STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	Case No. 93-CE-37-VIS
ACE TOMATO COMPANY, INC.,	)	(20 ALRB No. 7)
	)	
	)	Admin. Order No. 2010-16
Respondent,	)	
	)	ORDER AFFIRMING
and	)	DECISION OF THE
	)	ADMINISTRATIVE LAW
	)	JUDGE; ORDER DENYING
	)	MOTION TO CLOSE
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Charging Party.	)	
_____	)	

On May 20, 2009, the Regional Director of the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB or Board) 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 these cases was not warranted and further compliance efforts would not further the purposes of the Agricultural Labor Relations Act (ALRA).

On September 24, 2009, the Board ordered that the motion to close be held in abeyance until all parties had the opportunity to provide additional evidence or

clarification that could assist the Board in determining whether makewhole relief was owing under the unique facts of this case (Administrative Order No. 2009-12). On November 23, 2009, the Board issued an order for production of declarations supporting representations made by parties at the prehearing conference held on November 17, 2009 to ensure the record was as complete as possible and that no material facts were left in dispute.

On February 4, 2010, the Board issued Administrative Order No. 2010-4 which granted the motion to close this matter filed by the Visalia Regional Director on May 20, 2009.

On March 4, 2010, the Board issued Administrative Order No. 2010-06 which reopened the closed case and granted, *sua sponte,* reconsideration of this matter on the grounds that in its February order granting the motion to close, the Board had essentially made a finding that the equitable defense of laches precluded further action in the case without first holding a hearing in which evidence would be submitted and factual findings be made as to whether this defense was appropriate. Therefore, the Board directed that an evidentiary hearing be held for "factual findings on laches, unclean hands, and any equitable defenses to enforcement and compliance with the Board's orders in this matter." A hearing was held on July 20, 2010, and the Administrative Law Judge (ALJ) issued his decision on August 23, 2010.

The ALJ stated at the outset of his decision that Ace Tomato Company, Inc.'s (Ace or Employer) defiance of the Board's order by refusing to produce and then destroying the payroll records was conduct in itself that constituted ample grounds to

dismiss the Employer's equitable defenses. However, the ALJ assumed for the sake of argument that Employer's conduct did not constitute grounds for dismissal of its defenses, went on to analyze each of Employer's defenses in turn, found them without merit, and recommended that they be dismissed. The ALJ stated that it was "most likely" within the Board's broad authority over the remedies for unfair labor practices to grant some relief to Employer, if it chooses to, but that it was not required. The ALJ also noted that the Board had not set for hearing the issue of whether there was any bargaining makewhole due; therefore, he did not make any findings on this issue.

On September 16, 2010, Employer filed exceptions to the ALJ's decision.[1] Underlying Employer's argument that a number of equitable defenses should preclude further action in this case, is its long standing position that no makewhole is owed because it was paying the highest piece rate for the harvest of fresh tomatoes during the makewhole period.

As a preliminary matter, the Board specified that the hearing on July 20, 2010 was limited to factual findings on any equitable defenses to enforcement of the Board's order in 20 ALRB No. 7. The issue of whether there was any bargaining makewhole due was clearly beyond the scope of the hearing, and to the extent that Employer's "no makewhole is due" position is offered as elements of its equitable defenses, the Board disregards it. Nevertheless, the Board takes this opportunity to emphasize that it is not persuaded that evidence of payment of the highest wage rate during the makewhole period by itself leads to the conclusion that no makewhole is

[1] No replies were filed to Employer's exceptions.

due. The wage paid during the makewhole period is not, by itself, a proper measure of makewhole. Assuming Employer was paying the highest wage among similar operations, it does not automatically follow that good faith bargaining would have resulted in no additional wages and/or benefits.

PLEASE TAKE NOTICE that the decision of the ALJ finding that the equitable defenses raised by the Employer do not preclude further compliance proceedings in this case is AFFIRMED in so far as it is consistent with the discussion below.

Employer's laches defense fails because Employer has not shown the requisite prejudice caused by the delay. In *NLRB v. Int'l Ass'n, Bridge, Structural & Ornamental Ironworkers, Local 480* (1984) 466 U.S. 720, the Supreme Court held that it was well-established that a court may not refuse to enforce a backpay order solely because of the Board's delay subsequent to that order in formulating a backpay specification. (*Id.* at 724 citing *NLRB v. Rutter-Rex Manufacturing Co*. (1969) 396 U.S. 258.) In the case relied on by Employer, *TNS, Inc. v. NLRB* (6th Cir. 2002) 296 F. 3d 384, the Court held that denying enforcement solely on the basis of delay was inappropriate (*TNS, Inc., supra*, at p. 403, citing *NLRB v. Rutter-Rex Manufacturing, supra*, 396 U.S. 258.), and that unless there was a finding that the delay has prejudiced the company or given the Board or union an unfair advantage, the Court would enforce the Board's order.

TNS, Inc. can be distinguished from the present case. In *TNS, Inc*. the agency delay occurred during the "prosecution" phase of the case, that is, between the

filing of the charge and the finding of a ULP, thus prejudicing the employer's ability to defend the allegations. In contrast, in the instant case, the agency delay has occurred during the compliance stage of the case.[2] In contrast, in the instant case, Employer has been on notice since 1995 that a bargaining makewhole remedy was the final order of the Board as affirmed by the Court, and has also been on notice of the fixed time period covered by that remedy (June 14, 1993- July 27, 1994). Employer's pleas that it will be completely sideswiped by an ominous, unpredictable makewhole specification ring hollow. Although interest on the makewhole amount has been mounting, that alone is not sufficient to prejudice Employer at this point in the process for the reasons described by the ALJ.

The Board rejects Employer's argument that it would be prejudiced by the lack of available witnesses and/or witnesses with clear memories of this case. The fact of Employer's liability has already been determined, and it is unlikely that Employer would be significantly prejudiced by the lack of witnesses during the compliance phase.

The basis for Employer's unclean hands argument in its exceptions is the allegation that the Board, through Board Counsel Robert Murray, improperly interfered with the compliance process. The Employer shows a lack of understanding of Murray's role in the process. As reflected in open session minutes for its November 7, 2001 Board meeting, the Board considered a proposal that the Board "offer assistance to the General Counsel to develop a proposal for compliance cases involving the makewhole

[2] Similarly, in *NLRB v. Rutter-Rex Manufacturing, supra,* 396 U.S. 258, and in *NLRB v. Int'l Ass'n, Bridge, Structural & Ornamental Ironworkers, Local 480*, supra, 466 U.S. 720, the agency delay complained of was during the compliance phase.

remedy, and recommended offering Board Counsel Murray's help."

The Board takes judicial notice of its open session minutes and of a memo dated November 9, 2001 to the General Counsel from Board Chairwoman Shiroma which formalized this offer. This memo stated that the Board recognized the resources that the General Counsel could devote to the Ace and San Joaquin Tomato cases were limited, and that the "Board offers Board Counsel Bob Murray to assist [Compliance Officer] Ed Blanco in these cases. In so doing, [the Board] recognize[s] that neither [Member Shiroma] nor any other Board Member will be able to rely on Bob Murray's advice as Board Counsel should these cases come before the Board." Open session minutes for the following week, November 14, 2001, indicate that the General Counsel accepted the Board's offer of assistance. Board Counsel Murray was on loan to the General Counsel and not acting on behalf of the Board when he produced his report on alternative makewhole methodologies. Nor was the Board or its other counsel involved in the General Counsel's evaluation of Murray's recommendations.[3]

Employer's reliance on judicial estoppel as preventing further compliance efforts in this case is misplaced. First, this doctrine applies against the other party to a proceeding, not the quasi-judicial body itself, and second, even if this matter were before the Court of Appeal and the Board was a party to the action, the Board has never taken the formal position that no makewhole was owed in a judicial proceeding.

[3] Employer points to a November 2005 memo from Regional Director Lawrence Alderete in support of its argument that the Board improperly interfered with the compliance process (Respondent's exhibit 25). The phrase in this memo that "a determination was made at the board level…" reflects nothing more than a misstatement on the Regional Director's part.. The Board itself never gave such a directive; rather, the determination was made in the General Counsel's Headquarters office.

Moreover, the Employer's statement that "the Regional Director's office conducted an independent investigation and "determined and concluded" that Ace had paid the highest rate for the harvest of fresh tomatoes during the makewhole period and also concluded that no makewhole was owed in this case" is an overstatement. Rather, in General Counsel's April 2000 compliance report (Respondent's exhibit 13), the General Counsel states that the Region's investigation "has preliminarily established that the employer does not owe any makewhole because it paid wages at the top of the industry which may give it a positive differential to be applied against fringe benefits under *Norton*." (emphasis added.) Even if this statement did represent a conclusion, the Board is clearly within its authority to take a different position and ultimately overrule the Region and General Counsel. (See for example *Hess Collection Winery supra*, 31 ALRB No. 3.)

Employer's unjust enrichment defense fails for the reasons stated by the ALJ.

In addition to affirming the ALJ's rejection of the Employer's equitable defenses, we note that recent developments in the similar case of *San Joaquin Tomato Growers, Inc.*, Case No. 93-CE-38-VI, have precipitated further efforts at compliance by the Regional Office. Accordingly, the Regional Director's Motion to Close Case is hereby DENIED without prejudice in order to allow the Regional Director to assess

whether the developments in San Joaquin Tomato Growers, Inc. may have a bearing on the ability to proceed with compliance in the present case.

By Direction of the Board

Dated: October 11, 2010

J. ANTONIO BARBOSA
Executive Secretary, ALRB