Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KYUTOKU NURSERY, INC.,	)	
	)	
Respondent,	)	Case No. 77-CE-18-M
	)	
and	)	
	)	
UNITED FARM WORKERS AMERICA, AFL-CIO,	)	6 ALRB No. 32 OF (4 ALRB No. 55)
	)	
Charging Party.	)	
	)	

SUPPLEMENTAL DECISION AND REVISED ORDER

In accordance with the remand order of the -Court of Appeal for the First Appellate District, dated February 4, 1980, in Case 1 Civ. No. 45011, 4 ALRB No. 55 (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 conclusions with respect to our original Decision and Order.

In J.R. Norton Co. v. Agricultural Labor Relations Bd., supra, the California Supreme 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 every case in which an employer has refused to bargain in order to obtain judicial review of the Board's dismissal of its objection(s) to an election certification. Rather, we must determine, on a case-by-case basis, 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., 6 ALRB No. 26 (1980). Applying that standard to the facts of the instant case, we find, based on our review and reconsideration of the matter, that application of the make-whole remedy is appropriate herein.

On September 4, 1975, the United Farm Workers of America, AFL-CIO (UFW) filed a Petition for Certification in which it alleged, inter alia, that a majority of the employees at Respondent's Salinas nursery were engaged in a strike. Pursuant to Labor Code Section 1156.3(a),[1/] the Regional Director directed that an election be conducted on September 6. On September 5, the day before the election, Respondent's attorney sent a telegram to the Regional Director, objecting to the September 6 election date on the grounds that the employees had quit voluntarily on September 2 and that there was no strike at Respondent's premises which would justify an expedited election pursuant to Labor Code Section 1156.3(a). Respondent's attorney stated that the telegram would constitute Respondent's objection to the conduct of the election and its challenge to voters. The election was conducted on September 6, with the following results:

UFW	10
No Union.....	2
Void Ballot.....	1
Total.....	13

[1/]Labor Code Section 1156.3(a) provides that if an election petition is filed when a majority of the employees in the bargaining unit are engaged in a strike, the Board "shall, with all due diligence, attempt to hold a secret ballot election within 48 hours of the filing of the petition."

Respondent did not have a representative present at the election and no voters were challenged.

On September 10, Respondent's attorney sent the Regional Director another telegram, which stated that Respondent objected to the conduct of the election and conduct affecting the results of the election, and that supporting declarations would follow. The next day, September 11, Respondent sent a letter to the Salinas Regional Office specifically objecting that allegations in the Petition for Certification as to the number of employees and the existence of a strike were incorrect and that no proper ruling had been made on the "challenged ballots."

The Regional Director dismissed Respondent's objection as to the "challenged ballots," and we denied Respondent's request for review of the dismissal. The parties stipulated that the record in a related unfair-labor-practice case, Kyutoku Nursery, Inc., [Case No. 75-CE-115-M, 3 ALRB No. 30 (1977)], would serve as the record concerning Respondent's other objection to the election. Shortly thereafter, the Decision of the Administrative Law Officer (ALO) in the related unfair-labor-practice case issued. In his Decision, the ALO found that Respondent's employees were engaged in an economic strike at the time the Petition for Certification was filed, Kyutoku Nursery, Inc., 3 ALRB No. 30 (1977). On the basis of the record in that case, the Executive Secretary dismissed Respondent's remaining objection that the allegations in the Petition for Certification as to the number of employees and the existence of a strike were incorrect. The Board denied Respondent's request for review of the Executive

Secretary's dismissal and, on January 12, 1977, certified the UFW as the exclusive collective bargaining representative of Respondent's employees.

On January 24, 1977, the UFW sent a letter to Respondent, asking it to commence collective bargaining. Respondent, in letters dated March 15 and 16, 1977, advised the UFW that it was refusing to bargain in order to obtain judicial review of the Board's certification. On April 5, 1977, the Board affirmed the ALO's finding that Respondent's employees were engaged in a strike when the Petition for Certification was filed. Kyutoku Nursery, Inc., supra. We subsequently concluded that Respondent had committed an unfair labor practice by failing and refusing to meet and bargain in good faith with the UFW. Kyutoku Nursery, Inc., 4 ALRB No. 55 (1978).

We find that, at the time of its refusal to bargain, Respondent did not have a reasonable good faith belief that the election was not conducted in a manner which truly protected employees' rights, or that misconduct had occurred which affected the outcome of the election. J.R. Norton Co., supra. Respondent's main objections to the election were that its employees had voluntarily quit before the election and therefore were not eligible to vote, and that the Board agent failed to challenge voters on this ground on behalf of Respondent. However, at the same time the parties stipulated that the record in the related unfair labor practice case would serve as the record in the election case, the Respondent further stipulated that its last payroll period which ended prior to the filing of the election

petition was the week ending August 30, 1975, and that the employees who left the nursery before the end of the workday on September 2, 1975, were employed by Respondent during that preceding pay period. These employees were therefore eligible to vote under Labor Code Section 1157 and Section 20352(a) of the Board's regulations (then Section 20355) . Also, in Kyutoku Nursery, Inc., 3 ALRB No. 30 (1977), we upheld the ALO's finding that the employees were engaged in an economic strike. They were therefore also eligible to vote as economic strikers under Labor Code Section 1157 and Section 20352 (a) (4) of the Board's regulations (then Section 20355).

Neither in its election objections nor in the unfair labor practice case based on Respondent's refusal to bargain did Respondent argue that the Board incorrectly interpreted the statutory language concerning voter eligibility. Respondent also failed to present any evidence that the scheduling of the election interfered with the employees' free and uncoerced choice of a bargaining representative. Respondent did not present a "close" case that raised "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 p. 39. Also, Respondent neither filed an objection nor presented any evidence that any misconduct occurred which affected the outcome of the election.

We conclude that Respondent did not act reasonably in seeking judicial review of its objections and therefore a make-whole remedy is appropriate in this case. We shall therefore retain

the provision in our remedial Order requiring Respondent to reimburse its employees for any losses of pay and other economic losses they have suffered as a result of Respondent's refusal to bargain with the UFW, for the period from January 27, 1977, to such time as Respondent commences to bargain in good faith and continues to so bargain to the point of a contract or a bona fide impasse.

In paragraph l(b) of our Order, we directed Respondent to cease and desist from "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." We shall modify that paragraph so as to require 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. See M. Caratan, Inc., 6 ALRB No. 14 (1980); Hickmott Foods, Inc., 242 NLRB No. 177, 101 LRRM 1342 (1979).[2/]

REVISED ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders Respondent Kyutoku Nurseries, Inc., its officers, agents, representatives, successors, and assigns to:

1. Cease and desist from:

(a) Refusing to meet and bargain collectively in

[2/]We have also revised the Notice to Employees, which incorrectly stated the date on which Respondent initially refused to bargain, to conform to the Board's opinion in Kyutoku Nursery, Inc., 4 ALRB No. 55 (1977).

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 an understanding is reached, embody such understanding in a signed agreement.

(b) Make its agricultural employees whole for all losses of pay and other economic losses 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 hereinafter.

(e) Post copies of the attached Notice for 90 consecutive days at conspicuous places on its premises, the

period and places of posting to be determined by the Regional Director.

(f) Provide a copy of the Notice to each employee hired by 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 after the date of issuance of this Order, to all employees employed during the payroll period immediately preceding September 4, 1975, and to all employees employed by Respondent from and including January 27, 1977, 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 non-hourly 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 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 what further steps have been taken in compliance with this Order.

IT IS FURTHER ORDERED that the certification of the United Farm Workers, 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 actions. 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, on request, meet and bargain with the UFW about a contract because it is the representative chosen by our -employees.

WE WILL reimburse each of the employees employed by us after January 27, 1977, for any loss of pay or other economic benefits sustained by them because we have refused to bargain with the UFW.

KYUTOKU NURSERY, 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.

CASE SUMMARY

Kyutoku Nursery, Inc. (UFW) — 6 ALRB No. 32 (4 ALRB No. 55) Case No. 78-CE-18-M

BOARD DECISION

On remand from the Court of Appeal for the First Appellate District, Division Three, 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 Kyutoku Nursery, Inc., 4 ALRB No. 55 (1978). In the latter case Respondent was found to have violated Section 1153 (e) and (a) by refusing to bargain with the UFW as the collective bargaining agent for Respondent's agricultural employees.

Assessing Respondent's election objections by the criteria set forth in Norton, supra, the Board determined that they 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 employee had the election been properly conducted.

REMEDY

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