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. 2010-04
Respondent,	)	
	)	ORDER GRANTING
and	)	MOTION TO CLOSE
	)	CASE
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Charging Party.	)	
_____	)	

On May 20, 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 this case without full compliance on the grounds that the collection of such monetary relief under the unique facts of this case was not warranted and further compliance efforts would not further the purposes of the Agricultural Labor Relations Act (ALRA). It is noted in the Statement in Support of the Motion to Close that though the Employer's technical refusal to bargain made the case appropriate for a makewhole remedy which the Board had ordered in *Ace Tomato Co. Inc*. (1994) 20 ALRB No. 7, other circumstances precluded the award of additional monetary relief.

The Statement in Support of the Motion to Close, as well as briefing by the parties, failed to resolve questions central to determining whether makewhole relief is owed and, if so, whether compliance is indeed possible. To that end, the Board issued an order holding the Regional Director's motion in abeyance pending evidentiary hearings in the matter (Admin. Order No. 2009-12). The order instructed the Administrative Law Judge (ALJ) to take and allow cross-examination on evidence bearing on: 1) whether there were classifications of employees other than tomato harvesters who 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 an unsigned 1998 San Joaquin Tomato Growers contract, that any of the parties would have asserted as appropriate to compare to the wage rates paid by Ace during the makewhole period.[1] The ALJ was instructed to hold a prehearing conference to ascertain whether there were any material facts in dispute and to obtain, to the extent possible, stipulations on material issues of fact. The holding of evidentiary hearings was contingent upon there being material facts in dispute.

After conducting a prehearing conference to determine whether there were unresolved material issues of fact, the ALJ issued a report of the testimony at the prehearing conference. The ALJ noted the parties' positions as to whether a

[1] The makewhole period was deemed to be June 14, 1993, through July 27, 1994.

compliance hearing was necessary and the failure of the parties to stipulate as to applicable pay rates, what constituted a "comparable contract," and whether fringe benefits would have been negotiated, among other issues. The Board then issued an order for production of declarations supporting representations made by the parties at the prehearing conference (Admin. Order No. 2009-18) and sent additional communications to the parties seeking further clarification of their responses to Administrative Order No. 2009-18 to ensure that the record before it was as complete as possible and that no material facts were left in dispute.

Regrettably, we grant the Regional Director's motion to close this matter because the state of the record, the unavailability of crucial records, the unsubstantiated nature of many of the representations made thus far, and the passage of time make it highly unlikely that material issues of fact regarding whether any makewhole relief is owing and, if so, the amount owed, can ever be fairly resolved.

The Board set forth the circumstances under which a Regional Director could file a motion to close a case without full compliance in *John V. Borchard* (2001) 27 ALRB No. 1. "Where, in the judgment of the regional director, there is no reasonable likelihood that further efforts will result in full or additional compliance with the Board's order in a fully adjudicated case, the regional director may file a motion to close the case." (*John V. Borchard, supra*, 27 ALRB No. 1 at p. 6.) In this case, further efforts to determine the amount of makewhole relief due, if any, would be futile, as it is beyond the ability of the Board and the parties, given the state of the record, to reach a credible resolution.

The payroll and other records needed to determine what employees earned during the makewhole period are no longer available.[2] Their unavailability resulted initially from the legally unsupported position of employers' counsel that no makewhole relief was owing and his resultant refusal to produce those records in 1995 when this case was originally released for compliance. Given the passage of years since the inception of this case, the current unavailability of the payroll records is not surprising. Fault for this state of affairs lies with the parties, for not fully producing employee records or other relevant information; with the regional office, for not using all legal means available to it to procure the necessary records and achieve final adjudication; and with the Board, which is ultimately responsible for enforcing its own orders. The necessity to close this matter is unfortunate; however, under the unique circumstances present, the Board finds granting the Regional Director's motion to close is the most reasonable course of action. We stress that this case and its sister case, *San Joaquin Tomato Growers*, Case No. 93-CE-38-VI (20 ALRB No. 13) are anomalies.

In light of the unique nature of this matter, we note, as stated in our conclusion in *John V. Borchard,* that "a decision . . . to close a case without full compliance is not intended as a waiver of the right to reopen such a case in the event

[2] These records are crucial in determining the number and identities of employees at issue, their classifications and wage rates, and their hours worked -- all of which are basic facts necessary to even begin to make a comparison to the wage rates of similarly situated employees working under comparable or similar contracts during the makewhole period, assuming such contracts were available. The parties did not stipulate as to the wage rates paid by the employers during the makewhole period.

that circumstances change so that further compliance efforts may be fruitful."

(*John V. Borchard, supra*, 27 ALRB No. 1 at p. 6.)

ORDER

The motion to close filed on May 20, 2009, in the above-entitled case is hereby GRANTED, without prejudice.

By Direction of the Board.

Dated: February 4, 2010

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J. ANTONIO BARBOSA
Executive Secretary, ALRB