Brentwood, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RON NUNN FARMS,	)	
	)	
Respondent,	)	Case No. 79-CE-2-S
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	6 ALRB No. 41
	)	
Charging Party.	)	
	)	

DECISION AND ORDER

Upon charges duly filed by the United Farm Workers of America, AFL-CIO (UFW), alleging a violation of California Labor Code Section 1153 (e) and (a) by Ron Nunn Farms (Respondent), the General Counsel of the Agricultural Labor Relations Board issued a complaint against Respondent on November 6, 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 which waived an evidentiary hearing before an Administrative Law Officer.

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.

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 Labor Code Section 1140.4(f).

On May 25, 1978, the Agricultural Labor Relations Board certified the UFW as the collective bargaining representative of all Respondent's agricultural employees in Contra Costa County. Ron Nunn Farms (May 25, 1978) 4 ALRB No. 31. On June 1, 1978, the UFW requested Respondent to commence collective bargaining negotiations. On June 4, 1978, Respondent notified the UFW that it was refusing to bargain in order to obtain judicial review of the UFW's certification. Respondent admits it refused to meet and bargain but contends the Board improperly certified the UFW and that its refusal to bargain therefore did not constitute a violation of Labor Code Section 1153(e) and (a).

CONCLUSIONS OF LAW

The UFW filed the charge in this proceeding on February 9, 1979, almost eight months after Respondent first informed the UFW that it was refusing to bargain in order to obtain judicial review of the UFW's certification. Respondent asserts it may not be held liable for an unfair labor practice because the charge was not timely filed under Labor Code Section 1160.2. We disagree.

Labor Code Section 1160.2 states, in part, that "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made ...." The conduct alleged as the basis of the unfair labor practice charge is Respondent's refusal to bargain with the UFW when it had a legal obligation to do so. Respondent's

refusal to bargain did not occur only when it notified the UFW of its intention to test the certification but it continued up to and beyond the date the UFW filed the charge in this proceeding. Consequently, the conduct occurred throughout the six months preceding the date the UFW filed the charge.

The failure of the UFW to file the charge within six months following its last request for bargaining does not compel a different result. Although it is true that conduct may not be found to be an unfair labor practice if such a finding is totally dependent upon other conduct which occurred more than six months before the filing of the charge, Local Lodge No. 1424, IAM v. NLRB (1960) 362 U.S. 411 [45 LRRM 3212], we do not face that circumstance here. The UFW's request to commence bargaining was a continuing request. There is no evidence that the UFW placed a time limitation upon or withdrew the request. Repetition of the request would have been futile in light of Respondent's intention to test the certification. As the request is continuing, it is not necessary to rely solely upon conduct occurring more than six months prior to the filing of the charge to establish an unfair labor practice. Sewanee Coal Operators Assn. (1967) 167 NLRB 172 [66 LRRM 1022], aff'd in relevant part, 423 F.2d 169 [73 LRRM 2725]; Morris Novelty Co., Inc. (1966) 157 NLRB 1471 [61 LRRM 1563], rev'd on other grounds, 378 F.2d 1000 [65 LRRM 2577]. Accordingly, we conclude that the charge was timely filed.

We adhere to the National Labor Relations Board's proscription of relitigating representation issues in subsequent related unfair labor practice proceedings when no newly discovered

or previously unavailable evidence is presented and there is no claim of extraordinary circumstances. Julius Goldman's Egg City (February 2, 1979) 5 ALRB No. 8. As Respondent has not presented newly discovered or previously unavailable evidence and has claimed no extraordinary circumstances with respect to the post-election objections, we will not reconsider the representation issues in this proceeding. Accordingly, we conclude that Respondent violated Labor Code Section 1153(e) and (a) by failing to meet and bargain with the UFW.

REMEDY

We now turn to consideration of whether to award make-whole relief to the employees in the bargaining unit as a remedy for Respondent's unlawful refusal to bargain. When an employer refuses to bargain with a labor organization in order to test the labor organization's certification, we consider the appropriateness of the make-whole remedy on a case-by-case basis. J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal. 3d 1. We shall impose the make-whole remedy unless the employer's litigation posture is reasonable at the time of its refusal to bargain and the employer seeks judicial review of the certification in good faith. J. R. Norton Company (May 30, 1980) 6 ALRB No. 26.

On October 20, 1975, the Regional Director conducted a representation election among Respondent's agricultural employees. The Tally of Ballots showed the following results:

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UFW	105
No Union	71
Challenged Ballots	14
Void Ballot	1
Total	191

Respondent filed 65 post-election objections to the election. Five distinct issues were set for hearing, encompassing twelve of the objections. The other 53 objections were dismissed without a hearing by the Board's Executive Secretary. The Board denied Respondent's request for review of the Executive Secretary's decision. Following a hearing before an Investigative Hearing Examiner, the Board dismissed the twelve remaining objections and certified the UFW as the collective bargaining representative of Respondent's employees. Ron Nunn Farms (May 25, 1978) 4 ALRB No. 31. Respondent contends that the Board should have refused to certify the UFW on the basis of the objections which were dismissed either with or without a hearing. We find that Respondent's refusal to bargain based upon that position does not constitute a reasonable litigation posture and we therefore conclude that make-whole relief is an appropriate remedy in this case.

Post-Election Objections Dismissed Without a Hearing

Several of Respondent's post-election objections which were dismissed without a hearing were challenges to the sufficiency of the UFW's showing of interest.[1/] See Labor Code Section

[1/]Included within this group of post-election objections are those numbered 1, 2, 3, 4, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 33, 42, 45, 54, 60, 61 and 63.

1156.3 (a). At the time Respondent first refused to bargain, the Board had already held that the showing of interest is not a jurisdictional requirement for an election, is not reviewable in the post-election objections procedure, and is not a basis upon which the Board will set aside an election. 8 Cal. Admin. Code Section 20300 (j) (5); Napa Valley Vineyards, Co. (March 7, 1977) 3 ALRB No. 22; Louis Delfino Co. (January 18, 1977) 3 ALRB No. 2; Gonzales Packing Company (September 15, 1976) 2 ALRB No. 48; Skyline Farms (February 25, 1976) 2 ALRB No. 40; Jerry Gonzales Farms (February 23, 1976) 2 ALRB No. 33; John V. Borchard Farms (January 22, 1976) 2 ALRB No. 16; Jack or Marion Radovich (January 20, 1976) 2 ALRB No. 12. This policy is consistent with the practice of the National Labor Relations Board, S & H Kress & Co. (1962) 137 NLRB 1244 [50 LRRM 1361], rev'd on other grounds, 317 F.2d 225 [53 LRRM 2024]; NLRB v. Air Control Products of St. Petersburg, Inc. (5th Cir. 1964) 335 F.2d 245 [56 LRRM 2904], and has received judicial approval in California. Radovich v. Agricultural Labor Relations Bd. (1977) 72 Cal. App. 3d 36; Nishikawa Farms, Inc. v. Mahony, et al. (1977) 66 Cal. App. 3d 781, Consequently, we find that Respondent's refusal to bargain based upon these post-election objections does not constitute a reasonable litigation posture.[2/]

Objections numbered 49 and 50 assert that Labor Code Section 1156.3 is unconstitutional as it provides no opportunity

[2/]Respondent's objections concerning alleged 0FW coercion of employees in the procurement of authorization cards were set for hearing pursuant to objection number 46.

for an objecting party to contest the Board's jurisdiction to conduct an election. Objection number 51 asserts the Board did not have jurisdiction to conduct the election. According to Respondent's brief on the make-whole remedy, these objections relate to Respondent's contention that the UFW's petition was not supported by a sufficient showing of interest. Since Respondent's jurisdictional argument is based upon the showing of interest, our finding on the showing of interest objections set forth above is dispositive.

Objections numbered 55 and 56 attack the validity of 8 Cal. Admin. Code Section 21000. This regulation reads, in pertinent part:

> The symbol or emblem designating a choice of 'No Labor Organization' should be a circle with a diagonal slash from upper left to lower right through it, with the word 'No' centered in the circle, as a supplement to the words 'No Union' on the ballot.

Respondent asserts that, because labor organizations are permitted to place a distinctive symbol on the ballot as a designation for the labor organization, Respondent should be allowed to place its company logo by the choice of "No Union".

The purpose of the ballot is to provide eligible voters with a clear and easily understood method of indicating their choice in the election. Sunnyside Nurseries, Inc. (November 7, 1978) 4 ALRB No. 88; Alamo Lumber Co. (1970) 187 NLRB 384 [76 LRRM 1126]. Unless ballot designations are so ambiguous that voters are confused or misled, the Board will not set aside an election based upon the appearance of the ballot. Bayliss Trucking Corp. (1969) 177 NLRB 276 [71 LRRM 1636], enf'd 432 F.2d 1025 [75 LRRM 2501].

The regulation is designed to insure maximum understanding of the mechanics of voting. The circle with the slash is an internationally recognized symbol for the word "no". The Board has consistently held that an employer may not place its own logo by the "No Union" option because it may confuse employees; an employee may feel loyalty to the employer but also desire a labor organization as a collective bargaining representative. Chula Vista Farms (December 16, 1975) 1 ALRB No. 23; Egger & Ghio Company, Inc. (December 11, 1975) 1 ALRB No. 17; Yamada Bros. (November 28, 1975) 1 ALRB No. 13; Samuel S. Vener Co. (November 25, 1975) 1 ALRB No. 10. At the time of the refusal to bargain, this policy had already received judicial approval. Radovich v. Agricultural Labor Relations Bd., supra. Consequently, we find that Respondent's refusal to bargain based upon these objections is not indicative of a reasonable litigation posture.

Objections numbered 58, 59 and 62 were dismissed without a hearing because Respondent did not submit sufficient supporting declarations as required by 8 Cal. Admin. Code Section 20365(c).[3/] Objections 58 and 59 involve the appearance of Board agent bias and

[3/]Objections numbered 12, 13, 47 and 57 were dismissed on the same ground. Objections 12 and 13 allege the Board deliberately scheduled the election at the time most favorable to the UFW. Objection 47 involves coercion of employees by the UFW and objection 57 relates to the notice procedures used in the election. Respondent apparently is not refusing to bargain based upon objections 47 and 57 because similar objections were set for hearing and Respondent was able to present the evidence it considered relevant thereto. It is unclear whether Respondent refuses to bargain based upon objections 12 and 13. No declarations were submitted in support of these objections, however, and any refusal to bargain based upon the objections would therefore fail to be indicative of a reasonable litigation posture.

objection 62 alleges the Board failed to keep certain information confidential. Respondent contends it submitted declarations which raised factual issues requiring a hearing. We do not agree. The party objecting to an election has the burden of coming forward "with specific evidence showing that unlawful acts occurred and that these acts interfered with the employees' free choice to such an extent that they affected the results of the election." TMY Farms (November 29, 1976) 2 ALRB No. 58, at 9. See also NLRB v. Golden Age Beverage Co. (5th Cir. 1969) 415 P.2d 26 [71 LRRM 2924]. Unless the supporting declarations make allegations which, if true, would warrant setting aside the election, the Board may dismiss the objection without a hearing. J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal. 3d 1; Radovich v. Agricultural Labor Relations Bd., supra. The declarations Respondent submitted in support of these objections did not allege facts which would cause this Board to set aside the election. The objections themselves amounted to little more than conjecture. We therefore find that they do not form the basis for a reasonable litigation posture.

Objections numbered 35, 36, 37, 38 and 39 relate to alleged misrepresentations made by the UFW during the election campaign. These objections were dismissed because the alleged misrepresentations constituted no more than normal electioneering. We have reviewed the declarations and supporting documents and find not only that the alleged misrepresentations constituted nothing more than ordinary campaigning, but that Respondent has exaggerated some assertions and removed others from their context

in an effort to make the "misrepresentation" appear egregious.[4/] A refusal to bargain based upon these objections is not indicative of a reasonable litigation posture.

Objections 30, 32, 40, 48 and 64 were dismissed because they alleged the occurrence of conduct which could not possibly have affected the outcome of the election. Objection 30 and the supporting declaration allege that, on the day of the election, one employee told another that the UFW had offered her a bribe to file an unfair labor practice charge. The second employee (the declarant) had already voted when she was allegedly told of the attempted bribe. There was no allegation that the incident was generally known to employees. Objection 32 alleged that the UFW had violated 8 Cal. Admin. Code Section 20900 by taking excess access. The excess access allegations involved brief periods when union organizers allegedly were in the fields while employees were working. The alleged violations were all de minimis. Objections 40 and 48 alleged Respondent did not receive proper notice of the filing of the Petition for Certification. Respondent did receive notice although Respondent did not receive an exact copy of the Petition until a few days after the Petition was filed. There was no allegation of prejudice. Objection 64 alleged that a potential voter was not allowed to vote a challenged ballot.

Labor Code Section 1156.3 (a), states in part:

[4/]For example, Respondent alleges the UFW made the "insidious" claim "that the Employer made love to his employees." This allegation is apparently based upon a leaflet which stated "No dejen que los enganen con falsos cantos de Amor." In English, that statement reads: Do not allow yourselves to be fooled with false songs of love.

> If the board finds ... that ... misconduct affecting the results of the election occurred, the board may refuse to certify the election. Unless the board determines that there are sufficient grounds to refuse to do so, it shall certify the election. (Emphasis added.)

None of the objections discussed above raise the possibility that any misconduct by any Board agent or any party to the representation proceeding affected the results of the election. Consequently, there was no need for an evidentiary hearing because, even if the allegations were true, no basis existed for the Board to set aside the election. We find, therefore, that these objections do not constitute the basis for a reasonable litigation posture.

Respondent filed objections contesting the constitutionality of the access regulation (8 Cal. Admin. Code Section 20900) and the provisions of the Labor Code and the Board's regulations governing the time limit for filing post-election objections, Labor Code Section 1156.3(c) and 8 Cal. Admin. Code Section 20365 (a). Although Respondent no longer asserts these objections as bases for its refusal to bargain, it nonetheless maintains that its litigation posture regarding these objections was reasonable prior to the time it withdrew the objections. We do not agree.

At the time Respondent first refused to bargain, the California Supreme Court had already ruled that the access regulation was a proper exercise of the Board's power pursuant to Labor Code Section 1144. Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392. Therefore, Respondent's

objection to the election based upon the access regulation is not indicative of a reasonable litigation posture. As to Respondent's contention that the time limit for filing objections to the election is unconstitutionally short, Respondent did not allege or demonstrate that the time limit prejudiced it in any manner. Cf. Skyline Farms, supra, 2 ALRB No. 40. Consequently, we find that a refusal to bargain based upon this objection does not constitute a reasonable litigation posture.

Objections numbered 31 and 44 allege that UFW organizers were visible from the polling site and that they coerced employees by stopping cars en route to the polling area in order to check off names of those going to vote. The supporting declarations indicated the UFW checked off the names to determine which eligible voters did not go to the polls so they could supply rides if necessary. The Board dismissed these objections, citing R. T. Englund Co. (January 30, 1976) 2 ALRB No. 23, Klein Ranch (December 11, 1975) 1 ALRB No. 18, and Toste Farms (December 5, 1975) 1 ALRB No. 16. Respondent withdraws these objections because the California Supreme Court concluded in J. R. Norton Co. v. Agricultural Labor Relations Bd., supra, 26 Cal. 3d 1, that similar conduct did not justify setting aside an election. Respondent contends, however, that its refusal to bargain based upon these objections constituted a reasonable litigation posture prior to the Court's issuance of the Norton decision. We do not agree. The declarations indicate no reasonable basis for believing the UFW's conduct adversely affected the integrity of the election. We previously concluded that a similar objection did not provide a

basis for a reasonable litigation posture in J. R. Norton Co. (May 30, 1980) 6 ALRB No. 26. We find that these objections, like objections 30, 32, 40, 48 and 64, do not form the basis of a reasonable litigation posture.

Objections Dismissed Following the Evidentiary Hearing

In Ron Nunn Farms, supra, 4 ALRB No. 31, the Board held, as it had consistently done in the past, that the seven-day requirement of Labor Code Section 1156.3(a) was not jurisdictional and that an election could be conducted more than seven days after the filing of the petition. See Klein Ranch, supra, 1 ALRB No. 18. Respondent refuses to bargain to contest, inter alia, this legal conclusion. As the Board's interpretation of the Labor Code had already received judicial approval at the time of the refusal to bargain, Radovich v. Agricultural Labor Relations Bd., supra, we find that Respondent's refusal to bargain on this basis did not constitute a reasonable litigation posture.

Respondent places its primary reliance upon its objection that the Board scheduled the election in a manner which disenfranchised a significant number of voters. There was a very high voter turnout in this election (76 to 80 percent). At the hearing, the evidence showed that at most seven individuals were disenfranchised as a result of the scheduling of the election. This number was insufficient to affect the results. Respondent's argument must therefore be based upon the doubtful proposition that all of the remaining eligible voters who failed to appear at the polls did so because of the scheduling of the election. As we stated in Verde Produce (May 16, 1980) 6 ALRB No. 24, an eligible

voter may choose not to exercise his or her franchise without affecting the integrity of the electoral process. We do not find Respondent's argument to be reasonable.

Respondent's remaining contentions which were litigated at the hearing involved primarily factual questions which hinged on credibility resolutions and inferences drawn from the evidence. These allegations concerned the conduct of the election, the adequacy of notice of the election, alleged UFW coercion of employees and a disturbance during the balloting. As these objections did not present a close case, they did not constitute a reasonable basis for Respondent's refusal to bargain.

As we have reviewed all the objections to the election filed by Respondent and have concluded that none form the basis of a reasonable litigation posture, we shall order the make-whole remedy in this case.[5/]

Because the certification of this matter issued substantially after the certification in Adam Dairy dba Rancho Dos Rios (April 26, 1978) 4 ALRB No. 24, the exact data used to arrive at the make-whole award in that case may not provide a fully adequate basis for a make-whole computation in the instant matter. See, Adam Dairy, supra, at page 19. We therefore direct the Regional Director to include in his/her investigation and

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[5/]The make-whole period will commence on August 9, 1978, the date six months preceding the filing of the charge. As the UFW had notice of Respondent's refusal to bargain during the period between June 14, 1978, and August 9, 1978, i.e., more than six months prior to the filing of the charge, such conduct may not be the basis of an unfair labor practice finding and, consequently, we will not award make-whole for that period. As-H-Ne Farms (February 8, 1980) 6 ALRB No. 9.

determination of the make-whole award a survey of more recently negotiated UFW contracts.

ORDER

By authority of Section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board hereby orders that Respondent, Ron Nunn Farms, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Section 1155.2(a) of the Act, with the United Farm Workers of America, AFL-CIO, 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 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 agreement is reached, embody the terms thereof in a signed contract.

(b) Make whole its agricultural employees for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain from August 9, 1978, to the date on which Respondent commences to bargain collectively in good faith and thereafter bargains to a contract or a bona fide

impasse.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records and reports 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 at conspicuous places on its property for 60 days, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered or removed.

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

(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 by Respondent from the date on which it refused to bargain 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 after the date of the 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 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 23, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

RALPH FAUST, Member

NOTICE TO EMPLOYEES

A representation election was conducted by the Agricultural Labor Relations Board among our employees on October 20, 1975. The majority of the voters chose the United Farm Workers of America, APL-CIO, to be their union representative. The Board found that the election was proper and officially certified the UFW as the exclusive collective bargaining representative of our employees on May 25, 1978. When the UFW then asked us to begin to negotiate a contract, we refused to bargain so that we could ask the court to review the election.

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to bargain collectively with the UFW. The Board has ordered us to post this Notice and to take certain additional 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 in good faith 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 on or after August 9, 1978, when we were refusing to bargain with the UFW, for any money which they may have lost as a result of our refusal to bargain.

Dated: RON NUNN 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

Ron Nunn Farms (UFW) 6 ALRB No. 41
Case No. 79-CE-2-S

On the basis of a stipulation of facts entered into by all parties in this matter, the Board found that Respondent had unlawfully refused to bargain with the UFW, the certified collective bargaining representative of its agricultural employees, to obtain judicial review of the Board certification. The Board reviewed its previous dismissal of 53 post-election objections without a hearing and its prior decision on 12 objections litigated at a hearing. The Board determined that Respondent's litigation posture was unreasonable, under the standards of J. R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal. 3d 1, and therefore awarded make-whole relief.

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