Blythe, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HIGH & MIGHTY FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 78-CE-13-E 6 ALRB No. 31 (4 ALRB No. 51)

SUPPLEMENTAL DECISION AND REVISED ORDER

In accordance with the remand order of the Court of Appeal for the Fourth Appellate District, dated March 3, 1980, in Case 4 Civ. No. 20452, 4 ALRB No. 51 (1978), we have reviewed and reconsidered our remedial Order in light of J. R. Norton Co. v. Agricultural Labor Relations Bd., 26 Cal. 3d 1 (1980), and hereby make the following findings and modifications with respect to our original Decision and Order.

A representation election was conducted among the agricultural employees of Respondent, High & Mighty Farms, on November 24, 1975. The vote count was: UFW - 36; No Union - 25; Challenged Ballots - 3. Respondent timely filed objections to the election, two of which were dismissed by the Executive Secretary and three set for hearing. Respondent did not seek Board review of the dismissed objections.

After a hearing was held on the three objections and the Investigative Hearing Examiner's (IHE) Decision issued recommending that the objections be dismissed and the election be upheld, the

Board certified the UFW as the collective bargaining representative of Respondent's employees on November 29, 1977. High & Mighty Farms, 3 ALRB No. 88 (1977). On December 13, 1977, the UFW requested that Respondent meet and bargain with the Union concerning the employees' wages, hours, and working conditions. On January 17, 1978, Respondent informed the UFW that it was refusing to bargain in order to test in court the validity of the Board's certification. Following an unfair labor practice proceeding, the Board concluded that Respondent had unlawfully refused to bargain, in violation of Section 1153(e) and (a) of the Act and, as part of the remedy, ordered Respondent to make its employees whole for economic losses suffered as a result of Respondent's refusal to bargain. High & Mighty Farms, 4 ALRB No. 51 (1978).

In J. R. Norton Co. v. Agricultural Labor Relations Bd., supra, issued after our original Decision and Order herein, the Supreme Court held that, in technical refusal to bargain cases, the Board must determine the appropriateness of make whole relief on a case-by-case basis. In accordance with the Court's decision, we set forth, in J. R. Norton Co., 6 ALRB No. 26 (1980), the standards, procedures, and considerations involved in making such a determination. We shall henceforth determine in each case whether the respondent 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.

Turning to the case before us, we first inquire whether Respondent's litigation posture was reasonable at the time of the

refusal to bargain. One of Respondent's election objections was that the election petition was not timely filed pursuant to Section 1156.3 (a) (1)[1/] of the Act, because the number of employees employed by Respondent was less than 50 percent of its peak agricultural employment. The Board, in this case, was faced with a difficult peak problem. Before the election, Respondent employed both regular employees and workers hired through a labor contractor; the two groups were paid in different payroll periods. The Board decided, in light of Luis A. Scattini & Sons, 2 ALRB No. 43 (1976), to use two different payroll/eligibility periods for the two groups of employees. To determine the average number of employee-days worked during the applicable payroll periods, the Board modified the method used in Mario Saikhon, 2 ALRB No. 2 (1976) by computing the average number of employees-days worked for each group separately and then combining the figures. Finding that the contract employees did not work for the first four days of their payroll/eligibility period, the Board concluded that these four days were unrepresentative. Using the concept developed in Ranch No. 1, Inc., 2 ALRB No. 37 (1976), the Board averaged the number of contract employees over a three-day rather than a seven-day period.

[1/] 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.

Respondent's objection to the Board's determination of peak employment brings into play certain provisions of the Act, in particular Sections 1156.3(a) (1) and 1156.4.[2/] These provisions, based on the particular characteristics of the agricultural setting, have no counterpart in the National Labor Relations Act; therefore, there is no NLRA precedent on this issue. To ensure a fair and representative vote, the Board has devised several approaches in determining when 50 percent of peak employment has been reached. In the underlying representation case, the Board, for the first time, used a combination of various methods to compute the percentage of peak employment. When Respondent refused to bargain in order to test the validity of the certification, there were no judicial decisions involving the Board's determination of 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 was reasonable.

Furthermore, we find that the evidence available at the time of the litigation of the refusal to bargain issue does not reveal that Respondent acted in bad faith in seeking judicial

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[2/]Section 1156.4 provides, in 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.

review of the certification. Therefore, because the totality of the circumstances shows that Respondent's litigation posture was reasonable and in good faith, we find that the imposition of a make-whole order is inappropriate in this case. Accordingly, we shall modify our original Order by deleting the make-whole provision therein.

Paragraph l(b) of our original Order directed Respondent to cease and desist from "in any other manner" interfering with its employees' organizational rights. We shall modify that provision to order Respondent to cease and desist from interfering with its employees' organizational rights in any manner like or related to the unfair labor practice committed by Respondent. See M. Caratan, Inc., 6 ALRB No. 14 (1980); Hickmott Foods, Inc., 242 NLRB No. 177, 101 LRRM 1342 (1979).

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders Respondent, High & Mighty Farms, 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 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 issuance of this Decision.

(e) 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 November 17, 1975, and to all employees employed by Respondent at any time from and including January 17, 1978, 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 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: 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 action. 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: HIGH & MIGHTY FARMS

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

High & Mighty Farms (UFW)

6 ALRB No. 31
(4 ALRB No. 51)
Case No. 78-CE-13-E

BOARD DECISION

On remand from the Court of Appeal for the Fourth Appellate District, the Board reconsidered, in light of J. R. Norton Co. v. ALRB, 26 Cal. 3d 1 (1980), whether make-whole was an appropriate remedy in High & Mighty Farms, 4 ALRB No. 51 (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.

Respondent's election objection was that the petition was filed when the number of employees employed by Respondent was less than 50 percent of its peak agricultural employment. Because this objection involved statutory provisions having no counterpart in the NLRA and because the Board, in the underlying representation decision, for the first time used a combination of various methods to compute the percentage of peak employment, the Board found that Respondent's litigation posture, at the time of its refusal to bargain, was reasonable.

REMEDY

The Board deleted the make-whole provision in its Revised Order and narrowed the scope of the Order's cease and desist provision, directing Respondent to cease and desist from interfering with, restraining, or coercing employees in the exercise of their organizational rights in any manner like or related to the unfair labor practice committed by Respondent.

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