**AGRICULTURAL LABOR RELATIONS BOARD**
**CASE DIGEST SUPPLEMENT**
**VOLUME 41 (2015)**

103.01 Where the employer allegedly fails to comply with the terms of a collective bargaining agreement implemented pursuant to ALRA's mandatory mediation and conciliation procedures, and the CBA contains a grievance/arbitration procedure governing all disputes arising under the contract, the grievance/arbitration procedure provides the method to be followed by the union seeking to enforce its breach of contract claims. Any state law to the contrary would be subject to preemption under the Federal Arbitration Act.
SAN JOAQUIN TOMATO GROWERS, INC., 41 ALRB No. 1

106.07 In the absence of evidence establishing futility or the employer's repudiation of grievance/arbitration procedures, a union must exhaust its contractual remedies before seeking judicial relief. (*Vaca v. Sipes* (1967) 386 U.S. 171, 186.) These principles have equal application to a union's attempt to obtain enforcement of a CBA from the ALRB, assuming, *arguendo*, that such enforcement authority exists. Union's failure to exhaust (or even invoke) grievance/arbitration procedures therefore precludes the Board from taking action on union's claim that employer is not complying with terms of CBA.
SAN JOAQUIN TOMATO GROWERS, INC., 41 ALRB No. 1

202.06 Alleged custom harvester found to be a farm labor contractor where it did not have total control over the harvest (grower determined which fields were to be harvested and amount of produce to be harvested, and inspected produce for quality and packing), did not market or ship the produce, only bore risk of loss while transporting the crops, its business decisions did not affect the opportunity for profit or loss in the harvest, and did not have exclusive control over the terms and conditions of employment for its employees (grower set such standards and conditions, provided safety training and worker's compensation counseling, set minimum/maximum staffing levels, and assisted in disciplinary matters).
CALIFORNIA ARTICHOKE AND VEGETABLE CORPORATION dba OCEAN MIST FARMS, 41 ALRB No. 2

202.08 The test for determining whether a corporate shareholder should be held personally liable for a makewhole award under the equitable doctrine of alter-ego or piercing the corporate veil focuses on whether: (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and individuals are indistinct, and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

202.08 In determining whether the shareholders and corporation have failed to maintain their separate identities for purposes of piercing the corporate veil, specific factors to be considered include: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of the same or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate formalities and the failure to maintain an arm's-length relationship among related entities; (8) diversion of corporate funds or assets to noncorporate purposes; and, (9) transfer or disposal of corporate assets without fair consideration.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

202.08 The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form. Further, the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice or inequity that is found. The alter-ego doctrine affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. The lack of corporate funds to pay the judgment is not enough to impose alter ego liability.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

202.08 Individual corporate shareholder's use of personal assets to make up for corporations' inability to generate sufficient revenue and the personal guarantee of the corporation's loans does not establish a disregard for the corporation's separate identity or improper commingling so as to result in a finding of unity of interest.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

202.08 For purpose of analyzing alter ego, whether an entity is undercapitalized is most relevant at the time the entity is formed because that is indicative of whether it is being formed as a shell or sham entity. Undercapitalization cannot be inferred from current unprofitability where business was operated profitably over a substantial period of time.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

400.01 An employer does not necessarily violate ALRA section 115(a) merely by questioning an employee about his or her union sympathies. Violations of section 1153(a) require a showing that the conduct complained of has a tendency restrain, coerce, or interfere with employees in the exercise of rights guaranteed under the Act. The Board considers a variety of factors in determining whether under all the circumstances, the interrogation is reasonably likely to have such effect. Some of these factors include the background under which the interrogation takes place, the nature of the information sought, the identity of the questioner, the place and method of the alleged interrogation, whether the employee is an active and known union supporter, and any history of anti-union animus on the part of the employer.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
41 ALRB No. 4

402.03 An employer's conduct, in asking an employee to take an oath on his rosary that he will no longer support the union, constitutes an unlawful interrogation. Likewise, an employer's visit to company-provided worker housing to ask an employee if he supports the union, preceded by a foreman's threats of loss of employment because of union support and an impression of surveillance of workers' protected activities, reasonably tends to restrain, coerce or interfere with the exercise of rights under the ALRA.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
41 ALRB No. 4

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ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 41 ALRB No. 4

402.07 An employer's conduct, in asking an employee whether he intended to attend an ALRB hearing, and informing the employee would not be paid for time spent away from work while at the hearing, while also informing the employee that he has the right to attend and testify at the hearing, does not constitute an unlawful interrogation or threat. It is well-established that an employer is not required to pay an employee for time spent testifying against the employer at a Board hearing. Since the employer's comments included assurances that the worker had a right to testify, and contained no express or implied promise of benefit nor threat of reprisal or force, the comments are protected under ALRA section 1154.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 41 ALRB No. 4

416.04 Refusal to rehire employee who had engaged in protected concerted activity constituted an unfair labor practice in violation of section 1153(a) where employee had previously quit due to discriminatory treatment for engaging in protected concerted activity, then was denied rehire when he applied, despite the fact that Employer was hiring new workers when employee applied for rehire. This was true even though Employer did not have a policy of contacting its former workers for rehire.
CALIFORNIA ARTICHOKE AND VEGETABLE CORPORATION dba OCEAN MIST FARMS, 41 ALRB No. 2

419.12 Employer discriminated against employee in violation of section 1153(a) by refusing to grant him leave for a family emergency, despite a policy of granting such leave, in retaliation for his involvement in protected concerted activity.
CALIFORNIA ARTICHOKE AND VEGETABLE CORPORATION dba OCEAN MIST FARMS, 41 ALRB No. 2

423.07 Employer committed unfair labor practices in violation of section 1153(a) by disciplining employees who walked off the job due to good faith concerns over objectively dangerous working conditions (wetness and cold caused employees to display symptoms of hypothermia; muddy and slippery conditions made it dangerous to work with the tools and machinery). The walkout was protected concerted activity, and not an action inconsistent with Employer's legitimate expectations of its workers.
CALIFORNIA ARTICHOKE AND VEGETABLE CORPORATION dba OCEAN MIST FARMS, 41 ALRB No. 2

439.10 Statement purportedly made by union negotiator to employer at final negotiating session held over thirty years ago, that "we're through with you," does not constitute a disclaimer of interest in representing the bargaining unit.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 41 ALRB No. 6

451.02 Unfair labor practice allegations were not time-barred by section 1160.2 even when filed more than six months after they occurred, as allegations were closely related to the timely-filed original charge, arose out of the same protected activity, and were subject to the same defenses. This is in accordance with NLRB precedent, such as *Redd-I, Inc.* (1988) 290 NLRB 1115.
CALIFORNIA ARTICHOKE AND VEGETABLE CORPORATION dba OCEAN MIST FARMS, 41 ALRB No. 2

452.12 ALJ was correct to bifurcate unlawful labor practice hearing and limit hearing to alleged unfair practices, leaving merits of Employer's affirmative defense (to makewhole / backpay) of employee's immigration status for subsequent compliance proceedings.
CALIFORNIA ARTICHOKE AND VEGETABLE CORPORATION dba OCEAN MIST FARMS, 41 ALRB No. 2

453.03 For a party to prevail on a claim of agency bias violating fair hearing requirements, the party must establish an acceptable probability of actual bias on the part of those who have actual decision making power over the claims. A mere suggestion of bias is not sufficient to overcome the presumption of integrity and honesty.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

463.01 Employer failed to show prejudice to support a laches defense in a compliance proceeding, notwithstanding delay of more than twenty years between Board's issuance of bargaining makewhole order for the period covered by the remedy and the General Counsel's issuance of final makewhole specification. In contrast to a potentially expanding backpay remedy, makewhole covers a fixed period of time.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

463.01 Equitable defense of laches cannot be maintained by employer that for years, defied Board's bargaining makewhole order by refusing to produce payroll records and then destroying them.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

463.01 Where employer's refusal to bargain does not have the purpose of seeking court review of a certification election, the determination as to whether to impose bargaining makewhole remedy focuses on whether the public interest in the employer's position outweighs the harm done to the employees by its refusal to bargain. Unless the employer's position furthers the policies and purposes of the ALRA, bargaining makewhole is appropriate. The employer's position cannot be said to further the policies and purposes of the ALRA where its defense to the duty to bargain – abandonment and disclaimer -- is contrary to existing case law.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 41 ALRB No. 6

463.02 Respondent's "*Dal Porto* defense" to a bargaining makewhole claim, that makewhole should not be awarded because the parties would not have agreed to a contract calling for higher wages even absent the employer's unlawful refusal to bargain (*William Dal Porto & Sons, Inc. v. ALRB* (1987) 191 Cal.App.3d 1195), is only applicable to cases where surface bargaining has occurred, and has no applicability to an outright refusal to bargain.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 41 ALRB No. 6

463.06 Respondent's "*Dal Porto* defense" to a bargaining makewhole claim, that makewhole should not be awarded because the parties would not have agreed to a contract calling for higher wages even absent the employer's unlawful refusal to bargain (*William Dal Porto & Sons, Inc. v. ALRB* (1987) 191 Cal.App.3d 1195), is only applicable to cases where surface bargaining has occurred, and has no applicability to an outright refusal to bargain.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 41 ALRB No. 6

464.01 The consequences of agency delay in formulating a backpay specification should not be borne by innocent wronged employees to the benefit of wrongdoing employers.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

464.01 Exactitude is not required in makewhole calculations. Rather, the formula used must be reasonably calculated to arrive at a close approximation of the amount the employees would have earned if the employer had bargained in good faith.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

464.01 Mandatory mediation and conciliation is not a substitute for bargaining makewhole, and does not require a finding of bad faith bargaining as a prerequisite for implementation. Moreover, the mediator's report is not retroactive to the date of any unlawful refusal to bargain that preceded the request for mandatory mediation. Further, Section 1164 of the Act does not give a mediator the authority to find unfair labor practices or to remedy them, and does not authorize a mediator to issue a makewhole award.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 41 ALRB No. 6

464.01 Employees who allegedly worked off-the-books during the makewhole period, and thus, whose names do not appear on the makewhole specification, must be given an opportunity to participate in a claims procedure to be administered by the Regional Director, under which, any employee who provides some documentation of agricultural employment during the makewhole period shall be entitled to a share of the bargaining makewhole award, in an amount to be calculated by the Regional Director, subject to Respondent's right to submit evidence disputing the amount awarded to any such employee, with Regional Director empowered to make final decision on such objections, without any further formal compliance proceedings.
ACE TOMATO COMPANY, INC., 41 ALRB No. 7

464.02 The initiation of mandatory mediation under Section 1164 of the Act will serve to limit a bargaining makewhole award stemming from an employer's unlawful refusal to bargain preceding the request for mandatory mediation. The makewhole award will run from the date of the unlawful refusal to bargain to the date of the first MMC mediation session. Cutting off the makewhole award is appropriate because the statutory dispute resolution system serves as an extension of the bargaining process itself.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 41 ALRB No. 6

464.04 Other collective bargaining agreement should not be used as a comparable contract in a bargaining makewhole case where that other agreement was not contemporaneous with the applicable makewhole period, where it covered a smaller operation than that of respondent, and where it was negotiated only after the employer was found to have engaged in unlawful surface bargaining. The pernicious nature of surface bargaining weakens the union's bargaining position as much or more than an outright refusal to bargain, so this contract did not reflect the market wages that good faith bargaining would have achieved.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

466.01 Respondent is not entitled to reversion of undistributed bargaining makewhole principal; such funds must be deposited into the Agricultural Employees Relief Fund. The operation of the AERF does not in any way change the Respondent's remedial obligations. The fact that the bargaining makewhole award was issued prior to the statutory enactment of the AERF is irrelevant, because the operation of the AERF begins only after the Board collects a monetary remedy, and employees owed money are not located for a period of two years after the collection of the money.
ACE TOMATO COMPANY, INC., 41 ALRB No. 7

466.08 In accordance with decision in *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 4, in a compliance case where the agency, the employer and the union share responsibility for the twenty-year delay in issuing the final makewhole specification following the Board's order awarding bargaining makewhole remedy, interest is awarded on the makewhole amount for the entire period of the enforcement delay, but only with respect to those employees who can be located. Makewhole amounts owed as to employees who cannot be located shall be transmitted, without interest, to the Agricultural Employees Relief Fund. (Board Chairman Gould dissented from this aspect of the decision, expressing the view that interest should also be included as to portion of makewhole award to be transmitted to AERF.)
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

466.08 Respondent is not entitled to reversion of undistributed bargaining makewhole principal; such funds must be deposited into the Agricultural Employees Relief Fund. The operation of the AERF does not in any way change the Respondent's remedial obligations. The fact that the bargaining makewhole award was issued prior to the statutory enactment of the AERF is irrelevant, because the operation of the AERF begins only after the Board collects a monetary remedy, and employees owed money are not located for a period of two years after the collection of the money.
ACE TOMATO COMPANY, INC., 41 ALRB No. 7

504.01 Where the employer allegedly fails to comply with the terms of a collective bargaining agreement implemented pursuant to ALRA's mandatory mediation and conciliation procedures, and the CBA contains a grievance/arbitration procedure governing all disputes arising under the contract, the grievance/arbitration procedure provides the method to be followed by the union seeking to enforce its breach of contract claims. Any state law to the contrary would be subject to preemption under the Federal Arbitration Act.
SAN JOAQUIN TOMATO GROWERS, INC., 41 ALRB No. 1

504.05 In the absence of evidence establishing futility or the employer's repudiation of grievance/arbitration procedures, a union must exhaust its contractual remedies before seeking judicial relief. (*Vaca v. Sipes* (1967) 386 U.S. 171, 186.) These principles have equal application to a union's attempt to obtain enforcement of a CBA from the ALRB, assuming, *arguendo*, that such enforcement authority exists. Union's failure to exhaust (or even invoke) grievance/arbitration procedures therefore precludes the Board from taking action on union's claim that employer is not complying with terms of CBA.
SAN JOAQUIN TOMATO GROWERS, INC., 41 ALRB No. 1

506.01 Where the employer allegedly fails to comply with the terms of a collective bargaining agreement implemented pursuant to ALRA's mandatory mediation and conciliation procedures, and the CBA contains a grievance/arbitration procedure governing all disputes arising under the contract, the grievance/arbitration procedure provides the method to be followed by the union seeking to enforce its breach of contract claims. Any state law to the contrary would be subject to preemption under the Federal Arbitration Act.
SAN JOAQUIN TOMATO GROWERS, INC., 41 ALRB No. 1

600.15 General Counsel is not required to take declarations from its witnesses in an unfair labor practice hearing.
CALIFORNIA ARTICHOKE AND VEGETABLE CORPORATION dba OCEAN MIST FARMS, 41 ALRB No. 2

604.01 The equitable defense of laches can serve to bar an action where a party's unexcused and unreasonable delay has prejudiced the party's adversary. Delay alone will not constitute laches, rather the delay must have caused some prejudice to the party raising the defense. Generally, prejudice cannot be presumed by the delay itself, instead, the party asserting the defense must show it was prejudiced by the delay.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

604.01 In considering a laches defense, the existence of an analogous statute of limitation may result in a presumption of prejudice as an element of the defense, thereby shifting the burden of proof as to that element from the party asserting laches to the party arguing against the defense. However, neither Code of Civil Procedure section 338(a) [three years for filing a statutory wage claim] nor Business and Professions Code section 17208 [four years for filing unfair competition action seeking restitution] is analogous to an ALRB compliance proceeding, as those statutes of limitations address the time for commencing an action once a claim accrues, not the time period for obtaining compliance with remedies that have been awarded.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

604.01 Employer failed to show prejudice to support a laches defense in a compliance proceeding, notwithstanding delay of more than twenty years between Board's issuance of bargaining makewhole order for the period covered by the remedy and the General Counsel's issuance of final makewhole specification. In contrast to a potentially expanding backpay remedy, makewhole covers a fixed period of time.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

604.01 Equitable defense of laches cannot be maintained by employer that for years, defied Board's bargaining makewhole order by refusing to produce payroll records and then destroying them.
ACE TOMATO COMPANY, INC., 41 ALRB No. 5

702.03 Where employer had challenged first-year wage rates ordered in mediator's first report, and that challenge was rejected by the Board, the employer could not challenge those rates again when mediator issued second report.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 41 ALRB No. 3

702.05 Employer failed to establish prima facie case that mediator's findings were clearly erroneous where it did not identify any specific findings by the mediator that were allegedly erroneous.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 41 ALRB No. 3

702.06 Mediator's decision finding that comparison between employer and other regional agricultural employers was not apt because those other employers were non-union and that, therefore, there was no counterweight to those employers' ability to set wages was not arbitrary and capricious.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
41 ALRB No. 3

702.06 Where the mediator considered the evidence and arguments presented by the parties and provided a reasoned basis consistent with the permissive factors enumerated in Labor Code 1164(e) in adopting union proposal for wage rates, employer failed to establish that mediator's rulings were arbitrary and capricious.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
41 ALRB No. 3

702.06 Mediator's rulings on second-year wage increases upheld where mediator's rulings were based on Consumer Price Index and cost of living data, rising minimum wage, and industry trends.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
41 ALRB No. 3