

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	Case No. 93-CE-37-VI
ACE TOMATO COMPANY, INC.	)	(20 ALRB No. 7)
A California Corporation,	)	
	)	Admin. Order No. 2009-12
<b>Respondent,</b>	)	
	)	ORDER HOLDING IN
and	)	ABEYANCE REGIONAL
	)	DIRECTOR'S MOTION TO
UNITED FARM WORKERS OF	)	CLOSE PENDING
AMERICA,	)	EVIDENTIARY HEARING
	)	
<b>Charging Party.</b>	)	
_____	)	

On May 15, 2009, the Regional Director of the Visalia Regional Office filed a motion pursuant to section 20299(d) of the Board's regulations, set forth at Title 8, Division 2 of the California Code of Regulations, to close the above-captioned case without full compliance on the grounds that the collection of such monetary relief under the unique facts of this case is not warranted and further compliance efforts would not further the purposes of the Agricultural Labor Relations Act (ALRA). Specifically, the Regional Director avers: (1) That Respondent, employer Ace Tomato Company, Inc. (Ace or Employer) was paying its tomato harvesters "close to the highest, if not the highest, prevailing per-bucket wage during the makewhole period<sup>1</sup>," such that the award of additional monetary relief is unwarranted; (2) Ace employees were receiving

<sup>1</sup> The makewhole period was deemed to begin on June 14, 1993 until the date upon which Employer commenced good faith bargaining, July 27, 1994.

the same or a better wage than provided in a contract subsequently negotiated between the Charging Party, United Farm Workers of America (UFW) and Meyer Tomatoes and San Joaquin Tomato Growers, Inc., such that it is not apparent that the workers would have received a different per-bucket wage rate even if Ace had not engaged in the unlawful conduct that it did; and (3) Given the passage of time, there are practical problems of attempting to recreate payroll records dating back to the time in question and attempting to reach thousands of migrant agricultural workers affected by the decision in this matter.

In the Declaration of Ellen C. Kennedy in support of the Regional Director's Motion to Close Case Without Full Compliance, Ms. Kennedy provides as Exhibit 1 a March 27, 1996 letter from counsel for Ace averring that Ace paid the highest wage rate for fresh market tomatoes compared to anywhere in the State of California, and the United States and the entire world for that matter, and, as such, no makewhole was due.<sup>2</sup> It appears that no payroll records accompanied the March 27 letter. The declaration avers that on December 12, 1996, Ace provided three pages of payroll records as evidence that it paid its tomato harvesters the \$.475 per-bucket wage through its farm labor contractors and that this same rate was also paid in 1994. Although neither the declaration nor the records before the Board include the payroll records from Ace, internal ALRB correspondence indicates that such records were received and did show that Ace paid its tomato harvesters \$.475 per bucket.

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<sup>2</sup> Statement in Support of Regional Director's Motion to Close Without Full Compliance, Declaration of Ellen Clare Kennedy, Exhibit 1, March 27, 1996 letter from Spencer Hipp, Counsel for Ace Tomato Co., to Jose Carlos, Field Examiner, ALRB.

On June 19, 2009, the Charging Party, United Farm Workers of America (UFW), filed an opposition to the motion to close, arguing that the “contract averaging” or “contract survey” method of calculating makewhole in this matter, as proposed in a memorandum authored by former ALRB Board Counsel Robert Murray, provides a reasonable basis for determining amounts due. The Murray memorandum suggests that, based on EDD data, the per-bucket rate for fresh-market tomatoes during the makewhole period in the San Joaquin valley ranged between \$.45 and \$.55 per bucket.<sup>3</sup> The UFW further argues that the employer’s own database would be useful in attempting to contact former employees to establish exactly how much they were paid.

Ace filed a response to the UFW’s opposition on June 30, 2009 arguing that Ace indeed paid the highest piece rate for fresh market tomatoes at \$.475 per bucket; a collective bargaining agreement entered into between the UFW and Meyer Tomatoes in 1995 set the Meyer tomato harvest piece rate at \$.43 per bucket; companion negotiations between San Joaquin Tomato Growers, Inc. (San Joaquin) and the UFW resulted in the same \$.475 per bucket piece rate Ace paid during the 1993-1994 makewhole period; and the agreement between San Joaquin and the UFW did not include any health insurance plan or pension provision. Ace also argues that reliance on the Murray memorandum is misplaced because the data it relied upon from EDD regarding tomato harvest piece rates in the San Joaquin valley during the makewhole period were skewed in that they did not differentiate between per-bucket rates for Roma

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<sup>3</sup> Citing EDD data from EDD Report 881A, the Murray memorandum appears to state that the per-bucket rate for fresh market tomatoes during the 1993-1994 season in San Joaquin County ranged from a low of \$.45 to a high of \$.55 per bucket. Declaration of Ellen Clare Kennedy in Support of Motion to Close Case Without Full Compliance, Exhibit 2, Murray Memorandum at 2.

tomatoes, which are smaller and garner a higher per-bucket rate, and round tomatoes, which the Ace employees harvested and which garner a lower per-bucket rate.

It is unclear on the record before the Board whether other classifications would have been included in any makewhole specification and, if so, what wages were and/or would have been paid employees in such classifications during the time in question. Although Ace states that a subsequent agreement between the UFW and San Joaquin resulted in no health care or pension benefits being paid, the correspondence regarding Ace's employee compensation during the makewhole period is silent on whether any such fringe benefits were paid.

Finally, although Ace has argued that there were no comparable contracts with tomato growers in effect during the makewhole period, it is not clear on the present record whether this assertion is undisputed. Although comparable UFW contracts would be best in determining whether any makewhole is due, *Hess Collection Winery* (2005) 31 ALRB No. 3 at 4, the Board is not limited to considering only UFW contracts in determining makewhole amounts due. *Id.* at 5. In *J.R. Norton* (1984)10 ALRB No. 42 the Board did reject a subsequently negotiated contract as the proper measure of makewhole because, in the context of that case, such a contract was a questionable measure due to the weakened position of the union after the employer's bad faith delay in negotiations. Under the *Norton* decision, subsequently negotiated agreements such as the 1998 SJTG agreement may be disfavored as compared to other available measures, such as comparable contracts. We would like to satisfy ourselves that no better measurement is available.

The Board has reviewed the Regional Director's motion and supporting documents and has taken into account the parties' positions and has decided to hold the Regional Director's motion in abeyance until all parties have had the opportunity to provide additional evidence or clarification, if any, that can assist the Board in deciding whether makewhole relief is owing under the unique facts of this case. Specifically, the Board seeks evidence in order to determine: 1) Whether there were other classifications of employees that would have been covered under a makewhole specification and, if so, what those employees would have been paid during the makewhole period; 2) whether there were any fringe benefits paid during the makewhole period; and 3) whether there were any comparable contracts, UFW or otherwise, other than the unsigned 1998 San Joaquin Tomato contract, that any of the parties assert are appropriate to compare to the wage rates paid by Ace during the makewhole period. The assigned ALJ is instructed to take and allow cross-examination on evidence bearing on the issues listed above. Additionally, the assigned ALJ is instructed to hold a prehearing conference to ascertain if any material facts regarding the questions listed above remain in dispute and to endeavor to obtain stipulations on material issues of fact to the extent possible. Prior to the scheduling of an evidentiary hearing the ALJ shall submit to the Board a report on the prehearing conference detailing the stipulations obtained and the material facts remaining in dispute.

It is not lost on the Board that the passage of time makes deciding this motion difficult at best, and that the Board's failure to timely seek compliance complicates the matter all the more. The Board's purpose in ordering a hearing is to

ensure that the record before it is as complete as possible and that no material facts are left in dispute.<sup>4</sup>

By Direction of the Board

Dated: September 24, 2009

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J. ANTONIO BARBOSA  
Executive Secretary, ALRB

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<sup>4</sup> Chairman Almaraz disagrees that an evidentiary hearing in this matter is necessary as it appears there are no material facts in dispute that need to be resolved by a hearing. Mr. Almaraz is of the opinion that if there were material facts in dispute the Board could obtain clarification by simply soliciting declarations from the parties on those issues for which the Board seeks further information. After reviewing the record in this matter Mr. Almaraz believes there is currently enough information in the record to rule on the Regional Director's motion to close.