STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

WALLER FLOWERSEED COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 76-CE-16-M 4 ALRB No. 49

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

On March 8, 1977, Administrative Law Officer CALOl Gordon H. Rubin issued the attached Decision in this proceeding, in which he concluded that Respondent, Waller Flowerseed Company, unlawfully refused to bargain with United Farm Workers of America, AFL-CIO (UFW), the certified collective bargaining representative of its employees, in violation of Section 1153 (e) and (a) of the Act, and recommended that Respondent be ordered to make its employees whole for any loss of pay and other benefits resulting from its refusal to bargain. Thereafter, Respondent filed timely exceptions and a supporting brief and the UFW and the General Counsel each filed a reply brief to Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to

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affirm the rulings, findings,[1/] and conclusions [2/] of the ALO and to adopt his recommended Order as modified herein.

Respondent admits that it refused to meet and bargain with the UFW, but contends that its conduct was not unlawful because the representation election upon which the Board's certification is based was not held within seven days of the union's filing of a Petition for Certification, as required by Labor Code Section 1156.3(al 04}. Respondent asserts that the certification is therefore invalid.

Respondent, represented by counsel, availed itself of the opportunity to litigate this issue before the Board in a hearing on its objections to the election. On December 30, 1975, the Board unanimously found that no prejudice to any party had resulted from conducting the election nine days after the petition was filed, and reaffirmed its conclusion that the seven-day election requirement is not a jurisdictional limitation on the Board's authority to conduct representation elections. Waller Flowerseed

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[1/] The basic findings of fact, incorporated by reference and adopted in the ALO's Decision at page 7, are that: the UFW filed and served charges in this matter; Respondent is an agricultural employer, 'and the DFW a labor organization, within the meaning of the Act; John Waller is the owner of Respondent; the UFW was certified as the exclusive collective bargaining representative of Respondent's agricultural employees by the Board on February 11, 1976; and that Respondent, beginning February 11, 1976, and continuing to the present, has refused to bargain with the UFW by (a) refusing to meet with the UFW to discuss the terms and conditions of employment of its employees and (b) unilaterally changing the wage rates of its employees without prior consultation with the Union.

[2/] The conclusions of law, incorporated by reference and adopted by the ALO at page 7 of his Decision, are: that by the above-described acts, Respondent violated Section 1153 (e) and (a) of the Act.

Company, 1 ALRB No. 27 C19751; Klein Ranch, 1 ALRB No. 18 (1975). In these circumstances, Respondent is not entitled to relitigate the issue in this matter. Perry Farms, 4 ALRB No. 25 (1978).

In accordance with our Decision in Perry Farms, supra, we shall order that Respondent, rather than its employees, bear the costs of then delay, now more than two years, which has resulted from its failure and refusal to bargain with the Union, by making its employees whole for any losses of pay and other benefits which they may have suffered as a result thereof, for the period from February 11, 1976, to such time as Respondent commences to bargain in good faith and continues so to bargain to contract or impasse. The Regional Director will determine the amount of the award based upon the criteria set forth in Perry Farms, supra, and Adam Dairy,' 4 ALRB No. 24 C1978], However, we reject the General Counsel's request for the award of litigation costs to General Counsel and Charging Party.

ORDER

Pursuant to Labor Code Section 1160.3, the Respondent, Waller Flowerseed Company, its officers, agents, successors and assigns, is hereby ordered to:

[3/] Although the Board issued its Decision dismissing Respondent's objections to the election on December 30, 1975, an official certification order did not issue until February 11, 1976. The February 11 date was alleged as the beginning date of Respondent's refusal to bargain by the General Counsel in his complaint and was so adopted by the ALO in his findings and conclusions. No party has taken exception to the ALO's findings in this regard, and, moreover, Appendix 8 attached to the General Counsel's Motion for Summary Judgment is a letter from the Union addressed to Respondent, dated January 15, 1976, requesting a preliminary negotiations meeting. Accordingly, the Board will adopt the February 11 date as the beginning date of Respondent's refusal to bargain in this case.

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith, as defined in Labor Code Section 1155.2 (a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive bargaining representative of its agricultural employees in violation of Labor Code Section 1153 Gel and (a}, and in particular by: CD refusing to meet at reasonable times and places with the UFW for the purpose of collective bargaining; and (2} unilaterally changing the wage rates of its employees without prior consultation with the UFW.

(b) In any other manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed to them by Labor Code Section 1152.

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

(a) Upon request, meet and bargain collectively in good faith 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) Make its agricultural employees whole for all losses of pay and other benefits sustained by them as the result of Respondent's refusal to bargain.

(c) 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 the terms of this Order.

(d) Sign 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.

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

(f) Provide a copy of the Notice to each employee hired by the Respondent during the 12-month period following the issuance of this Decision.

(g) 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 September 8, 1975, and to all employees employed by Respondent from and including February 11, 1976, until compliance with this Order.

(h) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of 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 Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the

question-and-answer period.

(i) 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, Respondent shall notify him or her 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 collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year from the date on which Respondent commences to bargain in good faith with said Union.

Dated: July 19, 1978

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

MEMBER McCARTHY, Concurring:

I am in agreement with the majority insofar as it finds that this is an appropriate case for make-whole relief. Respondent's basis for challenging the Board's certification in Waller Flower Seed Company, 1 ALRB No. 27 (1975) is without legal merit, see, e.g., Klein Ranch, 1 ALRB No. 18 (1975). Therefore, Respondent's litigation posture may be regarded as frivolous or as being designed to delay the bargaining obligation.

For reasons discussed in my concurring opinion in Perry Farms, Inc., 4 ALRB No. 25 (1978), and my dissenting opinion in Superior Farming Company, Inc., 4 ALRB No. 44 (1978), I continue to oppose the proposition that the make-whole remedy is warranted in all refusal to bargain cases where employees are presumed to have incurred an economic loss.

Dated: July 19, 1978.

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act 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 bargain with the UFW about a contract because it is the representative chosen by our employees.

WE WILL pay each of the employees employed by us after February 11, 1976, any money which they lost because we have refused to bargain with the UFW.

WE WILL NOT change the wages of our employees without first discussing these changes with the UFW.

Dated: WALLER FLOWERSEED COMPANY

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.

CASE SUMMARY

Waller Flowerseed Company 4 ALRB No. 49
76-CE-16-M

ALO DECISION

The UFW was certified as the bargaining representative of Respondent's employees in February 1976. The Employer has declined to comply with the UFW's request to meet and bargain with regard to wages, hours and working conditions of employees in the unit, because it believes that the Board's certification was not proper.

In a decision on cross-motions for summary judgment, the ALO found Respondent's argument that certification was improper because the election had been held nine days after the filing of the petition for certification to be without merit. He held that the Board's ruling in the earlier representation case, Waller Flowerseed, 1 ALRB No. 27 (1975), that, in the absence of prejudice to any party, the seven day time period for elections in the statute was "directory" and not "mandatory", was an administrative interpretation of legislative intent which must prevail.

The ALO recommended that Respondent be ordered to bargain with the UFW and to make employees whole for any lost wages or other benefits resulting from Respondent's violation.

BOARD DECISION

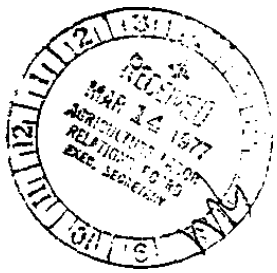
The Board affirmed the rulings, findings and conclusions of the ALO and adopted his recommended order with modifications. Citing Perry Farms, Inc., 4 ALRB No. 25 (1978), the Board re-emphasized its policy of proscribing relitigation of representation issues in related unfair labor practice proceedings.

The Board ordered that Respondent make its employees whole for any losses of pay and other benefits resulting from Respondent's refusal to bargain from February 4 until such time as Respondent commences to bargain in good faith. The Board declined to award litigation costs to the General Counsel and Charging Party.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of:	
WALLER FLOWERSEED COMPANY Respondent,	Case No. 76-CE-16-M DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging party	



INTRODUCTION

A hearing in the above-entitled matter was duly scheduled to commence on March 14, 1977 in Santa Maria, California and estimated to be a three day matter. Prior thereto, the General Counsel of the Board filed a motion for summary judgment, together with supporting declaration and exhibits, pursuant to Section 20240(b) of the California Administrative Code (Unfair Labor Practice Regulations adopted pursuant to the California Agricultural Labor Relations Act, Section 1140 et seq. of the Labor Code). The motion was received by the Board on February 3, 1977 and duly served on the respondent. A response was filed and served by respondent and received by the Board on February 15, 1977. Although termed a response, the papers filed by respondent request affirmative relief by way of dismissal of the complaint as a matter of law, in addition to opposing the Board's motion on that basis alone. For purposes of this decision, the papers in opposition filed by respondent are considered to be a cross-motion for summary judgment.

FACTUAL CIRCUMSTANCES

In the complaint the Regional Director alleges that the respondent has violated Labor Code Sections 1153(a) and (e), by refusing to bargain collectively in good faith with a labor organization, the United Farm Workers of America, AFL-CIO, certified pursuant to the provisions of Sections 1156, et seq. of the Code. Although respondent initially denies in its answer certain moving allegations in the complaint (concerning its refusal to bargain in good faith) it later makes clear in its "Response To Motion For Summary Judgment," page 2, that: "The present action hinges on the legality of the election on September 17, 1975 which was not held within the seven days required by Labor Code Section 1156.3(a)(4). Respondent submits that this is the only issue before the ALRB in this action." Respondent also raised this contention as an affirmative defense in its answer to the complaint. Accordingly, I find that respondent has constructively amended its answer by abandoning its denials of paragraphs 6 and 7 of the complaint.

Both sides note that the validity of the certification of the UFW, AFL-CIO as bargaining agent for respondent's employees was previously decided by the Board in Waller Flower Seed Company. 1 ALRB No. 27 (1975), attached as Appendix 6 to the General Counsel's motion for summary judgment. Respondent indicates that because the Act does not provide for appeal of the Board's certification decisions, its only method of challenging the above decision ". . . was to refuse to conform with the decision, and face an unfair labor practice charge." (Page 2 of "Response, etc.") Respondent then commences its legal argument to the

effect that certification of the UFW, AFL-CIO was in violation of the ALRA.

PROPRIETY OF USE OF SUMMARY JUDGMENT PROCEDURES

As noted previously, the summary judgment motions are brought pursuant to Section 20240 of the California Administrative Code, "Motions Before and After Hearings." Subsections (a) and (b) provide, in substance, that (a) motions shall be filed with the executive secretary and served on other parties and (b) that the "executive secretary or the administrative law officer assigned to the case shall rule on every motion. The ruling shall be in writing, with reasons stated, and shall be served on all parties." In addition, Section 1148 of the Labor Code provides that "The Board shall follow applicable precedents of the National Labor Relations Act, as amended." Summary judgment procedures are authorized by regulation adopted pursuant to the NLRA. (See 29 C.F.R. Section 102.024.) These procedures have likewise been upheld by the Federal Courts. "The board's summary judgment procedure is new, but its validity has been decided or assumed by every circuit that has considered it . . .[citations omitted]." NLRB v. Union Bros., Inc.. 403 F.2d 883, 387, 69 LRRM 2651 4th Cir. 1968). See, also, NLRB v. Red-More Corp., 418 F.2d 890, 72 LRRM 2803 (9th Cir. 1969).

Thus, it is clear that summary judgment procedures are available to the ALRB in disposing of matters without evidenciary hearings in appropriate cases. The present situation, involving an attempt to obtain higher review of a certification decision, is in a category of cases which have previously been determined appropriate for summary judgment or adjudication without

additional evidenciary hearing by the NLRB and the Federal Courts. In Warner Press, Inc. v. NLRB, 525 F.2d 190 (7th Cir. 1975) cert. denied, __ U.S. ___, 47 L.Ed.2d 348, 96 S. Ct. 1410 (1976) the court dealt with the precise issue presented here.

> "The Board adopted these recommendations and certified the Union. In order to obtain judicial review of the Board's certification order, the Company refused to bargain with the Union, and unfair labor practice charges were brought against it. In the unfair labor practice proceedings before the Board, the Board's General Counsel moved for summary judgment. Because the Company raised the same arguments before the Board that it had advanced in the representation proceedings, the Board granted the motion and ordered the Company to bargain ..."
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> Page 192.
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> "As this Court most recently stated:
>
> 'It is well established that in *a.* refusal-to-bargain unfair labor practice proceeding, there need be no evidenciary hearing to establish facts on which a certification is challenged if the company's objections have been adequately litigated and determined in the prior representation proceeding. NLRB v. Southern Health Corp., 514 F.2d 1121, 1125-1126 (7th Cir. 1975)]."
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> Page 196.

In the present case, it is clear that the objections of

respondent Waller Flowerseed Co. "have been adequately litigated and determined in the prior representation proceeding." Accordingly, unless respondent is able to demonstrate that the prior decision of the Board is in violation of law, that decision must stand.

LEGAL DISCUSSION

Respondent's position may be summarized as follows. Section 1156.3(a)(4) of the Labor Code provides that a representation election "shall" be held within a maximum of seven days from the filing of the petition for certification. In this case, the election was held on the ninth day following the filing of the petition. The statute setting forth a maximum of seven days is mandatory because it uses the word "shall" in connection with the time period. Thus, because the election was held beyond the maximum specified, certification by the Board was improper and void and the respondent was not required to bargain in good faith with the union. In support of its position, respondent cites a variety of cases relating to statutory construction and following the intent of the legislature and, particularly, relies on cases which indicate that the word "shall" is to be interpreted as mandatory. (See, for example Ursino v. Superior Court, 39 Gal. App. 3d 611, 619; 114 Cal. Rptr. 404 (1974).)

In its prior decision, Waller Flower Seed Co., 1 ALRB 27 1975), the Board discusses at length its reasons for finding that the holding of an election beyond the seven day period specified in the statute is not invalid. It thus construed the seven day period as "directory" and not "mandatory," contrary to the contentions of respondent. This conclusion is amply supported by

case law. It has long been held that whether the use of the word "shall" renders a statute mandatory depends on the unequivocal intention of the legislature. Coke v. Los Angeles, 164 Cal. 705, 709-710, 130 P. 723 (1913); Carter v. Seaboard Finance Co., 35 Cal 2d 564, 573, 203 P.2d 753 (1949). In determining legislative intent, it is a familiar rule of statutory construction that remedial statutes such as the ALRA are to be liberally construed in order to accomplish the intended purpose. It has been observed in regard to the NLRA that "... this type of legislation is remedial in character and is to be broadly construed to accomplish its intended purposes ..." Department & Specialty Store Emp. Union v. Brown, 234 F. 2d 619, 626 (9th Cir. 1961). In addition, although the final authority for interpreting the intent of the legislature is a matter for the judiciary, "It is likewise true that the administrative interpretation of a statute will be accorded great respect by the courts and will be followed if not clearly erroneous." Bodinson Mfg. v. California E. Com., 17 Cal. 2d 321, 325, 109 P.2d 935 (1941).

In its prior decision, the Board, in effect, concludes that in the absence of prejudice to any party the voiding of an election held two days beyond the period specified in the statute would defeat an important purpose of the law which requires representation elections to be held very quickly after the filing of *a* valid petition. As the Board is the agency charged by the legislature with administering the ALRA, its determination of the intent of the legislature in adopting Labor Code Section 1156(a)(4) must prevail for purposes of these cross-motions for summary judgment.. Accordingly, the motion for summary judgment brought by

the General Counsel is granted and the cross-motion of respondent is denied for the reasons set forth above.

FINDINGS OF FACT

Paragraphs 1 through 6 of the Complaint are hereby incorporated herein by this reference and adopted as Findings of Fact in this matter.

CONCLUSIONS OF LAW

Paragraph 7 of the Complaint is hereby incorporated herein by this reference and adopted as Conclusions of Law in this matter

PROPOSED REMEDY

1. An order issue requiring the repondent employer to bargain with the UFW on request.

2. The employer compensate loss of pay and other benefits to all employees working for respondent on February 11, 1976 and employed from February 11, 1976 to the present resulting from respondent's refusal to bargain, according to proof before the Board.

3. Posting of the terms of the Board's order in writing in a conspicuous place on the respondent's property.

DATED: March 8, 1977

Gordon H. Rubin

GORDON.H.RUBIN
Administrative Law Officer