Arvin, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CHARLES MALOVICH, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 79-CE-20-F 6 ALRB No. 29

DECISION AND ORDER

Upon charges filed by the United Farm Workers of America, AFL-CIO (UFW), alleging a violation of California Labor Code Section 1153 (e) and (a) by Respondent, Charles Malovich, General Counsel issued a complaint against Respondent on August 15, 1979, and duly served it on all parties.

In accordance with 8 Cal. Admin. Code Section 20260, this proceeding has been transferred directly to the Board on the basis of a stipulation of facts[1/] which waived an evidentiary hearing before an Administrative Law Officer. All parties submitted timely briefs to the Board.

The Board has considered the entire record herein, including the stipulation and briefs of the parties, and hereby

[1/]General Counsel and Respondent agreed on the stipulated facts. The UFW did not enter into the agreement on the sole ground that the record in the underlying representation decision, Charles Malovich, 5 ALRB No. 33 (1979) should not be admitted as evidence, because the evidence was unduly burdensome and was hearsay. We reject the UFW's argument and include the record in the representation decision as part of the record in this case.

issues the following findings of fact, conclusions of law, and remedial Order.

Findings of Fact

Respondent is, and at all times material herein has been, an agricultural employer within the meaning of Labor Code Section 1140.4 (c). The UFW is, and at all times material herein has been, a labor organization within the meaning of Section 1140.4 (f).

On April 20, 1977, the UFW filed a petition for certification as the collective bargaining representative of Respondent's agricultural employees. On April 26, 1977, the Board conducted a representation election among Respondent's agricultural employees, which the UFW won. Thereafter, an evidentiary hearing was conducted on Respondent's election objection and, on May 15, 1978, the Investigative Hearing Examiner (THE) issued her decision, in which she recommended dismissal of Respondent's objection and certification of the UFW. On May 9, 1979, the Board issued its decision, dismissing Respondent's objection and certifying the UFW as the exclusive collective bargaining representative of Respondent's agricultural employees. Charles Malovich, 5 ALRB Mo. 33 (1979).

By letter of May 14, 1979, the UFW requested Respondent to commence collective bargaining negotiations. Respondent, by letter dated May 18, 1979, replied that, in light of its motion for reconsideration of the representation decision pending before the Board, a response to the UFW1s request for collective bargaining would be inappropriate. In a letter dated May 22, 1979, which was received by Respondent on May 29, and in a letter dated June 21,

1979, the UFW repeated its request for negotiations. By letter of June 25, 1979, Respondent advised the UFW that it believed the certification was invalid and refused to meet "until all avenues of review have been exhausted."

In its answer to the complaint filed in this matter, Respondent asserts, as an affirmative defense, that the certification of the UFW is invalid, as it was not made pursuant to Section 1156.3 of the Act, and that Respondent has therefore not committed an unfair labor practice by its failure and refusal to meet and bargain with the UFW.

Conclusions of Law

This Board has adopted the NLRB's broad proscription against relitigation of representation issues in related unfair labor practice proceedings. D'Arrigo Brothers of California, 4 ALRB No. 45 (1978). In our decision in Charles Malovich, 5 ALRB No. 33 (1979), we considered and ruled on the issues raised by Respondent's objection to the election in Case No. 77-RC-4-D. Respondent here presents no newly discovered or previously unavailable evidence, nor does it argue any extraordinary circumstance (s) which might justify relitigation of such issues. Accordingly, we conclude that Respondent had a duty to meet and bargain collectively with the UFW based upon the certification we issued on May 9, 1979, and that Respondent, by its failure and refusal, at all times since May 18, 1979, to meet and bargain collectively in good faith with the UFW, has violated Labor Code Section 1153 (e) and (a).

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The Remedy

Having found that Respondent has refused to meet and bargain collectively in good faith with the UFW, we must now determine whether the make-whole remedy is appropriate in light of J. R. Norton Co. v. Agricultural Labor Relations Bd., 26 Cal. 3d 1 (1980). In accordance with the standard enunciated by the Court and discussed in J. R. Norton Co., 6 ALRB No. 26 (1980), we shall "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." J. R. Norton Co., supra, at 2.

Turning to the case before us, we first inquire whether Respondent's litigation posture is reasonable.

Respondent's election objection was that the petition was not timely filed pursuant to Section 1156.3 (a) (1)[2/] of the Act, because the number of employees employed by Respondent was less than 50 percent of its peak agricultural employment,- In this case, peak employment for the calendar year in which the election was held occurred after the election but before the hearing on the objections. Respondent argued that the actual peak figures were

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[2/]Section 1156.3 (a) (1) provides that an election petition may be filed alleging:

> That the number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent of his peak agricultural employment for the current calendar year.

available at the time of the hearing and that the Board should have used only these figures in reviewing the Regional Director's decision that the petition was timely filed. The Board rejected this argument and enunciated the rule that review in prospective-peak cases[3/] will be based upon whether the Regional Director's peak determination was a reasonable one in light of the information available at the time of the investigation of the petition.

Respondent's objection to the Board's approach in this prospective-peak case brings into play certain provisions of the Act, in particular Sections 1156.3 (a) (1) and 1156.4.[4/] As these provisions, based on the particular characteristics of the agricultural setting, have no counterpart in the National Labor Relations Act, there is no applicable NLRA precedent on this issue. In the underlying representation case, the Board for the first time articulated the approach it would use to determine whether a

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[3/] A prospective-peak case is one in which the employer's peak employment for the applicable calendar year has not yet occurred t the time the petition is filed.

[4/] Section 1156.4 provides, in pertinent part:

> ... the board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.
>
> In this connection, the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon all ether relevant data.

petition has been timely filed in prospective-peak cases. When Respondent refused to bargain in order to test the validity of the Board's certification, there were no judicial decisions, and as of this date there are still no judicial decisions, involving these statutory provisions or the Board's methods of determining peak employment. We find that these factors resulted in a "close [case] that [raises] important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice." J. R. Norton Co. v. Agricultural Labor Relations Bd., supra, at 39. Under these circumstances, we find that Respondent's litigation posture is reasonable.

Furthermore, we find that the record does not reveal that Respondent acted in bad faith in seeking judicial review of the certification. Therefore, because the totality of the circumstances shows that Respondent's litigation posture is reasonable and in good faith, we find that imposition of the make-whole remedy is not warranted in this case, and therefore we shall not include it in our remedial Order.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders Respondent, Charles Malovich, its officers, agents, successors, and assigns, to:

1. Cease and desist from:

(a) Failing or refusing to meet and 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 collective bargaining representative of its agricultural employees.

(b) In any like or related 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) 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 hereinafter.

(c) Post copies of the attached Notice for 60 consecutive days at places on its premises, the times and places of posting to be determined by the Regional Director.

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

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed at any time during the payroll period immediately preceding April 20, 1977, and to all employees employed by Respondent at any time from and including

May 18, 1979, until compliance with this Order.

(f) 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.

(g) Notify the Regional Director in writing, within 30 days after the date of issuance 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 as to 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

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from the date on which Respondent commences to bargain in good faith with said union.

Dated: May 30, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCarthy, Member

RALPH FAUST, Member

NOTICE TO EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to meet and bargain about a contract with the UFW. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all 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, on request, meet and bargain with the UFW about a contract because it is the representative chosen by our employees.

Dated: CHARLES MALOVICH

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

Charles Malovich (UFW) — 6 ALRB No. 29
Case No. 79-CE-20-F

BOARD DECISION

Respondent Charles Malovich refused to bargain in order to test the validity of the Board's certification of the UFW in Charles Malovich, 5 ALRB No. 33 (1979). The Board, on stipulated facts, concluded that Respondent had violated Section 1153 (e) and (a) of the Act by its refusal to bargain.

The Board had to determine whether the make-whole remedy was appropriate in this technical refusal to bargain case, in light of J. R. Norton Co. v. ALRB, 26 Cal. 3d 1 (1980). Respondent's election objection in the underlying representation decision was that the petition was filed when the number of employees employed by Respondent was less than 50 percent of its peak agricultural employment. The Board, in the representation decision, articulated for the first time the approach it would use to determine whether a petition has been timely filed in prospective peak cases. Its decision involved statutory provisions having no counterpart in the NLRA. At the time of Respondent's refusal to bargain, there were no judicial determinations involving these issues. Under these circumstances, the Board in the instant case concluded that Respondent's litigation posture was reasonable. It therefore declined to order make-whole relief.

REMEDY

The Board issued a narrow cease-and-desist order, ordered Respondent to bargain with the UFW, and to post, mail, distribute and read a Notice to its employees. The Board also extended the certification of the UFW for one year from the date on which Respondent commences to bargain in good faith.

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