El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J. R. NORTON COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 77-CE-166-E 6 ALRB No. 26 (4 ALRB No. 39) REMAND

SUPPLEMENTAL DECISION AND ORDER

In accordance with the remand of the Supreme Court in J. R. Norton Co. v. Agricultural Labor Relations Bd., 26 Cal. 3d 1 (1980), we have reviewed and reconsidered our remedial Order and hereby make the following findings and conclusions with respect to our original Decision and Order.

In Norton, the Court held that Section 1160.3 of the ALRA does not authorize this Board, "...to impose the make-whole remedy as a matter of course in cases in which an employer has refused to bargain in order to obtain judicial review of the Board's dismissal of his challenge to an election certification." 26 Cal. 3d at 9. The Court stated, however, that the remedy is appropriate where an employer, claiming merely to challenge the validity of the election results, refuses to bargain as a dilatory tactic intended to stifle employee organization. Ibid.

The Court noted two competing considerations in the determination whether to grant a make-whole remedy:

> The first is the need to discourage frivolous election challenges pursued by employers as a dilatory tactic designed to stifle self-organization by employees. The second is the important interest in fostering judicial review as a check on arbitrary administrative action in cases in which the employer has raised a meritorious objection to an election and the objection has been rejected by the Board. 26 Cal. 3d at 30.

By imposing a blanket rule providing for a make-whole remedy in "technical" refusal-to-bargain cases, the Board was found to have over-emphasized the equitable goal of compensating employees for economic losses incurred as a result of employer misconduct, to the neglect of other policies and goals of the Act. Thus, the first lesson from Norton is that, in technical refusal-to-bargain cases, we must proceed on a case-by-case basis.

In Norton, the Court advised us to determine in each case whether the employer litigated in a reasonable good-faith belief that the election was conducted in a manner which did not fully protect employees' rights, or that misconduct occurred which affected the outcome of the election. The Court stated at page 39:

> the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. We emphasize that this holding does not imply that whenever the Board finds an employer has failed to present a prima facie case, and the finding is subsequently upheld by the courts, the Board may order make-whole relief. Such decision by hindsight would impermissibly deter judicial review of

> close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice. As discussed above, judicial review in this context is fundamental in providing for checks on administrative agencies as a protection against arbitrary exercises of their discretion. On the other hand, our holding does not mean that the Board is deprived of its make-whole power by every colorable claim of a violation of the laboratory conditions of a representation election: it must appear that the employer reasonably and in good faith believed the violation would have affected the outcome of the election.

We take this language to mean that the employer's litigation posture must have been reasonable at the time of the refusal to bargain, and that the employer must have acted in good faith. The good-faith aspect requires consideration both of the employer's belief as to the validity of its objection, and of the employer's motive for engaging in the litigation, i.e., whether it "went through the motions of contesting the election results as an elaborate pretense to avoid bargaining." Ibid.

We recognize that an employer may act in good faith, while not having a reasonable basis for his position. An employer may also offer a reasonable basis, while not acting in good faith as shown by the totality of the circumstances. We shall consider evidence relevant to those determinations which is available at the time of the litigation of the refusal-to-bargain charge. This also is in accordance with the Court's concern that the determination not turn on whether the employer was successful in its claim. Application of this standard will permit this Board to give adequate consideration, on a

case-by-case basis, to the concerns raised by the Court in Norton.

A number of the briefs we have received in this and related cases suggest that we simply apply a "frivolous versus debatable" test to the election objections. We find, however, that such a limited criterion would not comply with the Court's directive co determine the necessity of the remedy "from the totality of the employer's conduct." See quoted language, above, at pages 2-3. We also believe that such an approach would not give adequate weight to the purposes of avoiding delay and of promoting collective bargaining, which the Court noted at 26 Cal. 3d at 30. While there is discussion of a "frivolous versus debatable" standard in the Court's decision, it appears from the decision as a whole that a more comprehensive review of the cases is required.[1/]

Both the NLRB and the ALRB do use a frivolous-versus-debatable test in determining whether to award attorney fees. NLRB v. Food Store Employees, 417 U.S. 1, 86 LHRM 2209 (1974) ' Western Conference of Teamsters (V. B. Zaninovich), 3 ALRB No. 57 (1977). We find, however, that the objectives in applying a make-whole remedy differ significantly from the

[1/] Footnote 20 of the Court's decision indicates that whether the objections are debatable is simply a part of the determination of the good-faith issue. In Int'l. Union of Electric, Radio & Machine Workers v. NLRB (Tiidee Products, Inc.), 426 F.2d 1243, 73 LRRM 2870 (D.C. Cir. 1970), cert, denied 400 U.S. 950 (1970), the Court of Appeal, finding that the objections raised were "frivolous," remanded the case to the NLRB to consider whether a make-whole remedy would be warranted. The Court did not suggest that the use of this remedy must be limited to such cases.

rationale for awarding or denying attorney fees. In Teamsters, supra, we noted that the award of attorney fees as a remedy where the respondent's litigation posture is "frivolous" would serve the purpose of enabling the agency "to utilize effectively its resources, unfettered by trial calendars crowded with meritless litigation." 3 ALRB No. 57, at page 7. With respect to the make-whole remedy, on the other hand, his Board, unlike the NLRB, is specifically granted the power to use the remedy, Section 1160.3, in order to compensate employees for the losses they incur as a result of unlawful delays in collective bargaining. 26 Cal. 3d at 36. Thus, the Court stated at page 31, "It is clear that make-whole relief is appropriate when an employer refuses to bargain for the purpose of delaying the collective bargaining process." We find that a broader standard is necessary for the application of the make-whole remedy than for attorney fees.

We turn now to the question whether application of the make-whole remedy is appropriate in the instant case. We conclude that Respondent did not have a reasonable belief that the election was conducted in a manner which did not fully protect employees' rights, or that misconduct occurred which affected the outcome of the election. We therefore reaffirm our prior order providing, inter alia, for a make-whole remedy.

After an election conducted on February 6, 1976, the Tally of Ballots showed the following results: UFW-155; No Union-41; Void-1; Challenged Ballots-15. Respondent filed

17 objections to the election, 15 of which were dismissed without hearing by the Board's Executive Secretary, whose action the Board affirmed. The remaining two objections were the subject of an investigative hearing. The hearing examiner dismissed the objections, and the Board affirmed the dismissal, and certified the UFW as the exclusive collective bargaining representative of Respondent's employees. J. R. Norton, 3 ALRB No. 66 (1977). Respondent subsequently refused to bargain with the UFW, and was found by the Board to have thereby violated Sections 1153(e) and (a) of the Act. J. R. Norton Company, 4 ALRB No. 39 (1978).

Review was summarily denied by the Court of Appeal. Respondent then petitioned for review in the Supreme Court, contending that the Board and its Executive Secretary had improperly dismissed eight of the objections without granting a hearing. The Court concluded that the objections were properly dismissed. 26 Cal. 3d at 27.

The only issue relating to the certification which was litigated in the courts was the propriety of dismissing eight of its objections without granting a hearing. Respondent contended that on the basis of the declarations which accompanied these objections, it had established a prima facie case of misconduct.[2/] In dismissing these objections, the Board

[2/]In note 8 of its opinion, the Supreme Court stated that Respondent did not contend that the burden of supplying declarations which state a prima facie case, 8 Cal. Admin. Code § 20365, was unreasonable. Rather, the Court found that Respondent impliedly conceded the validity of this requirement.

found that even if the facts recited in the declarations were true, there would not be cause to set aside the election. 26 Cal. 3d at 19.

In reviewing the declarations which supported Respondent's eight objections, we find that at the time of the refusal to bargain, Respondent had no reasonable basis for believing that the alleged misconduct affected the outcome of the election.[3/] Four objections concerned alleged union activity and disruptive conduct at the polling site, three objections involved alleged violations of the Board's access rule, and the remaining objection alleged that the Board Agent improperly changed the location of the polling places.

One of the declarations as to union activity and disruptive conduct stated that union organizers stood at the entrance to the site, stopping cars, questioning the occupants, and writing something down. Another declaration stated that two unidentified people asked a voter his name and how he planned to vote. Under two early ALRB cases, Toste Farms, Inc., 1 ALRB No. 16 (1975) and William Pal Porto & Sons, Inc., 1 ALRB No. 19 (1975), the facts recited in these declarations are clearly insufficient to cause the election to be set aside. Other declarations alleged that the voting took place in a public area and that two intoxicated persons attempted to vote. These declarations were devoid of any showing of disruptive conduct, or of effect on the election.

[3/] The objections and the underlying declarations are described in detail by the Court, 26 Cal. 3d at 19-27.

The declarations relating to access violations were limited to statements that an organizer told employees to leave work in order to attend a union meeting, but that none complied with his request, and that on one occasion organizers stayed one hour over the time permitted by the Board's regulation. 8 Cal. Admin. Code Section 20900. There is no evidence or indication of any coercion or intimidation, and thus no possibility of an effect on the outcome of the election.

The final objection, relating to a change in the location of the polling site, was also the subject of one of the objections set for hearing. The Board dismissed that objection after the hearing, and Respondent did not seek review in the courts. Therefore, Respondent conceded the invalidity of the objection which was not set for hearing.

We therefore conclude that Respondent did not have a "reasonable good-faith belief" in the invalidity of the certification as a basis for seeking review of the eight objections dismissed by the Executive Secretary and affirmed by the Board. Consequently the delay in bargaining warrants imposition of the make-whole remedy in this case. Accordingly,

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we hereby reaffirm and reinstate the original remedial Order in this case.
Dated: May 30, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

RALPH FAUST, Member

CASE SUMMARY

J. R. Norton Company (UFW) 6 ALRB No. 26
(4 ALRB No. 39)
Case No. 77-CE-166-E

BOARD DECISION

On remand from the California Supreme Court, J. R. Norton Co. v. ALRB, 26 Cal. 3d 1 (1980), the Board reconsidered whether make-whole was an appropriate remedy in J. R. Norton Company, 4 ALRB No. 39 (1978). In the latter case, Respondent was found to have violated Section 1153(e) and (a) by refusing to bargain with the UFW after the Board upheld election results and certified the UFW as collective bargaining agent for Respondent's agricultural employees. The Board stated that, in determining whether make-whole is appropriate in technical refusal-to-bargain cases, it would consider whether the employer's litigation posture was reasonable at the time of the refusal to bargain and whether the employer acted in good faith.

Assessing those of Respondent's election objections which it litigated in court by the criteria set forth in the Court's Norton decision, the Board determined that the objections were not substantial enough to support a reasonable good faith belief on Respondent's part, at the time of its refusal to bargain, that the union would not have been freely selected by the employees had the election been properly conducted.

REMEDY

The Board retained the make-whole provision in its Revised Order.

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

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