Guadalupe, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

WALLER FLOWERSEED COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 76-CE-16-M 6 ALRB No. 51 (4 ALRB No. 49)

SUPPLEMENTAL DECISION AND REVISED ORDER

In accordance with the remand order of the Court of Appeal for the Second Appellate District, dated January 11, 1980, in Case 2 Civ. No. 54301, 4 ALRB No. 49 (1978), we have reviewed and reconsidered our remedial order in light of J. R. Norton Co . v. Agricultural Labor Relations Bd. (1980) 26 Cal. 3d 1, and hereby make the following findings and modifications in our original Decision and Order.

A representation election was conducted among the agricultural employees of Respondent, Waller Flowerseed Company, on September 17, 1975. The vote count was: UFW - 26; Teamsters -8; No Union - 1; Challenged Ballots - 4. After a hearing was held on Respondent's election objection, the Board certified the UFW as the collective bargaining representative of Respondent's employees on December 30, 1975. Waller Flower seed Company (Dec. 30, 1975) 1 ALRB No. 27. On January 15, 1976, the UFW requested that Respondent begin bargaining with the Union. Respondent subsequently informed the UFW that it was refusing to bargain in

order to test the validity of the Board's certification. Following an unfair labor practice proceeding, the Board concluded that Respondent had unlawfully refused to bargain with the UFW, in violation of Section 1153(e) and (a) of the Act, and ordered Respondent to reimburse its employees for loss of pay and other economic losses suffered as a result of Respondent's unfair labor practice. Waller Flowerseed Company (July 19, 1978) 4 ALRB No. 49.

In J. R. Norton Co. v. Agricultural Labor Relations Bd., supra, 26 Cal. 3d 1, which issued after our prior Decision and Order in this matter, 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 the standards, procedures and considerations involved in making such determinations in J. R. Norton Co. (May 30, 1980) 6 ALRB No. 26. We shall 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. Respondent objected to the holding of the election beyond the seven-day limit set forth in Section 1156.3 of the Act. The election was held on September 17, 1975, nine days after the filing of the petition on September 8. In considering this objection, the Board, citing a previous decision, Klein Ranch

(Dec. 11, 1975) 1 ALRB No. 18, held that the expiration of the seven-day period does not deprive the Board of jurisdiction to hold an election. The Board went on to find that the only evidence of voter disenfranchisement presented at the hearing in this case was that two employees might not have been able to vote because of the longer period between the filing of the petition and the election. The Board concluded that this possible disenfranchisement did not affect the outcome of the election. Waller Flowerseed Company (Dec. 30, 1975) 1 ALRB No. 27.

Respondent's objection to holding the election beyond the seven-day limit involves an interpretation of Section 1156.3 which reads, in pertinent part:

> Upon receipt of such a signed petition, the board shall immediately investigate such petition, and, if it has reasonable cause to believe that a bona fide question of representation exists, it shall direct a representation election by secret ballot to be held, upon due notice to all interested parties and within a maximum of seven days of the filing of the petition.

This provision, based on the particular characteristics of the agricultural setting, has no counterpart in the National Labor Relations Act; therefore, there is no NLRA precedent on this issue. At the time that Respondent refused to bargain in order to test the validity of the certification, there were no judicial decisions involving the interpretation of this statutory language.

On July 27, 1977, Radovich v. Agricultural Labor Relations Bd. (1977) 72 Cal. App. 3d 36 was decided. The court there held that the seven-day limitations period in Section 1156.3 is directory rather than jurisdictional. Notwithstanding this judicial determination on the very issue on which Respondent was

seeking review, Respondent did not thereafter commence bargaining with the UFW. We recognize that a decision of a court of appeal is not binding in the other courts of appeal; however, a court of appeal will normally follow prior decisions of its own or other districts or divisions. 6 Witkin, Cal. Procedure (2d ed. 1971} Appeal, § 667, p. 4580. In the instant case, given the simplicity of the legal issue involved, it is highly unlikely that other courts of appeal would not follow the Radovich decision.

Respondent's only other challenge to the certification would necessarily be based on the Board's determination that the possible disenfranchisement of two employees, in light of the vote count, did not affect the outcome of the election. Because a judicial decision had been made on the legal issue described above, and because the challenge concerning disenfranchisement did not provide a reasonable basis for judicial review, we find that Respondent's litigation posture warrants the imposition of the make-whole remedy in this matter.

Because Respondent's litigation posture, prior to the Radovich decision, could be considered reasonable, [1/] we shall inquire whether Respondent's motive for litigating during that period was in good faith. J. R. Norton Company (May 30, 1980) 6 ALRB No. 26. We find that the evidence available at the time of

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[1/] The fact that a Board decision involves the interpretation of a provision in the ALRA having no counterpart in the NLRA does not automatically give rise to a reasonable belief that the Board decision would be reversed upon judicial review. In this case, however, we find that, prior to the Radovich decision, Respondent could reasonably have believed that its interpretation of Section 1156.3 might be adopted by a reviewing court.

the litigation of the refusal-to-bargain issue does not establish that Respondent was in bad faith in seeking judicial of the certification.[2/]

Considering the totality of the circumstances in this case, we find that the make-whole remedy is warranted for the period following the Radovich court's determination of the Section 1156.3 issue. Accordingly, we shall modify our original Order to apply the make-whole remedy for the period from August 15, 1977, to such time as Respondent commences to bargain in good faith with the UFW and continues so to bargain to contract or a bona fide impasse. Commencement of make-whole relief on August 15, 1977, reflects a reasonable amount of time after the Radovich decision, issued July 27, 1977, during which Respondent could have obtained notice of the decision and informed the UFW of its willingness to negotiate.

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 paragraph 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. (Mar. 12, 1980) 6 ALRB No. 14; Hickmott Foods, Inc. (1979) 242 NLRB No. 177 [101 LRRM 1342].

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[2/]We hereby deny General Counsel's Motion to Re-open the Record to introduce evidence of Respondent's motive, as the proffered evidence would not change the result of our decision.

REVISED ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders Respondent, Waller Flowerseed Company, its officers, agents, successors, and assigns, to:

1. Cease and desist from:

(a) Refusing to 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 bargaining representative of its agricultural employees, in violation of Labor Code Section 1153(e) and (a), and in particular by: (1) refusing to meet at reasonable times and places with the UFW for the purpose of collective bargaining; and (2) unilaterally changing the wage rates of its employees without prior notice to and consultation with the UFW.

(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) Reimburse its agricultural employees for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain, for the period from

August 15, 1977, to such time as Respondent commences to bargain in good faith with the UFW and continues so to bargain to the point of 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 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 hereinafter set forth.

(e) Post copies of the attached Notice for 90 consecutive days at conspicuous places on its premises, the period and places of the posting to be determined by the Regional Director.

(f) Provide a copy of the attached Notice to each employee hired by the Respondent during the 12-month period following the date of issuance of this 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 during the payroll period immediately preceding September 8, 1975, and to all employees employed by Respondent at any time from and including February 11, 1976, 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 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: September 4, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY,

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to bargain about a contract with the UFW. The Board' has ordered us to post this Notice and to take 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 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 bargain with the UFW about a contract because it is the representative chosen by our employees.

WE WILL pay each of the employees employed by us after August 15, 1977, any money which they lost because we have refused to bargain with the UFW.

WE WILL NOT change the wages of our employees without first discussing these changes with the UFW.

Dated: WALLER FLOWERSEED COMPANY

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

Waller Flowerseed Company (UFW) 6 ALRB No. 51
(4 ALRB No. 49)
Case -No. 76-CE-16-M

On remand from the appellate court to determine the applicability of the make-whole remedy, in this technical refusal to bargain case, in light of J. R. Norton Co. v. Agricultural Labor Relations Bd. (1980) 26 Cal. 3d 1, the Board awarded make-whole relief for a limited period. Respondent's basis for testing the validity of the certification was the legal issue of whether the Board had authority under Labor Code Section 1156.3 to hold an election more than seven days after the filing of the petition. On July 27, 1977, after certification and Respondent's refusal to bargain in the instant case, an appellate court decided in another case that the seven-day limitation period was directory rather than jurisdictional. Radovich v. Agricultural Labor Relations, Bd. (1977) 72 Cal. App. 3d 36. The Board found that, prior to issuance of the court's decision in Radovich, Respondent's litigation posture was reasonable and that Respondent contested the Board's certification in good faith. The Board held that, given the simplicity of the legal issue concerning Section 1156.3, it was highly unlikely that other appellate courts would not follow the Radovich decision, and that Respondent's litigation posture after Radovich was therefore unreasonable. Accordingly, the Board imposed the make-whole remedy commencing August 15, 1977, allowing Respondent time to take notice of the court decision.

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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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