Gilroy, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

A & D CHRISTOPHER RANCH, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 81-CE-170-SAL 8 ALRB No. 84

DECISION AND ORDER

Upon charges filed by the United Farm Workers of America, AFL-CIO (UFW), alleging a violation of Labor Code section 1153 (e) and (a)[1/] by A & D Christopher Ranch (Respondent), the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint against Respondent on February 19, 1982, and duly served it on all parties.

In accordance with California Administrative Code, title 8, section 20260, this proceeding has been transferred directly to the Board on the basis of a stipulation of facts entered into by the Charging Party, General Counsel, and Respondent In the stipulation, all parties waived an evidentiary hearing before an Administrative Law Officer.

Pursuant to the provisions of Labor Code section 1146, the Board has delegated its authority in this matter to a three-member panel.

[1/] All section references herein are to the California Labor Code unless otherwise noted.

We have considered the record in light of the briefs filed by the General Counsel and Respondent and we hereby make the following findings of fact and conclusions of law.

Findings of Fact

Respondent is, and at all times material herein has been, an agricultural employer within the meaning of section 1140.4(c). The UFW is, and at all times material herein has been, a labor organization within the meaning of section 1140.4(f).

On October 9, 1981, the Board certified the UFW as the exclusive collective bargaining representative of all Respondent's agricultural employees in California. (A & D Christopher Ranch (Oct. 9, 1981) 7 ALRB No. 31.) On October 23, 1981, the UFW, by its negotiator Paul Chavez, sent a letter to Respondent requesting that Respondent commence collective bargaining negotiations. On November 13, 1981, Respondent, by its attorney Randolph C. Roeder, sent the UFW a letter stating that it was refusing to bargain in order to obtain judicial review of the Board's certification of the UFW. Respondent admits that it refused to meet and bargain with the UFW, but contends that 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

This Board has adopted the NLRB's proscription against relitigation of previously resolved representation issues in subsequent related unfair labor practice proceedings, absent a showing of newly discovered or previously unavailable evidence, or other extraordinary circumstances. (Ron Nunn Farms (July 23, 1980)

6 ALRB No. 41.) As Respondent has not presented newly discovered or previously unavailable evidence and has claimed no extraordinary circumstances with respect to its post-election objections, we shall not reconsider the representation issues in this proceeding. Accordingly, we conclude that Respondent violated section 1153(e) and (a) by failing and refusing to meet and bargain with the UFW.

Remedy

We now turn to consideration of whether makewhole should be awarded 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 certified labor organization in order to gain judicial review of the Board's certification, we consider the appropriateness of the makewhole remedy on a case-by-case basis. (J. R. Norton Company v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1.) We shall impose the makewhole 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 Board's certification in good faith. (J. R. Norton Company (May 30, 1980) 6 ALRB No. 26.)

On July 30, 1980, the Regional Director conducted a representation election among Respondent's agricultural employees. The Tally of Ballots showed the following results:

UFW	188
No Union	5
Challenged Ballots	169 [2/]
Total	362

[2/] Almost all the challenges were made by Board agents and were based on the fact that the challenged voters' names did not appear on the eligibility list.

Respondent timely filed post-election objections, three of which were set for hearing.[3/] Those objections alleged: that picketers engaged in conduct which intimidated and threatened Respondent's employees and affected the outcome of the election; that Board agents improperly forced Respondent's observer at the election to sign a stipulation concerning the opening of eleven challenged ballots; and that Respondent was not at 50 percent of its peak agricultural employment during the payroll period immediately preceding the filing of the Petition for Certification. After a hearing before an Investigative Hearing Examiner (IHE), the Board dismissed those three objections and certified the UFW as the exclusive collective bargaining representative of Respondent's agricultural employees. (A & D Christopher Ranch, supra, 7 ALRB No. 31.) Respondent contends that the Board should have refused to certify the UFW on the basis of the objections which were litigated at the hearing. For the following reasons, we find that Respondent's refusal to bargain based upon that position does not constitute a reasonable litigation posture, and we therefore conclude that makewhole relief is an appropriate remedy in this case.

The Petition for Certification, which was filed July 26, 1980, alleged that Respondent was at 50 percent of its peak employment and that a strike was in progress. During the Board agent's

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[3/] The remainder of Respondent's post-election objections were dismissed by the Executive Secretary. Although Respondent, in its brief, describes conduct which was the subject of the dismissed objections, it does not argue that the Executive Secretary improperly dismissed the objections which were not set for hearing, or that its refusal to bargain was based on or related to the dismissals.

investigation of the petition, Respondent's representatives alleged that Respondent was not at 50 percent of its peak employment during the eligibility period and that Respondent's peak employment would not occur until later in the year. The Board agent determined that Respondent was at 50 percent of its peak agricultural employment, and that the petition was therefore timely filed, by using the averaging method set forth in our decision in Mario Saikhon, Inc. (Jan. 7, 1976) 2 ALRB No. 2, excluding from his calculations days which he determined were not representative because few or no employees worked. (See California Lettuce Co. (Mar. 29, 1979) 5 ALRB No. 24.)

The IHE found that Respondent was at 50 percent of its peak employment during the eligibility period. The IHE's peak determination was also based on the Saikhon averaging method and the exclusion of unrepresentative days; i.e., days on which few or no unit employees worked. The IHE found that Respondent failed to meet its burden of providing the Board agent with adequate information to support its prospective peak argument, since Respondent's oral data on prospective peak was not substantiated and appeared to be unreliable in view of the fact that Respondent had actually decreased its acreage.[4/] (See Charles Malovich (May 9, 19r9}

[4/] The IHE specifically declined to make a credibility resolution concerning the Board agent's testimony that Respondent did not indicate that he anticipated an increase in productivity over the previous year. Respondent's representative testified that he told the Board agent he anticipated a 20 percent increase in labor needs because of greater productivity caused by improved farming techniques and an increase in labor intensive crops. He testified that he did not give the Board agent any written data on prospective peak.

5 ALRB No. 33; Domingo Farms (May 10, 1979) 5 ALRB No. 35.)

In our decision in A & D Christopher Ranch, supra, 7 ALRB No. 31, we found that it was unnecessary to rely on the Saikhon averaging method, or to determine whether the Board agent properly excluded three days from the eligibility week, since we found that the Board agent could reasonably have determined peak using the "body count" method described in Donley Farms, Inc. (Sept. 22, 1978) 4 ALRB No. 66, and utilized in Valdora Produce Company (Feb. 4, 1977) 3 ALRB No. 8, Kawano Farms, Inc. (Mar. 16, 1977) 3 ALRB No. 25, and Wine World, Inc. dba Beringer Vineyards (May 29, 1979) 5 ALRB No. 41. The "body count" method was also discussed by this Board with approval in Bonita Packing Co. (Dec. 1, 1978) 4 ALRB No. 96. (See also, Kamimoto Farms (Dec. 21, 1981) 7 ALRB No. 45.) We noted that there were 429 employees on Respondent's payroll during the eligibility period and 755 employees on its payroll during the 1979 peak period, and that since 429 is more than 50 percent of 755, the peak requirement of section 1156.3 (a)(1) was met.

Respondent contends that its litigation posture is reasonable and in good faith because both the Board agent and the IHE calculated peak using the averaging method, and the "body count" method was neither suggested nor utilized until the Board issued its prior decision in this matter. Respondent also argues that the employment figures the Board used for the eligibility and peak periods were erroneous and that the Board failed to discuss the projected peak for 1980. In support of its argument that the make-whole remedy is inappropriate in this case, Respondent cites

High & Mighty Farms (May 30, 1980) 6 ALRB No. 31, in which we declined to award the makewhole remedy because, in that case, the Board for the first time used a combination of various methods to compute the percentage of peak employment.

We are not persuaded by Respondent's arguments. Although the Board agent and the IHE used the averaging method in their peak calculations, the Board clearly based its finding of peak on the body count method, which had been used in several prior cases. The body count method of determining peak is easily derived from the statutory requirement (sections 1156.3(a)(l) and 1156.4) that we compare the employer's employment figures for the payroll period immediately preceding the filing of the petition with its peak agricultural employment for the current calendar year. The figures used by the Board are supported by the record, and our application of the body count method, a straightforward peak calculation technique clearly established in our previous decisions, does not present "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, 26 Cal.3d at p. 39.)

High & Mighty Farms, supra, 6 ALRB No. 31, cited by Respondent, is inapposite. That case involved the use of the Saikhon averaging method, combined with the Scattin[5/] method of using different payroll/eligibility periods for different groups of employees, and the unrepresentative days concept developed in

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[5/] Luis A. Scattini & Sons (Mar. 3, 1976) 2 ALRB No. 43.

Ranch No. l.[6] The Board's determination of peak in the present case involves none of the problems present in High & Mighty Farms.

Although Respondent argued that it had not yet reached 50 percent of its prospective peak employment during the payroll period preceding the filing of the Petition for Certification, the IHE found that Respondent failed to substantiate that claim at the hearing. Although prospective peak determinations can be difficult, Respondent failed to support its contention that such a determination was necessary, and the mere statement that it was not yet at the required 50 percent of prospective peak does not present a "close case."[7]

The remaining issues which were litigated at the hearing on objections, concerning striker misconduct and a stipulation signed at the election, involved primarily factual issues which the IHE resolved on the basis of credibility resolutions and inferences drawn from the record evidence. We find that neither of those objections presented a close case and therefore did not constitute a reasonable basis for Respondent's refusal to bargain.[8]

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[6] Ranch No. 1, Inc. (Feb. 23, 1976) 2 ALRB No. 37.

[7] in Charles Malovich, supra, 6 ALRB No. 29, we declined to award the makewhole remedy because, in that case, we announced our rule that review in prospective peak cases will be based upon whether the Regional Director's peak determination was a reasonable one in light of the information available to him or her at the time of the investigation of the petition.

[8] For example, the IHE dismissed Respondent's objection concerning striker misconduct based on his findings that few, if any, of the employees who witnessed the alleged incidents voted in the election. The IHE also found that Respondent's election observer signed the stipulation concerning challenged ballots with the approval of Respondent's attorney, who was present at the opening of the ballots.

(Ron Nuhn Farms, supra, 6 ALRB No. 41; George Arakelian Farms, Inc. (May 30, 1980) 6 ALRB No. 28; C. Mondavi & Sons dba Charles Krug Winery (May 30, 1980) 6 ALRB No. 30.)

Given the insubstantial nature of Respondent's objections to the election, we find that Respondent could not have entertained a reasonable belief that the election was conducted in a manner which did not fully protect employees' rights or that misconduct occurred which tended to affect the outcome of the election. Accordingly, we conclude that Respondent did not act reasonably or in good faith in seeking judicial review of the Board's certification, and we shall therefore order the makewhole remedy in this case.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent A & D Christopher Ranch, 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 Agricultural Labor Relations Act (Act), 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 any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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 all agricultural employees employed by Respondent at any time during the period commencing on November 13, 1981, the date of Respondent's first refusal to bargain with the UFW, and extending until May 17, 1982, the date the parties signed the stipulation in this matter, and continuing thereafter until the date on which Respondent commences good faith collective bargaining with the UFW which leads to a contract or a bona fide impasse, for all economic losses they have suffered as a result of Respondent's aforesaid refusal to bargain, the makewhole awards to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all records in its possession relevant and necessary to a determination, by the Regional Director, of the makewhole period and the amounts due employees under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from November 13, 1981, until the date on which the said Notice is mailed.

(g) Provide a copy of the attached Notice in the appropriate language, to each agricultural employee hired by Respondent during the 12-month period following the date of issuance of this Order.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined 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 and/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 in order to compensate them for time lost at this reading and during the question-and-answer period.

(j) Notify the Regional Director in writing, within

30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

IT IS FURTHERED 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 commencing on the date on which Respondent commences to bargain in good faith with the UFW.

Dated: November 23, 1982

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

A representation election was conducted by the Agricultural Labor Relations Board (Board) among our employees on July 30, 1980. The majority of -the voters chose the United Farm Workers of America, AFL-CIO (UFW), 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 agricultural employees on October 9, 1981. When the UFW asked us to begin to negotiate a contract, we refused to bargain so that we could ask the court to review the election. After a hearing, at which all parties had the opportunity to present evidence, the Board found that we have violated the Agricultural Labor Relations Act by refusing to bargain collectively with the UFW. The Board has told us to post and publish this Notice and to take certain additional actions. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise 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 November 13, 1981, during the period 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, plus interest.

Dated: A & D CHRISTOPHER RANCH

By: _____

Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California, 93907. The telephone number is (408) 443-3161.

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

A & D Christopher Ranch
(UFW)

8 ALRB No. 34
Case No. 81-CE-170-SAL

BOARD DECISION

On the basis of a stipulation of facts entered into by all parties in this matter, the Board concluded that Respondent unlawfully refused to bargain with the UFW, the certified representative of its employees, despite Respondent's contention that its admitted refusal to bargain was based on a reasonable belief that the Board had improperly certified the UFW. In 7 ALRB No. 31, the Board utilized an application of the "body count" method by comparing Respondent's employment figures during the eligibility period with such figures for the peak employment period of that year. The employment figures used by the Board were supported by the record, and the body count method was a straightforward peak calculation technique clearly established in previous Board decisions and easily derived from Labor Code section 1156.3(a)(1) and 1156.4 requirements concerning the determination of peak. The Board therefore rejected Respondent's argument that its peak objection constituted a reasonable basis for its refusal to bargain. The Board also rejected Respondent's reliance on its post-election objections concerning striker misconduct and a stipulation signed at the election, since those objections involved primarily factual issues which were resolved based on credibility resolutions and inferences that were well supported by the record in the hearing on objections.

The Board therefore concluded that makewhole relief was an appropriate remedy, as it found that Respondent did not have a reasonable basis for believing that the election was conducted in a manner which did not fully protect employees' rights or that misconduct occurred which tended to affect the outcome of the election.

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