McFarland, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MONTEBELLO ROSE COMPANY, Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 76-CE-28-F 8 ALRB No. 3 (5 ALRB No. 64)

SUPPLEMENTAL DECISION AND REVISED ORDER

In accordance with the remand order of the Court of Appeal for the fifth Appellate District in Montebello Rose Co. v. Agricultural Labor Relations Bd. (1981) 119 Cal.App.3d 1, 38, we have reconsidered our remedial Order in Montebello Rose Company (Oct. 29, 1979) 5 ALRB No. 64 in light of the decision of the California Supreme Court in J. R. Norton Company, Inc. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, and hereby affirm our original Decision and Order.

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.

In Montebello Rose Company, supra, 5 ALRB No. 64, the Board concluded that Respondent, Montebello Rose Company, violated Labor Code section 1153 (a), (c), and (e) by engaging in bad faith or "surface" bargaining with the United Farm Workers of America, AFL-CIO (UFW) and by firing and laying off employees for engaging in union activity. To remedy these violations, we ordered

Respondent, inter alia, to make its employees whole for any economic losses they may have suffered as a result of the violations.

Our findings and conclusions regarding Respondent's bad faith bargaining and unlawful discharges were affirmed by the Court of Appeal in Montebello Rose Co., supra, 119 Cal.App.3d 1. However, the make-whole portion of our remedial order was remanded to the Board for reconsideration in light of the California Supreme Court's decision in J. R. Norton Co., supra, 26 Cal. 3d 1.

After considering the statutory principles at issue in J. R. Norton and Respondent's conduct in the instant case, we conclude that J. R. Norton only applies where an employer refuses to bargain in order to test the validity of a certification.

The Court in J. R. Norton struck down the Board's rule that the make-whole remedy was automatically applicable in all cases where the employer's refusal to bargain was a means to obtain judicial review of the Board's action in certifying the union.[1/] See Perry Farms, Inc., (Apr. 26, 1978) 4 ALRB No. 25. Such a blanket imposition of make-whole relief, the Court reasoned, would discourage an employer from seeking judicial review of a meritorious claim that an election did not represent the free choice of the employees as to their bargaining representative.

[1/] An order in a certification proceeding is not directly review-able in the courts, since it is not a "final" order within the meaning of Labor Code section 1160.8. It is only by refusing to bargain with the certified union that an employer may obtain judicial review of the Board's certification and its finding that the refusal was an unfair labor practice. Nishikawa Farms, Inc. v. Mahony (1977) 66 Cal.App.3d 781, 787. Such employer conduct is known as a "technical refusal to bargain."

In our Perry Farms decision, we concluded that the make-whole remedy was appropriate whenever the employer refused to bargain, because the employees suffered the same economic harm regardless of the circumstances of the refusal and because "only the employer would be the ultimate beneficiary of its refusal to bargain regardless of the eventual result of its appeal." Perry Farms, Inc., supra, 4 ALRB No. 25 at 11. We further stated that although an employer has the right to test its legal obligation by judicial review of its election objections, this test should not be financed by the employees.

In reviewing the Board's analysis of its power to award the make-whole remedy, the Court in J. R. Norton rejected the conclusion that only the employer benefits from judicial review of election objections and observed that:

> When the integrity of a representation election is being attacked, two competing considerations arise that are both fundamental to the promotion of ALRA policy. The first is the need to discourage frivolous election challenges pursued by employers as a dilatory tactic designed to stifle self-organization by employees. The second is the important interest in fostering judicial review as a check on arbitrary administrative action in cases in which the employer has raised a meritorious objection to an election and the objection has been rejected by the Board. 22 Cal.3d at 30.

The Court further observed that:

> The need to avoid placing undue restraints on judicial review in the context of proceedings concerning representation elections must be recognized as especially compelling when one considers that the NLRA and ALRA purpose is not exclusively to promote collective bargaining, but to promote such bargaining by the employees' freely chosen representatives. The imposition of make-whole relief undermines this purpose to the extent that it discourages employers from exercising their right to judicial review in cases in which the NLRB or ALRB has rejected their meritorious challenges to integrity of

election 26 Cal.3d at 34.

After considering the tension between the statutory goals of free choice and effective collective bargaining, the Court concluded that:

> ... automatic imposition of make-whole relief cannot be sustained on the ground that it promotes ALRA policy by fostering collective bargaining. A central feature of the collective bargaining process is the exercise of the employees' free choice in selecting their bargaining representative. The ALRB's blanket rule for the application of the make-whole remedy does not provide a sufficient guarantee that the integrity of representation elections will be preserved. 22 Cal.3d at 35.

The central holding of the J. R. Norton decision, in our view, is that this Board may not automatically assign to the employer the risk of substantial make-whole liability, where the employer's refusal to bargain serves the statutory purpose of preserving the free choice of its employees. This holding clearly applies to a technical refusal to bargain where the employer is reasonably and in good faith seeking review of election objections.[2/] We conclude, however, that it does not apply to the instant case, in which employee free choice is not an issue.

Respondent here argued, in effect, that its once-acknowledged duty to bargain no longer existed because the union was no longer "certified" within the meaning of Labor Code section 1153(e) and (f) and 1152.2(b), the "certification year" having

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[2/] In Adam Farms (July 18, 1980) 6 ALRB No. 40, we declined to apply the J. R. Norton standards where the employer's refusal to bargain was not an attempt to get judicial review of election objections.

elapsed.[3/] This technical statutory argument was raised by the Respondent/Employer in its own behalf and does not involve the conduct of an election or any "question of representation."[4/]

Absent a question of employee free choice raised by Respondent's appeal, only Respondent stands to gain from the delay in the bargaining process. Respondent's total course of conduct in collective bargaining negotiations indicates an intent to frustrate and delay the process of reaching an agreement. In the nine-month period prior to Respondent's assertion of its technical argument as to the certification year, Respondent delayed in responding to the UFW' s request to negotiate, failed to provide a negotiator, declared a false and premature impasse, took arbitrary and unyielding bargaining positions, made unilateral wage increases which were higher than its best offer at the negotiating table, attempted to bargain directly with the employees, fired two UFW activists, and laid off four members of the UFW bargaining committee. After asserting its technical argument,

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[3/] This Board rejected Respondent's argument in Kaplan's Fruit and Produce Co., Inc. (April 1, 1977) 3 ALRB No. 28. The Board's interpretation of the ALRA as to this issue was affirmed in Montebello Rose Co., supra, 119 Cal.App.3d 1, 23-30.

[4/] The employer's continuing duty to bargain with the certified union is related to the continuing desire of the employees to be represented. However, the employees may exercise their free choice after the certification year through a decertification or rival union petition for an election. The employer may not assume, as Respondent did here, that a majority of the employees no longer support the union since no election indicating such loss of support has ever been held and its results certified. On the contrary, Respondent's refusal to bargain simply because the certification year elapsed denies the continuing validity of the employees' most recent expression of free choice and attempts to nullify that choice.

Respondent offered to resume bargaining if the UFW would guarantee no strikes during the budding season, and later offered to bargain only if the Union dropped all pending unfair labor practice allegations. All of the above conduct led this Board to the conclusion that Respondent did not bargain in good faith, but rather engaged in "surface" bargaining" with no intent to reach agreement. Montebello Rose Co., supra, 119 Cal.App.3d. 1. We are not persuaded that Respondent's bad faith approach to bargaining suddenly changed when it decided to pursue its certification year theory. See Masaji Eto (Apr. 25, 1980) 6 ALRB No. 20 at 9-10.

Since Respondent's technical refusal to bargain does not serve the purpose of protecting employee free choice, and since Respondent herein engaged in an overall course of bad faith bargaining, we conclude that our original remedial order, including make-whole relief, must be and hereby is reaffirmed and reinstated.

Dated: January 22, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Montebello Rose Company (UFW)

8 ALRB No. 3
(5 ALRB NO. 64)
Case No. 76-CE-28-F

BOARD DECISION

In Montebello Rose Co. v. ALRB (1981) 119 Cal.App,3d 1, the California Supreme Court remanded Montebello Rose Co. (Oct. 29, 1979) 5 ALRB No. 64 to the Board to reconsider its remedial order in light of J. R. Norton v. ALRB (1979) 26 Cal.3d 1. J. R. Norton held that this Board may not automatically apply the make-whole remedy in every case where the employer refused to bargain since such an automatic remedy would discourage genuine appeals which could protect employee free choice.

In this case, the Board reviewed the employer's argument that its duty to bargain terminated with the expiration of the certification year and found no issue of employee free choice. Since no issue of free choice was presented and since the employer's overall course of conduct indicated bad faith bargaining, the Board concluded that J. R. Norton did not apply and that the make-whole remedy was still warranted.

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NOTICE TO EMPLOYEES

After charges were made against us by the United Farm Workers of America, AFL-CIO, and a hearing was held where each side had a chance to present evidence, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers by firing Javier Alvarado. The Board has ordered us to distribute and post this Notice, and do the things listed below.

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 unions;

3. To bargain as a group and to choose a union or 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 one another; and

5. To decide not to do any of these things.

Because you have these rights, we promise you that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

In particular:

WE WILL NOT fire any worker because that person has done any of the things listed above;

WE WILL offer Javier Alvarado his old job back, and we will pay him any money he lost because we fired him, plus interest.

If you have any questions about this notice or your rights as farm workers, you may contact any office of the Agricultural Labor Relations Board. One is located at 627 Main Street, Delano, California 93215, telephone (805) 725-5770.

Dated: NASH-DE CAMP COMPANY

By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE OF THE AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA, AND IS NOT TO BE REMOVED, DISFIGURED OR DEFACED IN ANY WAY.