STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	Case No. 93-CE-38-VIS
SAN JOAQUIN TOMATO GROWERS, INC.) A California Corporation,	)	(20 ALRB No. 13)
	)	Admin. Order No. 2009-15
Respondent,	)	
	)	ORDER HOLDING IN
and	)	ABEYANCE REGIONAL
	)	DIRECTOR'S MOTION TO
UNITED FARM WORKERS OF AMERICA,	)	CLOSE PENDING
	)	EVIDENTIARY HEARING
Charging Party.	)	
_____	)	

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 San Joaquin Tomato Growers, Inc. (SJTG or Employer) was paying its tomato harvesters "close to the highest, if not the highest, prevailing per-bucket wage during the makewhole period[1]" such that the award of additional monetary relief is unwarranted;

[1] The makewhole period was deemed to have begun on July 12, 1993 until the date on which Employer commenced good faith bargaining, which was later determined to have been September 8, 1994.

(2) SJTG employees were receiving 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 such that it was not apparent that the workers would have received a different per-bucket wage rate even if SJTG had not engaged in the unlawful conduct that it did; (3) the UFW subsequently agreed to, but did not finalize, an agreement with SJTG paying $.475 per bucket such that it is not apparent that the workers would have received a different per-bucket wage rate even if SJTG had not engaged in the unlawful conduct that it did; and (4) 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 26, 1996 letter from counsel for SJTG averring that SJTG paid the highest wage rate for fresh market tomatoes compared to anywhere in the State of California, and in the United States and the entire world for that matter, and, as such, no makewhole was due.[2] It appears that no payroll records accompanied the March 26 letter. The declaration avers that on December 12, 1996, SJTG provided payroll checks and check stubs for six workers as evidence that it paid its tomato harvesters the $.475 per-bucket wage rate.

[2] Statement in Support of Regional Director's Motion to Close Without Full Compliance, Declaration of Ellen Clare Kennedy, Exhibit 1, March 26, 1996 letter from Spencer Hipp, Counsel for SJTG, 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 Employment Development Department (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.[3] The UFW further argues that efforts could be made to contact aggrieved employees through the use of Spanish language press and/or radio and that a reasonable claims procedure could be set up to afford workers the ability to provide evidence on their claims.

SJTG filed a response to the UFW's opposition on June 30, 2009 arguing that SJTG and the UFW reached an agreement on a collective bargaining agreement that included the same $.475 per-bucket rate that SJTG paid during the makewhole period; the agreement reached between SJTG and the UFW expressly did not include a health insurance plan or pension plan; the $.475 per-bucket rate paid during the makewhole period was the highest piece rate paid for the harvest of fresh-market tomatoes at that time; and a collective bargaining agreement entered into between the UFW and Meyer Tomatoes in 1995 set the Meyer tomato harvest piece rate

[3] 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 4.

at $.43 per bucket. SJTG further argued 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 tomatoes, which are smaller and garner a higher per-bucket rate, and round tomatoes, which the SJTG employees harvested and which garner a lower per-bucket rate. Finally, SJTG argued that, in light of the fact that a subsequent agreement was reached between the parties, that agreement should be used to determine any makewhole calculations.

Although SJTG 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 the wage rate and any other compensation, if any, paid SJTG employees during the makewhole period is disputed; and 2) whether there were any comparable contracts, UFW or otherwise, other than the unsigned 1998 SJTG contract, that any of the parties assert are appropriate to compare to the wage rates paid by SJTG 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. [4]

By Direction of the Board

Dated: October 6, 2009

J. ANTONIO BARBOSA
Executive Secretary, ALRB

[4] 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.