join or help any union;

(3) to bargain as a group and to choose anyone they want to speak for them;

(4) to act together with other workers to try to get a contract or to help or protect each other; and

(5) to decide not to do any of these things.

Because this is true we promise you that:

WE WILL NOT in the future interfere with union organizers by assaulting or threatening them or by damaging their property.

WE WILL bargain with the UFW about a contract because it is the representative chosen by our employees.

WE WILL pay each of the employees hired by us after January 13, 1976 any money which they lost because we have refused to bargain with the UFW.

ERNEST PERRY, PERRY FARMS, INC. AND
LATHROP FARM LABOR CENTER, INC.

Dated: _____ By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.

PERRY FARMS, INC. Case No. 76-CE-l-S

ALO DECISION

The UFW was certified as the bargaining representative of Respondent employees in December of 1975, and in January 1976, made a written demand to bargain and requested information from Respondent regarding unit employees and existing pay rates, job description, benefit plans, etc. Neither bargaining nor provision of information occurred and the UFW filed charges alleging Respondent's refusal to bargain. The General Counsel's complaint alleged refusal to bargain and sough" the imposition of a make-whole order for the refusal to bargain under Labor Code Section 1160.3. The Respondent sought to defend against the refusal to bargain charge by pointing to claimed defects in the underlying certification.

The ALO determined that the Respondent had refused to bargain by failing to meet with the UFW although requested to do so and by failing to provide the UFW with the requested information. On the basis of the General Counsel's amendment at trial, the ALO found that Ernest Perry, Perry Farms, Inc., and Lathrop Farm Labor Center (LFLC) were one Employer within the meaning of the Act. The ALO fixed the beginning of the Respondent's refusal to bargain on January 13, 1976, the date of the UFW's first effective request to bargain. The ALO additionally found that Respondent violated Section 1153(a) of the Act by its actions on August 30, 1975, in interfering with, threatening, and damaging the property of the UFW organizers present that day to procure authorization cards.

The ALO recommended that the Respondent be ordered to make-whole its employees for losses sustained 'by them as the result of the Respondent's refusal to bargain. The ALO recommended awarding make-whole on the basis of the highest rates selected from among UFW contracts. He would also award lost union dues to the UFW.

BOARD DECISION

The Board affirmed the ALO's findings and conclusions, but made modifications in his Order based on its construction of the make-whole provision.

The Board initially rejected the Respondent's claim that the ALO had erred in his finding of the August 30, 1975 assault incident because it was not charged within the 6 month limitation of Labor Code Section 1160.2. The Board rejected this claim, citing two Federal Court of Appeal cases to the effect that the limitation period is not jurisdictional, but must be affirmatively raised by the Respondent. Citing Chicago Roll Farming Co., 167 NLRB 961, 971, 66 LRRM 1228, ent'd 72 LRRM 2683 (7th Cir. 1969); Shumate v. NLRB, 78 LRRM 2905, 2908 (4th Cir. 1971). Since in this case the Respondent had not raised the defense, and had presented rebuttal witnesses to the incident, the Board dismissed this aspect of the exception. In another procedural ruling, the Board adopted the

NLRB rule against the relitigation of representation matters in related refusal to bargain cases. Citing King's Markets, 233 NLRB No. 60 (1977).

The Board upheld the ALO's finding that on the facts of this case Ernest Perry, Perry Farms, Inc. and LFLC were a single integrated enterprise and constituted one Employer for the purpose of the Act. The Board based its finding on the following factors: Ernest Perry personally made the labor relations and business policy for both Perry Farms, Inc. and LFLC; while he owned Perry Farms, Inc., outright, Perry owned one-half of the LFLC stock with another person, who shared with him the corporate offices in both entities; both corporate entities had the same address and the same telephone; Ernest Perry determined in which capacity-—e.g., farmer, harvester, labor contractor—the various entities functioned. Therefore, the failure to have served Ernest Perry or LFLC with a charge or complaint was not material to the case, and a remedial order would be entered as to all three.

Finally, the Board rejected the ALO's conclusion that while Ernest Perry was liable for violating Section 1153(a) of the Act by interfering with the UFW organizers and destroying their property, etc., he was not liable for the actual fight itself. Rather, in the Board's view, Perry was liable for the entire course of conduct, including the assault on the organizer. Citing Tex-Cal Land Management, 3 ALRB No. 14 (1977); D'Arrigo Bros, of California, 3 ALRB No. 31 (1977).

The Board construed the make-whole provision to apply to those cases where the Employer has refused to bargain and the employees have suffered losses of pay as a result. It rejected the claim of Respondent and the amicus that the remedy should apply only where the refusal to bargain was "flagrant" or "willful". Because the employee's losses were the same whether the Employer had "flagrantly" or "technically" violated the Act, the Board found that distinction invalid.

The Board adopted the generalized approach to the calculation of the basic make-whole wage which was set forth in Adam Dairy, and took administrative notice of the more detailed evidence regarding the relevant UFW contracts executed pursuant to Board certification which appeared in the record of that case. On the basis of this evidence the Board determined that the UFW had negotiated in the first year of these contracts a minimum basic wage in the vicinity of $3.10 per hour, without regard to crop or location, which averaged $3.13 per hour. The Board adopted this figure as the make-whole base wage for the year 1976. For 1977, it adopted the figure of $3.26 per hour.

As in Adam Dairy, the Board resorted to generalized data sources for an approach to the calculation of the fringe-benefit component of make-whole which avoided the changes and delay inherent in a so-called "costing out" method using a typical UFW contract. The basic document underlying this approach was a Bureau of Labor Statist! publication entitled Employee Compensation in the Private Nonfarm Economy, 1974 (Bulletin 1963). The publication contained the

results of surveys conducted by the Bureau during the period 1966-1974 regarding the various components of the total compensation paid to employees nationally during that period. Based on this study, the Board determined to assign to the basic make-whole sum of $3.13 per hour a value of 78% of the total compensation due to the employee. The fringe benefits payable therefore made up the remainder of the award.

The Board determined that the make-whole period in this case was the period from January 13, 1976 until such time as the Respondent commences to and does, bargain in good faith to contract or impasse. However, because of the varied functions performed by the Respondent the Board directed that the actual calculation of the award should exclude any period in which the Respondent was acting solely as a labor contractor vis-a-vis all or some of its employees.

In a separate opinion, Member McCarthy concurred in the majority's order of make-whole on the facts of this case, but declined to adopt the Board's broad rule for application of the remedy. The Board should proceed on a case-by-case basis in the exercise of the make-whole power according to McCarthy.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW OFFICER

Case No. 76-CE-l-S

In the Matter of

PERRY FARMS, INC.,

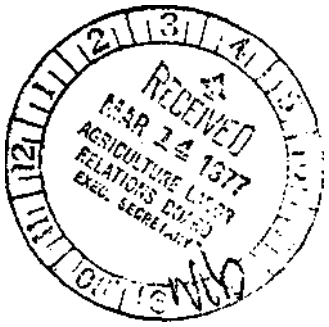
Respondent,

and

UNITED FARM WORKERS OF AMERICA,

AFL-CIO,

Charging Party.



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On the basis of a charge against perry Farms, Inc. filed by the United Farm Workers of America, AFL-CIO, on January 5, 1976, the instant complaint issued February 6, 1976. Respondent served its answer to the complaint on February 16, 1976. A hearing was conducted before an Administrative Law Officer on January 31, 1977, through and including February 4, 1977.

JURISDICTION

The complaint alleges and the answer admits that the Employer herein is an Agricultural Employer within the meaning of § 1140.4(c) of the Agricultural Labor Relations Act. Pursuant to Chapter 6 of the Agricultural Labor Relations Act, the Board has power to determine whether an unfair labor practice has occurred, and if it is determined that an unfair labor practice has occurred. to remedy the unfair labor practice.

The complaint alleges, inferentially, that the employees involved are agricultural employees within the meaning of the Agricultural Labor Relations Act, and the answer admits, inferentially, that the employees involved are Agricultural Employees within the meaning of the Agricultural Labor Relations Act. The testimony established that the employees involved were engaged in harvesting of agricultural crops in the San Joaquin production area. As the Employer is an Agricultural Employer within the meaning of the Agricultural Labor Relations Act, the employees involved are Agricultural Employees within the meaning of the Agricultural Labor Relations Act, and these proceedings are authorized by statute. Jurisdiction of the Agricultural Labor Relations Board is established.

LABOR ORGANIZATIONS

The complaint alleges, and the answer denies, that the United Farm Workers of America, AFL-CIO, is a labor organization within the meaning of § 1140.4(f) of the Agricultural Labor Relations Act. The testimony established that the United Farm Workers of America, AFL-CIO, is an organization in which employees participate, and which exists in whole or in part for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work for agricultural employees. The evidence established that the United Farm Workers of America, AFL-CIO, has been certified as a labor organization and as the representative of agricultural employees in numerous cases. Moreover, this labor organization has entered into numerous negotiations with employers concerning

grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work, which negotiations have resulted in numerous labor agreements. The employer's contention that the United Farm Workers of America, AFL-CIO, is not a labor organization within the meaning of the Act was based upon an alleged disparity in the effective voting power of each union member in selecting delegates to the union's convention. This alleged disparity appears to be similar in nature to the disparity in voting power between citizens of Nevada and citizens of California in selecting their respective Senators to the United States Senate. In any case, there does not appear to be any precedent or statutory history indicating that the word "participate" in § 1140.4(f) should be construed so narrowly. In consonance with the legislative requirement that this Act be interpreted in conformity with the National Labor Relations Act, the word "participate is to be construed broadly, and is satisfied by the participation of any union member or group of members and not necessarily the employees or the employer involved herein. The United Farm Workers of America, AFL-CIO, is a labor organization within the meaning of the Agricultural Labor Relations Act.

EMPLOYER

The complaint alleges that "Respondent, dba Perry Farms, Inc. . . .is. . .an agricultural employer. ..." The answer admits this allegation. The certification of representative names the employer as Perry Farms, Inc. The charge on which the complaint is based names the employer as Perry Farms, Inc. The petition upon which the certification of representative issued

named the employer as Ernest Perry/Ernest Perry Farms. The petition was filed September 2, 1975. In response to the petition the employer, by telegram on September 4, 1975, stated that the employer's name is Perry Farms, Inc., a California corporation.

An amendment to the complaint made at the hearing alleged that Ernest Perry, Perry Farms, Inc., and Lathrop Farm Labor Center, Inc. are one and the same person for purposes of the Act. Permission to amend was granted. In conformity with applicable Board rules, the respondent is deemed to have denied the new allegations without the necessity of amending their answer.

Facts.

On or about August 30, 1975, organizers of the United Farm Workers of America-, AFL-CIO, solicited authorization cards from workers harvesting tomatoes in a field which was somewhat off a highway in the San Joaquin production area. There were approximately 180 employees then working. These employees were employees of the Lathrop Farm Labor Center, Inc., a California corporation, owned fifty percent by Ernest Perry and fifty percent by Leonardo Loduca. Both Perry and Loduca were present and at the field at the time of this organizing activity. Both were involved in an incident with the union organizers, which incident will be referred to infra. On September 2, 1975, the union filed its petition for an election, stating that the number of workers employed was 180. For the most part, the employees indicated on their authorization cards that their employer was Perry. Further, most employees regarded their employer to be the individual,

Ernest Perry, and did not intend to refer to the corporate entity, Perry Farms, Inc.

Generally, agricultural employees are obtained by an employer driving to a known location in town (in this case, Stockton) with a bus. Workers willing to work that day are then loaded on the bus and transported to the fields. In some instances, amounting only to a small percentage of the workers, workers discover by some means where the working field is and drive in their own cars to the field, and are hired at that time. Workers are paid daily, based upon a work card which is punched a number of times indicating the number of units of production the worker performed that day. There is a known pay rate per unit. In the case of the tomato fields in question, Ernest Perry personally supervised the harvest and personally paid the workers at the end of the day. Others could substitute for Ernest Perry in either activity; however, Ernest Perry performed these activities on a regular basis. It was generally known that Ernest Perry was the "boss."

Both Perry Farms, Inc. and Lathrop Farm Labor Center, Inc. are California corporations. They are separate legal entities for many purposes. Ernest Perry owns one hundred percent of Perry Farms, Inc. Perry Farms, Inc. did, in years earlier than 1975, hire agricultural employees. It had possibly one agricultural employee on its payroll in 1975. Ernest Perry is President of Perry Farms, Inc., and Leonardo Loduca is Vice President of Perry Farms, Inc. Ernest Perry administers the affairs of Perry Farms, Inc. and controls and directs is labor relations policy.

Ernest Perry is President of Lathrop Farm Labor Center,

Inc., and Leonardo Loduca is Vice President of Lathrop Farm Labor Center, Inc. Ernest Perry controls and administers the affairs of Lathrop Farm Labor Center, Inc. and controls and administers its labor relations policy.

With respect to the workers in the subject tomato fields, their work cards bore the initials LFLC. Presumably their pay stubs or paychecks similarly bore the initials LFLC. Moreover, the bus which transported the workers to the agricultural fields bore the name and the number of the Lathrop Farm Labor Center, Inc. The record suggests that the Lathrop Farm Labor Center, Inc is a licensed labor contractor within the meaning of the exclusionary provision of § 1140.4(c). With respect to the tomato fields in question, Lathrop Farm Labor Center, Inc. was acting as a farmer and not as a labor contractor.

Ernest Perry, Lathrop Farm Labor Center, Inc., and Perry Farms, Inc. are all located at the same address. Both corporations have the same telephone number. Neither corporate entity has a permanent, owned situs where it farms crops year after year.

Contentions of the Parties.

The employer contends that it is Perry Farms, Inc., a California corporation.

The General Counsel of the Agricultural Labor Relations Board contends that, under the circumstances, Ernest Perry, Lathrop Farm Labor Center, Inc., and Perry Farms, Inc. form a

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single employer within the meaning of the Agricultural Labor Relations Act. The intervenor, United Farm Workers of America, AFL-CIO, agrees with the General Counsel.

Analysis and Conclusion.

Section 1140.4 of the Act defines "Agricultural Employer" in relevant part as follows:

> "The term 'agricultural employer' shall be liberally construed to include any person acting directly or indirectly in the interests of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative "grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes. ..."

(The exclusionary provision is not here relevant as it is admitted that Lathrop Farm Labor Center, Inc. was acting in a capacity other than as a labor contractor with respect to the tomato fields in question.)

In acting as an agricultural employer, Ernest Perry has total discretion as to whether or not to act as Ernest Perry, or as Lathrop Farm Labor Center, Inc., or as Perry Farms, Inc., or as

any other entity. The record discloses no limitation on the exercise of this discretion, and in fact affirmatively establish that the two corporations, both administratively and in the area of labor relations, do exactly as Ernest Perry wants them to do. At the time Ernest Perry informed the Agricultural Labor Relations Board that the name of the employer was Perry Farms, Inc., Ernest Perry knew that the employees organized were nominally the employees of Lathrop Farm Labor Center, Inc. and riot the employees of Ernest Perry personally or the employees of Perry Farms, Inc. This conclusion, which is abundantly supported by the record, is demonstrated by the fact that Perry Farms, Inc. had no employees (at most, one) at the time Perry received the petition. Moreover, Perry was fully aware that on or about August 30, the union attempted to solicit cards from approximately 180 workers who were employed by Lathrop Farm Labor Center, Inc. A few days later, Perry received a petition which indicated that about 180 workers were involved. While the Agricultural Labor Relations Board had information from which it could have deduced that an entity other than Perry Farms, Inc. was the nominal employer of the agricultural employees involved, the Agricultural Labor Relations Board has no control over the name an agricultural employer wishes to use. In this case, there was an affirmative request by the employer involved to use the name Perry Farms, Inc. While it is quite clear that Ernest Perry's subjective motivation was not to call the complex of himself and the two corporations by the single name of Perry Farms, Inc., that subjective motivation is of no moment. It is clear that Perry thought the Agricultural Labor Relations Board had made a severe mistake, and Perry was

going to help the Board perpetuate that mistake.

Subjective motivation is of no relevance to these proceedings or any other proceedings known to this writer. Objective motivation, that is, motivation determined by deduction from objective events, is relevant. In this case, there is sufficient evidence to find that Ernest Perry, Lathrop Farm Labor Center, Inc., and Perry Farms, Inc., individually separate entities for many purposes, are a single entity for purposes of the Agricultural Labor Relations Act. I so find. Further, I find that the only legitimate interpretation of the telegram of September 4, 1975, sent to the Agricultural Labor Relations Board, is to inform the Agricultural Labor Relations Board that the employer desires that it be known as Perry Farms, Inc. for purposes of all acts and activities under the Agricultural Labor Relations Act.

I therefore find that Ernest Perry, Lathrop Farm Labor Center, Inc., and Perry Farms, Inc. are the employer involved herein, and are collectively known as Perry Farms, Inc. for purposes of the Agricultural Labor Relations Act. This Act is governed by precedents, where applicable, of the National Labor Relations Act. It is clear that under the National Labor Relations Act, the separateness of an entity for other than labor relations purposes is not determinative of whether or not it is a separate entity for purposes of labor relations. As this Act is created for the benefit of agricultural employees, it is to be interpreted with respect to their viewpoint. Under these circumstances, from the viewpoint of agricultural employees, Ernest Perry is the boss, and the mechanism by which or through

which Ernest Perry reports to various governmental agencies for taxing purposes or for state corporation law purposes is of no moment or consequence to them.

THE UNFAIR LABOR PRACTICES

The complaint alleges that the employer interfered with, restrained, and coerced its employees by failing to bargain in good faith, by obstructing Board processes, by making adverse comments about the union, and by stating its legal position to Board agents.

Without detailing the evidence in all respects, insofar as the complaint alleges as unfair labor practices (a) the comments of Ernest Perry calling the union "sons of bitches," (b) Perry stating his legal position to the Board agents, and (c) Perry expressing his opinion of the Board, the union, or the Board processes, the complaint is dismissed. Agricultural Employers have to abide by the Act, not like it. Moreover, Agricultural Employers have to bargain in good faith with certified unions, but again, they do not have to like it.

Other Alleged 1153(a) Violations

Other alleged and/or litigated unfair labor practices incidents are:

a) The Employer's refusal to bargain;

b) The Employer's interference with union organizers;

c) The Employer's violence and threatened acts of violence against union organizers and Board agents.

The Refusal to Bargain

Insofar as the employer illegally refused to bargain in violation of § 1153(e) of the Act, the employer also violated § 1153(a) of the Act. This topic is discussed infra.

Employers' Interference with Union Organizers and Board Agents

Facts.

FIRST INCIDENT

On or about August 30, 1975, the employer was harvesting tomatoes for its own account. It had approximately 180 to 200 workers in the fields. Both of the employers' principal officers were present at the fields. Perry was overseeing production and Loduco was repairing machinery.

UFW organizers entered the field, across private land from a highway to the working fields, and solicited signatures.

The UFW organizer testified that while he was talking to and handing out authorization cards to employees at the tomato fields, Ernest Perry approached him in a hostile manner, which hostility was manifested by various loud and hostile comments, throwing authorization cards all over the ground out of the organizer's car, and by pushing the organizer to the ground and tearing off a portion of his moustache. The employers' witnesses testified that Perry, angry at the intrusion by an outsider onto the fields, attempted in a hostile

manner to eject the organizers from the fields. Mr. Loduco testified that he got involved in the incident by attempting to separate Perry and Drake, the union organizer, and as a result of Drake's pushing and shoving, Loduco (the smaller man) grabbed Drake's moustache and pulled.

SECOND INCIDENT

On about December 20, 1976, two Agricultural Labor Relations Board agents attempted to serve a subpoena on Ernest Perry. The two agents went to Perry's office during normal business hours and were told that Perry was not there and would return later.

The agents returned about 6:00 P.M. and walked to the office. After trying the door and discovering it was locked, the agents knocked. Perry approached the door shouting. The agents either identified themselves or attempted to identify themselves. Perry ordered them off his property, first with a shotgun and later with a revolver. The agents left.

Analysis and Conclusion.

Despite some factual conflicts, it appears clear that Perry consistently maintained the position that union organizers and Board agents have no business on his private property.

Perry's actions in furtherance of that viewpoint were

part appropriate and in part inappropriate. Insofar as he requested persons to leave his land, called for police aid to enforce the request, or filed lawsuits for damages, his actions are appropriate. Insofar as Perry disrupted organizing activity by provoking a fight or throwing authorization cards away, his actions are inappropriate, interfere with and coerce employees with respect to their § 1152 rights, and are unfair labor practices.

As to the first incident, I find that the General Counsel ; did not satisfy its burden as to the fight itself, and therefore I do not find that the employer engaged in violence in violation of the Act.

As to the Board agent incident, I do not find that to be an unfair labor practice. The General Counsel, by various allegations, attempts to equate the acts and responsibilities of its agents with the acts and responsibilities of parties or potential parties—workers, unions, and employers. That equation fails. The Board, its agents, and its processes are outside the relationships among the parties which the Act attempts to civilize. Interference with the Board, its agents, and its processes may and should result in civil and criminal penalties, but not in unfair labor practices. (It is recognized that some factual circumstances could be characterized as both an unfair labor practice and as interference with the Board. In those cases, all remedies apply.)

I find the employer violated § 1153(a) by interfering with United Farm Workers organizers at the tomato fields on or about August 30, 1975, by provoking a fight, by destroying or damaging union property (authorization cards), and by disrupting

the meeting between the organizers and the workers.

The Refusal to Bargain

Facts.

The Board certified the union on December 19, 1975, by an amended certification. The record does not disclose the date of the original certification.

The employer was aware within, at most, two days after its filing, that a petition had been filed. The employer was aware within, at most, hours after its occurrence, that an election had been held.

On November 7, 1975, the union was notified by the employer's representative that a certain law firm represented the employer. Perry confirmed this agency at the hearing.

By at least January 13, 1976, the United Farm Workers requested that bargaining begin by contact with the law firm.

By letter dated September 23, 1975, the union delivered to the employer its request for information needed in bargaining.

At all times the employer refused to bargain by either meeting and negotiating in good faith or by supplying the requested information.

Contentions of the Parties.

The General Counsel contends that the employer refused to bargain from on or about December 19, 1975.

The employer contends that it had no duty to bargain because the election procedure was improper.

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Analysis and Conclusion.

At this unfair labor practice proceeding, both parties litigated the issues of election procedure, but incompletely.

Election issues' shall not be litigated in an unfair labor practice proceeding absent a Board order combining such issues with unfair labor practices for hearing. Moreover, a certification is not attackable in a § 1153(e) proceeding except upon constitutional grounds going to a party's opportunity to utilize Board processes in the election procedure. In this case the employer had timely notice of the petition and timely notice of the election. (Notice of election is timely if the party has an opportunity to timely file objections to the election.)

Therefore, the certification is inviolate in these Proceedings.[1/]

In this connection, the General Counsel's and Intervenor's motion to amend the certification is denied.

1/ There was some suggestion that eligible voters in numbers sufficient to affect the results of the election were not given notice of the election and were therefore denied the opportunity to vote. I believe this is a similar due process issue to lack of notice to any other party. I also believe the issue to be very different from issues concerning sick voters, 50% employment requirements, and many other issues which have in common only the conclusion that a potential voter did not vote. However, no one proved or attempted to prove that sufficient eligible voters to affect the results of the election were denied that opportunity. References to the gross number of employees of an employer by year, month, or even by week is not sufficient. As the employer engaged in both farming and labor contracting, there must be proof that the employees who did not vote were eligible to vote. The burden of overcoming the policy of enforcing certifications is with the party attacking the certification.

* * *

The employer refused to bargain from January 13, 1976, the earliest date of demand subsequent to effective certification and further refused to supply information in violation of § 1153(e) of the Act from September 23, 1976. The union's demands to bargain before certification are irrelevant. These violations are also violations of § 1153(a) of the Act.

THE REMEDY

Various remedies apply to the facts established at the hearing. The only one raising *a* substantial controversy is the statutory provision:

> ". . .[A]nd making whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain. ..."

It is unclear whether or not the Board could provide for such a remedy in the absence of the above-quoted language. In any case, the language of the statute exists.

I find the controversy over the above provision to arise out of newness, rather than substance.

Backpay awards are traditional, and traditional rules apply. Pay has always meant all economic benefits, not just wages, and there is no reason herein to break tradition. Further, the computation of the time period for computing the worker's loss is traditional, from the beginning of the loss (normally a discharge), to the end of the loss (normally reinst ment or an unconditional offer of reinstatement). I find the be-

ginning of the loss to have occurred with the commission of the unfair labor, practice and the end of the loss to have occurred when the employer remedies the unfair labor practice by, in this case, adequate communication to the workers by posting of notices[2/] by supplying requested information to the union, and by bargaining or offering to bargain in good faith.

If the time period for backpay computation were shifted to end with a contract, the negotiation process would be distorted in a variety of ways. Nothing in the Act suggests such an interference with traditional bargaining.

The amount of backpay is measured by existing labor agreements. The primary measure is the highest pay provided in any existing agreement between any entities concerning the type of crop or crops involved. Moreover, in determining "highest pay" the employee gets the benefit of, for example, higher vacation benefits in one agreement and higher wages in a different agreement. The contracts which may be used as source information are not limited geographically, except as to the State of California. I believe this limitation to be artificial but necessary for efficient administration at this time. In the absence of labor agreements concerning the crop or crops in question, agreements concerning other relatively similar crops ,in terms of workers' pay, may be used. It is recognized that legitimate disputes concerning this issue may arise.

It is for the Board, through the Regional Directors and compliance offiers and procedures, to determine the specifics in each case.

2/ It is only necessary that initial posting occur. It is not required that backpay run for the entire posting period if the other prerequisites to termination of the backpay remedy are satisfied.

The above decision is required by the purpose of the Act. The Act is designed to civilize labor relations in the agricultural industry in California. Its purpose is to remove the benefits derived from violations of law, not to punish a party. Further, its purpose is not to give strength to one party to compensate for another's violations, but only to place the parties in the position they would be in had no violation occurred.

It is impossible to know ahead of time the bargain the parties would have struck. The alternative of retroactively giving the employees the benefit of a future bargain interferes with the bargaining process as much as giving benefits pending agreement. Here, we have a clear violation and a legal remedy. The remedy, in conformity with traditional California law, will not fail because of the difficulty of ascertainment.

The maximum existing pay benefit is within the range of reasonably possible bargains. There is no clear reason to give the workers less, as there is no clear reason to select any particular amount within the reasonable range of possibilities. The burden is on the law violator to show, if he can, that he would have agreed to less than the existing maximums.

Further, the employer is to deduct union dues from the workers' backpay award and pay that money over to the union. The union has been representing those employees as actively as it could in this case. Moreover, the workers are not made whole if the resources of their bargaining agent are depleted. They are entitled to a representative who is as strong at the time of bargaining as it was when bargaining should have taken place.

Subsequent unfair labor practices, if any, will be remedied as provided in the statute and not before they occur.

Other Remedies

Any appropriate remedy may be imposed whether or not requested. [See § 1160:3 of the Act.]

In this case, the employer is ordered to notify each affected employee (any and all within the certified unit):

1) Of the true identity of the employer;

2) That the employer will bargain in good faith with the United Farm Workers of America, AFL-CIO, upon request;

3) That the employer will provide in a timely manner information needed and requested by the United Farm Workers of America, AFL-CIO, for bargaining;

4) That the employer will not threaten or attack union representatives;

5) That the employer will not interfere with the union's lawful access to the employer's employees.

Further, the union's certification is extended for one year from the date bargaining in good faith begins.

The General Counsel has requested reimbursement for its expenses in prosecuting this charge. Neither the Board nor the union is entitled to such reimbursement in this case. Whether by design or chance, this is a case involving issues not previously decided. If in the future, a certification of representative is

ignored, an award of costs and fees may be appropriate.

Procedural Concerns

The notice to employees is to be in Spanish and English.

Notice is to be given by mailing copies of the notice, at the employer's expense, to the last known mailing address of all affected employees, if the employer selects that option.

Posting of the notice means that the notice is to be posted from now until the end of the next peak season in conspicous places at all the employer's locations, including its offices, its buses, its other hiring places, and at its fields, whether owned or worked on a custom basis.

Under the "make whole" remedy, backpay terminates upon the cessation of bad faith bargaining. In this case, the employer must provide the union with all lawfully requested information and must have engaged in the first session of good faith bargaining. The employer will be deemed to have engaged in its first session of good faith bargaining either by an actual negotiation session with the union negotiators or by an unconditional offer to meet, provided the union has been given 72 hours' actual notice of the time, date, and place of the proposed bargaining session at a mutual place

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CONCLUSIONS OF LAW

1. Lathrop Farm Labor Center, Inc. in its capacity as a farmer, custom farmer, and custom harvester, Perry Farms, Inc., and Ernest Perry, collectively, are a single Agricultrual Employer within the meaning of § 1140.4(c) of the Act.

2. The United Farm Workers of America, AFL-CIO, is a Labor Organization within the meaning of § 1140.4(f) of the Act.

3. By refusing to bargain with the United Farm Workers of America, AFL-CIO, the certified representative of the employer's employees, after demand to bargain was made, the employer engaged in unfair labor practices within the meaning of § 1153(a) and (e) of the Act.

4. By provoking a fight with the United Farm Workers of America, AFL-CIO, organizer Drake, by interfering with Drake's attempt to organize agricultural employees, and by damaging United Farmer Workers of America, AFL-CIO, property, the employer engaged in unfair labor practices within the meaning of § 1153(a) of the Act.

5. By failing and refusing to provide United Farm Workers of America, AFL-CIO, with requested information in preparation for bargaining, the employer engaged in an unfair labor practice within the meaning of § 1153(a) and (e) of the Act.

* * *

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this proceeding, I recommend that the employer, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with the organizing activities of the United Farm Workers of America, AFL-CIO,

(b) Refusing to supply the United Farm Workers of America, AFL-CIO, with requested information needed for preparation for negotiations.

(c) Refusing to bargain with the United Farm Workers of America, AFL-CIO, the certified representative of the employer's employees.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Provide the United Farm Workers of America, AFL-CIO, with all information requested in preparation for negotiations;

(b) Make whole all the agricultural employees of the employer for pay lost as a result of the employer's refusal to bargain for the time period and in the amounts determined pursuant to the decision in this matter. Interest is to be added thereto in the manner set forth in Isis Plumbing and Heating Company, 138 NLRB 716.

(c) Pay over to the United Farm Workers of America AFL-CIO, out of the backpay award

the periodic dues it would have paid over pursuant to the union's standard union security and check-off provisions. Dues shall be payable for a period of time equivalent to the extent of the backpay remedy provided for in paragraph 2(b) above.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Decision.

(e) Post, in Spanish and in English, notices at the locations set forth in this Decision, for time periods as set forth in this Decision; notices to be provided by the Board and to be headed "Notice to Employees, Posted by Order of the Agricultural Labor Relations Board, an Agency of the State of California," which notices shall contained the following text:

ERNEST PERRY, PERRY FARMS, INC. and LATHROP FARM LABOR CENTER, INC. are all one employer using different names from time to time.

All Agricultural Employees of the employer are represented by the UNITED FARM WORKERS OF AMERICA, AFL-CIO,

as the result of an election conducted by the Agricultural Labor Relations Board.

After a hearing in which the employer offered all of its evidence, the Agricultural Labor Relations Board has found that the employer violated the Agricultural Labor Relations Act by interfering with organizers of the UNITED FARM WORKERS OF AMERICA, AFL-CIO, and by refusing to bargain with the UNITED FARM WORKERS OF AMERICA, AFL-CIO, with respect to the wages, hours, and other terms and conditions of the employer's agricultural employees.

In order to correct the effects of our violations of the Agricultural Labor Relations Act:

We will make whole all our employees for any pay they lost because of our unlawful refusal to bargain with the UNITED FARM WORKERS OF AMERICA, AFL-CIO.

We will not provoke fights with organizers of the UNITED FARM WORKERS OF AMERICA, AFL-CIO.

We will not interfere with the organizers, agents, or representatives of the UNITED FARM WORKERS OF AMERICA AFL-CIO.

We wil provide all information requested by the UNITED FARM WORKERS OF AMERICA, AFL-CIO, so that they can intelligently negotiate a labor agreement on your behalf.

We will bargain in good faith with the UNITED FARM WORKERS OF AMERICA, AFL-CIO, or any certified representative of our Agricultural Employees .

All of our Agricultural Employees are free to become or remain, or to refrain from becoming or remaining, members of the UNITED FARM WORKERS OF AMERICA, AFL-CIO.

* * *

The notice shall state that it is an official notice and must not be defaced by anyone. Moreover, the notice will contain the address and telephone number of the nearest Agricultural Labor Relations office with a statement that any complaints or questions concerning the notice or any statements therein can be referred to such office.

(f) The above notice, when prepared by the Board or a Regional Office of the Agricultrual Labor Relations Board shall, in addition to being posted, be mailed to all the employer's Agri-

cultural Employees who were so employed at any time by the employer from the date the employer refused to bargain with the UNITED FARM WORKERS OF AMERICA, AFL-CIO, until such time as it does bargain in good faith with the UNITED FARM WORKERS OF AMERICA, AFL-CIO. In lieu of mailing, the employer, at its option, may publish said notice in Spanish and in English at least twice a week for ten (10) consecutive weeks in at least two (2) newspapers of general circulation in the Stockton area, [3/] and by posting said notice for a period of ninety (90) consecutive days in at least six (6) locations known to be frequented by Agricultural Employees in the la market area, such as, restaurants, markets, and churches. It is the responsibility of the employer to obtain permission for said posting and to ensure that said notices are posted for ninety (90) consecutive days.

(g) Notify the Regional Director of the Agricultural Labor Relations Board regional office serving Stockton, California, in writing, within twenty (20) days of the date of receipt of this decision, what steps the

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3/ The identity of the newspapers is to be selected by the Board through its Regional Director.

employer has taken to comply herewith, and to continue to notify said Regional Director periodically until compliance is complete.

3. The certification of representatives is extended for one (1) year from the date good faith bargaining begins.

DATED: March 10, 1977.

Ronald M. Telanoff

RONALD M. TELANOFF
Administrative Law Officer