STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC., **Respondent,** **and** **UNITED FARM WORKERS OF AMERICA** **Charging Party**	**Case Nos.: 2012-CE-041-VIS** **2013-CE-007-VIS** **2013-CE-010-VIS** **44 ALRB NO. 1** **DECISION AND RECOMMENDED ORDER**

Appearances:

For the General Counsel:

Michael Marsh, Assistant General Counsel
ALRB Salinas Regional Office
342 Pajaro St.
Salinas CA 93901

Xavier Sanchez, Assistant General Counsel
ALRB Visalia Regional Office
1642 West Walnut Ave.
Visalia CA 93277-5348

Veronica Cervantes, Assistant General Counsel
ALRB Visalia Regional Office
1642 West Walnut Ave.
Visalia CA 93277-5348

David Sandoval, Assistant General Counsel
ALRB Salinas Regional Office
342 Pajaro St.
Salinas CA 93901

For Charging Party UFW:

Edgar I. Aguilasocho, Esq.,
Martinez, Aguilasocho & Lynch
P.O. Box 1998
Bakersfield CA 93303

For Respondent Gerawan Farming, Inc.,

Ronald H. Barsamian, Esq.
Patrick S. Moody, Esq.
Seth G. Mehrten, Esq.
Barsamian and Moody
1141 W. Shaw Ave. Suite 104.
Fresno CA 93711-3704

David A. Schwarz, Esq.
Sheppard, Mullen, Richter and Hampton, LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles CA 90067-6055

DECISION AND ORDER

John J. McCarrick Administrative Law Judge: This case was heard pursuant to the direction of the Agricultural Labor Relations Board (Board) in its decision in *Gerawan Farming, Inc.,* (2018) 44 ALRB No. 1 and the Makewhole Specification (Specification) issued by the Regional Director for the Visalia Region of the Board on December 13, 2021. The hearing was conducted from August 15-18, 2022, via WebEx video conference.[1] At the hearing, the parties had a full opportunity to examine and cross examine witnesses and present documentary evidence. All parties submitted post

[1] At the prehearing conference held on July 11, 2022, all parties agreed that the hearing should be conducted via WebEx.

hearing briefs which I have reviewed. Based upon the entire record, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. Procedural History

Charging Party United Farm Workers of America (UFW) was certified as the exclusive collective bargaining representative of Gerawan Farming, Inc.'s (Respondent) agricultural employees in 1992. *Ray and Star Gerawan Ranches, et al.* (1992) 18 ALRB No. 5.

On March 29, 2013, the UFW filed a request for mandatory mediation and conciliation with Respondent pursuant to Labor Code section 1164. On April 16. 2013, the Board ordered the parties to mediation with mediator Matthew Goldberg (Goldberg). *Gerawan Farming, Inc.,* (2013) 39 ALRB No. 5. The parties engaged in four mediation sessions with Goldberg in June and July 2013, without being able to reach a voluntary agreement. On September 28, 2012, Goldberg filed his report fixing the terms of a collective bargaining agreement. Respondent filed an appeal to the mediator's report and on October 25, 2013, the Board ordered the mediator to file a second report addressing issues raised on review. *Gerawan Farming, Inc.,* (2013) 39 ALRB No. 16. After receiving the mediator's second report, on November 19, 2013, the Board ordered the mediator's second report to take immediate effect. *Gerawan Farming, Inc.,* (2013) 39 ALRB No. 17. The mediator's contract has never been implemented.

On January 22, 2018, the Board found that Respondent had violated the Agricultural Labor Relations Act (Act) by refusing to bargain in good faith with the UFW during the period January 18, 2013, to June 30, 2013. *Gerawan Farming, Inc.,* (2018) 44 ALRB No. 1. To remedy Respondent's unfair labor practices, the Board ordered a bargaining makewhole remedy for Respondent's agricultural employees for this period. In its decision the Board declined to use the contract terms in the mediator's report[2] as the methodology for makewhole as this issue is a case of first impression for the Board. Instead, the Board directed that whether the MMC contract as the basis for makewhole should be fully briefed and litigated in this proceeding.[3]

After the various appeals ran their course and the case was released for compliance, on December 13, 2021, the Regional Director for the ALRB Visalia Regional Office issued a Makewhole Specification utilizing the contract averaging method (CAM) recommended by Dr. Zachariah Rutledge (Dr. Rutledge). The Specification applied Dr Rutledge's report[4] on contract averaging. The Specification

[2] Gerawan Farming, Inc., (2013) 39 ALRB No. 17.

[3] Gerawan Farming, Inc., (2018) 44 ALRB No 1, page 57, fn. 26.

[4] General Counsel's exhibit 2.

provides that there was no comparable contract for comparison and relied upon 23 collective bargaining agreements between the UFW and various employers that were in effect during the makewhole period to calculate a makewhole formula. Based on those contracts the Specification included as a measure of makewhole to employees an additional 27.7% of employee earnings which consisted of a wage increase of .65%, a health insurance contribution of 23.09%, a pension contribution of 1.34%, holiday pay of .73% and vacation pay of 1.9%. Using these percentages, the specification sets forth the makewhole amount to Respondent's 4636 employees[5] of $4,867,702.54 in principal plus interest for a total amount of $6,752,067.78. This sum is based on the calculations of Mr. Kenneth Creal[6] (Creal), a certified public accountant.

Respondent filed its Answer to the Specification on January 24, 2022. In its Answer Respondent contends that General Counsel's Specification is not a reasonable method for calculating backpay because there is a comparable contract, the MMC contract imposed by mediator Goldberg in 2013. Respondent argues the MMC contract should be the guide for determining backpay. Respondent argues further that if the CAM method is found a reasonable methodology it was not correctly applied to the facts of this case.

B. The Facts[7]

1. General Counsel's Experts

a. Dr. Rutledge

Dr. Rutledge was retained by the General Counsel to recommend a bargaining makewhole methodology for this case. Dr. Rutledge has a PhD in agricultural economics and is a professor at Michigan State University. He has published scholarly articles concerning agricultural labor economics.[8]

In its brief Respondent argues that Dr. Rutledge is not an expert under California Evidence Code section 801 nor did his testimony or report attached to the Specification

[5] This number includes direct hires and employees who worked with eight different FLCs

[6] I have found that Mr. Creal to be an expert in the field of accounting.

[7] The parties entered into a Joint Stipulation of Facts Not in Dispute, Joint Ex. 1, a Joint Stipulation as to the Authenticity of Documents, Joint Ex. 2, and a Joint Stipulation as to Duplicate Exhibits. Joint Ex. 3. In addition, pursuant to my direction after the close of the hearing Respondent substituted redacted Respondent's exhibits 1-33b, as some of those original exhibits contained employee addresses. In addition, pursuant to my order after the close of the hearing Respondent substituted Respondent's exhibits 73, 87a and 87b for originals that were illegible due to the small font size. Those exhibits are now contained on a memory stick in an envelope labelled as Respondent's exhibits 73, 87a and 87b. There was no objection to the substitution of Respondent's exhibits, and they will be received into the record.

[8] See General Counsel's exhibit 1.

comport with the standards set forth by the California Supreme Court in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal. 4th 747; (see also *People v. Sanchez* (2016) 63 Cal. 4th 665; *People v. Veamatahau* (2020) 9 Cal 5th 16.) Respondent contends Dr. Rutledge's methods were arbitrary, irrational, and unreasonable.

California Evidence Code section 801 provides that a witness' expert opinion testimony must relate to a subject that is sufficiently beyond common experience that the opinion would benefit the trier of fact and is based on matter including the special knowledge, skill, experience, education, and training, that may reasonably be relied upon by an expert. In *Sargon* the Supreme Court concluded that under Evidence Code section 801, the trial judge is a gatekeeper who has the authority to exclude speculative or unreliable expert testimony. The court held that expert testimony must be based on matter an expert may reasonably rely upon, must be based on reasons supported by matter on which the expert relies and must be based on facts that have evidentiary support that are neither speculative nor conjectural. *Sargon, supra* at 770-772.

In its brief Respondent contends that Dr. Rutledge ignored, did not consider or was unaware of the MMC contract. Accordingly, having ignored crucial facts, his report, recommendations, and testimony do not comport with the *Sargon* standards.

Respondent's contention misrepresents the record. At the hearing, Dr. Rutledge gave credible testimony that he considered the MMC contract and rejected it from his calculations because it was outside the makewhole period and was imposed during Respondent's ongoing bad faith bargaining.[9]

Respondent's *Sargon* argument is inapposite. The MMC was not overlooked by Dr. Rutledge but considered and excluded based on his review of both Board law and Dr. Martin's recommended methodology which the Board has previously accepted. To the contrary Dr. Rutledge's report and testimony is based on his experience, education, skill knowledge of the law and the underlying 27 contracts he reviewed. Dr. Rutledge's opinion as set forth in his report and testimony are based on Board law discussing alternate makewhole methods, the data contained in the 23 contracts he used and sound reasoning based on the law and facts. I conclude that the *Sargon, Sanchez and Veamatahau* standards as well as Evidence Code section 801 requirements have been met in Dr. Rutledge's report and testimony.

Based upon the record including Dr. Rutledge's testimony and his curriculum vitae, I find he is an expert about methods of calculating backpay in Board proceedings.

[9] Transcript volume 1, page 50. All references to the transcript will be Tr.

In his reports Dr. Rutledge stated that he reviewed 27 collective bargaining agreements between various agricultural employers and the UFW in effect between January 18, 2013, and June 30, 2013.[10] With two exceptions those employers were all located in California and engaged in crop production.

In his testimony at hearing Dr. Rutledge testified that he reviewed the Goldberg MMC and rejected it from consideration because it was outside the makewhole period and was imposed during Respondent's ongoing refusal to bargain in good faith.

Dr. Rutledge's report reflects that he reviewed applicable Board law dealing with alternate backpay makewhole methodologies including CAM and comparable contracts.

In his report Dr. Rutledge explained the 1988 paper by Dr. Martin which argues that the comparable contract method is too time consuming and expensive because it requires an examination of each employee's payroll records demanding a six-step calculation for each employee.[11] Dr. Martin's paper argues that CAM for wages and benefits simplifies the makewhole calculation, reduces the cost of litigation and shortens the amount of time to implement the makewhole remedy.

Dr. Rutledge excluded four of 27 contracts from consideration because they were either from out of state employers, not agricultural employers or negotiated in mandatory mediation. After reviewing the 23 agreements and applying the *J.R. Norton*[12] factors, Dr. Rutledge concluded there were no comparable contracts. Based on these conclusions, Dr. Rutledge recommended use of CAM as applied by the Board in *Ace Tomato Co. Inc.* (2015) 41 ALRB No.5 and *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 4.

In calculating wages and benefits from the 23 collective bargaining agreements, Dr. Rutledge excluded contracts where there was no data to calculate wages or benefits.

With respect to the Swanton Berry Farms[13] and Balleto[14] contracts, the documents were unclear as to wages and so were not included in his calculations. Dr. Rutledge did not make the wages for Swanton and Balleto a zero value but left them blank because it was clear the employees were paid some wage. Dr. Rutledge said this practice is common for agricultural economists when averaging data. When the contract was clear that there was no benefit, Dr. Rutledge assigned a zero value, however when the contract was unclear as to benefits, he did not assign a zero value.

[10] See General Counsel's exhibits 2, 3.
[11] General Counsel's exhibit 2, p. 3.
[12] *J.R. Norton Co.,* (1984) 10 ALRB No. 42.
[13] General Counsel's exhibit 5.
[14] General Counsel's exhibit 6.

If a contract assigned monthly benefit amounts, Dr. Rutledge did not include those figures since he had no data to establish how many hours employees worked for those employers making hourly calculations impossible.

In addition, where a contract provided for health benefits other than the Robert F. Kennedy Health Plan (RFK) they were excluded. Of the 23 contracts, 20 provided health benefits, four had monthly contributions and 11 had RFK contributions.

Thirteen contracts provided pension benefits on an hourly contribution basis. Several contracts provided other types of pension benefits including 401k funds or another type of fund.[15] In his report Dr. Rutledge states he only considered hourly contributions to the Juan de la Cruz Pension Fund (JDLC).

In his report Dr. Rutledge explained that for wage increases CAM considers the data in each UFW contract in effect during the makewhole period to identify the average general labor wage in effect on two reference dates one calendar year apart. The use of these dates creates comparable data values across contracts. The first reference date used by Dr. Rutledge is July 1, 2012, a year before the end of the makewhole period. The second date is July 1, 2013, the date immediately after the end of the makewhole period. CAM calculates the percent increase in wages by taking the difference between the average general labor wage in UFW contracts on July 1, 2013-$9.71 and July 1, 2012-$9.65 and dividing it by the average general labor wage on July 1, 2012.[16] The increase year over year of $0.06 is 0.65% of the general labor wage of $9.65.[17]

For health and pension benefits Dr. Rutledge used the yearly increase in average hourly employer contributions to the RFK health plan and hourly employer contributions to the JDLC pension plan from the 23 contracts.[18]

To calculate holiday pay Dr. Rutledge averaged the number of holidays in each of the contracts. In his report Dr. Rutledge noted that the contracts required employees to work a certain number of days before the holiday to qualify for holiday pay. Since he did not have access to payroll data to calculate which employees would be eligible, relying on Dr. Martin's paper, Dr. Rutledge assumed that employees would be eligible for half the average number of paid holidays during the makewhole period. Dr. Rutledge adopted Dr. Martin's assumption that each paid holiday is worth 8 hours of pay or 0.8% of the hourly rate of pay.[19]

[15] General Counsel's exhibit 4.
[16] General Counsel's exhibit 2, p. 4.
[17] General Counsel's exhibit 4, p. 2.
[18] General Counsel's exhibit 2, p. 4.
[19] Ibid.

Most of 23 contracts reviewed provided for some form of holiday pay.[20] The contracts had differing eligibility requirements, including working in the week before and after the holiday as well as differing paid holidays. Dr Rutledge's report reflects that for holiday pay the 1989 Martin paper assumes employees would receive half the average number of paid holidays specified in contracts, that employees work an average of 1000 hours per year, and that each paid holiday is worth eight hours of pay or .8% of hourly pay.[21] A value of zero was assigned to contracts where there was no holiday pay or if there were no holidays during the makewhole period.

Many of the contracts reviewed provided vacation benefits with a variety of eligibility requirements.[22] These eligibility requirements generally demanded a fixed number of hours worked in the previous year and additional vacation was provided for longer seniority. The Rutledge report cites the 1989 Martin paper that assumes employees would have qualified for half vacation pay of an employee with 15 years. In his computation of vacation pay Dr. Rutledge concluded that employees employed during the makewhole period would qualify for half of vacation pay of employees with 5 years seniority.[23]

Based upon his review of the 23 collective bargaining agreements, Dr. Rutledge calculated that each employee was owed increased wages and benefits which he calculated on an hourly basis and then converted to a per cent based on the hourly value over hourly average general labor wages of $9.65 on July 1, 2012. Based upon his review of the article by Philip Martin and Daniel Egan from 1989 recommending CAM for calculating bargaining makewhole, and the simplification for the Board in making backpay calculations, Dr. Rutledge recommended using percent figures rather than per hour numbers.

The converted percentages from the 23 contracts showed an average hourly increase from July 1, 2012, to July 1, 2013, in wages of $0.06 or .65 percent, health insurance increase of $2.23 or 23.09 percent, pension $0.13 or 1.34 percent, holiday pay of 1.82 percent and vacation of 3.8 percent. These figures were compiled into a spreadsheet that has been received into the record.[24]

[20] General Counsel's exhibits 5-32.
[21] General Counsel's exhibit 2, p. 5.
[22] General Counsel's exhibits 5-32.
[23] General Counsel's exhibit 2, p.5.
[24] General Counsel's exhibit 4.

b. Kenneth Creal

General Counsel also retained Kenneth Creal, CPA,[25] to review the payroll records of Respondent. Mr. Creal applied the Specification calculations based on Dr. Rutledge's report to the payroll records and calculated the amount owed each employee.[26] Mr. Creal calculated that 4,615 employees were owed $6,795,561.31 with interest through March 1, 2022. Additional interest through August 15, 2022, amounted to $67,913.01. Mr. Creal used National Labor Relations Board[27] calculations to determine the correct interest to apply. At the hearing Mr. Creal testified that ongoing interest amounted to $532.88 per day.

2. Respondent's Experts

a. Dr. Charles Mahla

Respondent retained Dr. Charles Mahla (Dr. Mahla) to determine a bargaining makewhole remedy in this case. Dr. Mahla has a PhD in economics and has written extensively about damages in civil cases. He has been an economics professor at the University of North Carolina. At his current employer Econ One, Dr. Mahla provides expert testimony in cases involving damages in employment related cases.[28]

Dr. Mahla was directed by Respondent's counsel to prepare a report on Respondent's makewhole liability using the Goldberg MMC as the basis for his calculations. In his report[29] Dr. Mahla determined that 4617 of Respondent's employees were entitled to $795, 667.00 through February 1, 2022.

Dr. Mahla also prepared a Supplemental Expert Report[30] on February 16, 2022. This report reviews Dr. Rutledge's report[31] dated September 16, 2021, which forms the basis for General Counsel's Specification herein. In Dr. Mahla's Supplemental Report he concluded Dr. Rutledge's application of CAM is inconsistent with economic principles that would be applied in an analysis of economic losses due to bad faith bargaining and that there are deficiencies in Dr. Rutledge's analysis.

In his Supplemental Report Dr. Mahla compared the backpay remedy herein with any employment discrimination case where damages to the plaintiff are estimated by

[25] Based upon his testimony as well as his curriculum vitae and their being no objection, I found Mr. Creal to be an expert in calculating backpay sums with interest.

[26] General Counsel's exhibits 35, 36.

[27] General Counsel's exhibit 69.

[28] I found Dr. Mahla to be an expert concerning calculation of damages in employment related cases.

[29] Respondent's exhibits 70.

[30] Respondent's exhibit 71.

[31] General Counsel's exhibit 2.

comparison to similarly situated individuals. Dr. Mahla suggested that this is like the Board's comparable contracts method and should be the standard in this case.

Going forward, Dr. Mahla stated that the 23 contracts Dr. Rutledge reviewed are not comparable to a likely UFW-Respondent contract, although Dr. Rutledge treated them as if they were comparable.[32]

Next Dr. Mahla found it problematic that the majority of the 23 averaged contracts were not in the same geographic area as Respondent's operations. He faulted Dr. Rutledge for failing to take into consideration the wage differences across the locations of the 23 averaged employers. He noted further that general labor wages for farm labor are 5-7% lower in Fresno that the average in Dr. Rutledge's findings.[33] Dr. Mahla criticized Dr. Rutledge for not considering that Respondent's wages were 10% higher than average.[34] Dr. Rutledge's report is further criticized for not considering the difference in wages based on the type of crops harvested, noting that harvesting deciduous fruit trees, like Respondent's crops, paid among the lowest wages in the San Joaquin Valley. On cross examination Dr. Mahla admitted that the data he used to reach these conclusions included non-farm labor and non-union wage rates and much of the data was outside the backpay period.[35]

In his Supplemental Report Dr. Mahla discussed the factors considered in *J.R. Norton, supra,* and finds Dr. Rutledge failed to follow its guidance in considering geographic location of employers. Dr. Mahla failed to mention or consider the Board's later approach to backpay makewhole in the *San Joaquin Tomato, supra,* or *Ace Tomato, supra,* cases.[36]

Next, Dr. Mahla critiqued Dr. Rutledge's report for failing to include data points from all 23 contracts he reviewed, for failing to consider that a UFW-Respondent contract may not have included the RFK Health Plan and for not considering eligibility requirements.[37] Dr. Mahla applied the same disapproval to the JDLC pension plan where Dr. Rutledge used only 10 contracts to average this benefit. In his critique of Dr. Rutledge's report, Dr. Mahla found that Dr. Rutledge made his findings regarding benefits in a "vacuum" and failed to consider how actual negotiations take place. Dr. Mahla argued Dr. Rutledge should have considered the total cost of benefits and wages to an employer in reaching his averages.[38]

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[32] Respondent's exhibit 71, p. 6-7.
[33] Ibid. p. 8.
[34] Ibid. p. 10.
[35] See Respondent's exhibit 71, p. 10, fn. 19.
[36] Ibid. p, 11-12.
[37] Ibid. p. 13.
[38] Ibid. p. 15-16.

Dr. Mahla took issue with Dr. Rutledge for failing to consider Respondent's higher wage rate paid during the makewhole period, vacation pay of $0.0192 hour per hour worked to its eligible cultural and crew employees and a $.015 bonus to these employees as an offset to the total amount of backpay.[39]

Dr. Mahla advanced the argument that only all Central Valley contracts should be considered including Airdrome Orchards, CP-Meilland, Gargiulo, Inc., Montpelier Orchards, and Pacific Triple E, considering all types of benefits thus reducing the CAM averages Dr. Rutledge proposes.[40] Neither Dr. Mahla nor Respondent argued that any of these contracts are comparable contracts under the *J.R. Norton* standards.

b. Dr. Ricki Sarkisian

Respondent hired Dr. Ricki Sarkisian, (Dr. Sarkisian) to conduct a wage survey of agricultural employers in the Fresno area. Dr. Sarkisian has a PhD in Educational Psychology and has experience in vocational rehabilitation with an emphasis on assessing employability and earning capacity. [41] Dr. Sarkisian has experience in performing wage surveys.[42]

Dr. Sarkisian conducted a wage survey for Respondent in 2013.[43] The survey reflects unnamed employers A through I, together with Respondent and lists hourly wages for 11 categories of employees on the first page, piecework wages on page two, the seasonal nature of work on page three and benefits paid on page four.

At the hearing Dr. Sarkisian admitted that he surveyed the eight agricultural employers who were referred to him by Respondent and derived his data from phone calls with unknown representatives of those employers. Dr, Sarkisian was unable to recall the names of the employers and he provided no documentary support for the data contained in this report. The eight employers failed to provide Dr. Sarkisian with the source of the information Dr. Sarkisian received. Dr. Sarkisian did not know the size of those employers' workforces, or whether they had direct hires or FLC hires.

General Counsel argues that Dr. Sarkisian's report should be stricken as both unreliable and hearsay. Dr. Sarkisian's report is wholly lacking in foundation as to the form of the data provided, the identity of the provider, its source, if the employer had a contract with the UFW, or the timeframe the data covered. I find Dr. Sarkisian's report lacks sufficient foundation to establish its reliability denying General Counsel meaningful

[39] Ibid. p. 17.
[40] Ibid. p. 17-18.
[41] Respondent's exhibit 77.
[42] I found Dr. Sarkisian an expert in conducting wage surveys.
[43] Respondent's exhibit 78.

cross examination as to its relevance and materiality. Dr. Sarkisian's report will be disregarded. See *George Arakelian Farms v. ALRB (1989)* 49 Cal. 3d 1279, 1293.

C. The Analysis

1. Bargaining Makewhole Methodology

The legislature authorized the Board to make employees whole for the loss of pay due to an employer's refusal to bargain in good faith. Labor Code section 1160.3 of the Agricultural Labor Relations Act (Act) provides in part that the Board may require a person:

> ". . . to take affirmative action, including . . . making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part."

Bargaining makewhole is a remedy designed to give agricultural employees the difference in wages and benefits between what they earned and what they would have earned in a collective bargaining agreement that was the product of good faith bargaining between the union and their employer. *The Hess Collection Winery* (2005) 31 ALRB No. 3.

In addition, CCR section 20291(b)(3) provides that a makewhole specification may be based not only on comparable contracts but other economic measures and shall state:

> (3) The bargaining makewhole wage rate; the comparable contract(s) or other economic measures upon which it is based, together with the reasons for their selection; and the manner in which the makewhole rate was derived from the comparable contract(s) or other economic measure.

In *Hess Collection Winery*, *supra,* pp. 4-5, the Board noted that historically it prefers using comparable contracts negotiated by the same union to calculate bargaining makewhole. The Board added that, "it is important to note that the comparable contract approach was developed and approved at a time when it was common to have numerous contracts negotiated by the same union that might be considered comparable." The Board explained that in formulating the comparable contracts method in *J.R. Norton Company, Inc.,* (1984) 10 ALRB No 42, the UFW was party to about 175 contracts at the time and General Counsel had used the eight most comparable contracts of 30-35 the UFW negotiated in the area. However, the Board affirmed that it has authority to formulate alternate methods where comparable contracts are not available, citing CCR 20291(b)(3). This method is appropriate because the Board's obligation is to arrive at a

reasonable approximation of what the employees lost due to the employer's refusal to bargain in good faith. Perfection is not required.

In *San Joaquin Tomato, supra, p. 15,* the Board had another opportunity to explain the use of comparable contracts and affirmed its holding in *Hess Collection Winery, supra,* that the Board may use alternate formulas where no comparable contracts exist. In *San Joaquin Tomato*, General Counsel had used the CAM methodology of Dr. Martin where a broad sample of 24 contracts involving the same union were used to calculate the average wage increase in wages. The Board justified the use of averages as being a reasonable measure of increases in benefits as well.[44] The Board noted that the use of average increases mitigates concerns over the contracts not being comparable. The Board approved of Dr. Martin's pension and health benefit calculations, using only contracts with per hour contributions to the Robert F. Kennedy Medical and Juan de la Cruz Pension plans since the value of these plans could be measured.[45]

In *Ace Tomato Company, Inc., supra*, the Board reaffirmed its decision in *San Joaquin Tomato Growers, Inc., supra,* finding once again that the CAM methodology of Dr. Martin based on 38 UFW contracts with 26 agricultural employers to be reasonable. The Board approved Dr. Martin's conversion of hourly increases to percentages.[46] The Board rejected Ace's arguments that the Martin methodology was speculative since the contracts reviewed bore no resemblance to Ace's operations or that Ace would not have agreed to the increases in the specification since it paid the highest wages at the time. In addition, the Board rejected Ace's contention that there was a comparable contract since the contract proffered was not contemporaneous with the makewhole period and was negotiated after the employer was as found guilty of surface bargaining. The Board found the Martin CAM methodology reasonable even though the averaged contracts involved different crops.[47]

While approving the CAM methodology in *Ace Tomato, supra*, the Board modified its application to health and pension contributions which together amounted to 16.71% of an average laborer's pay. Under the Regional Director's specification employees earning $12 per hour would receive $2 per hour in health and pensions contributions, twice the average of contributions in the contracts averaged. The Board found this amount unreasonable and reduced the backpay to $1.10 for health and pension.

The Board in *Ace Tomato* also modified the CAM methodology applied to holiday pay. The Board found that the assumption that employees would be eligible for 2.9 holidays was not reasonable given the short duration of the harvest season and therefore reduced the eligible holidays to 2. The Board found there was not enough data to verify

[44] *San Joaquin Tomato, supra*. p. 17.
[45] *Ibid*. p 20.
[46] *Ace Tomato Growers, supra,* p 6.
[47] *Ibid.* pp. 38-39.

which days the employees worked and disregarded the remand in *San Joaquin Tomato* to revise the specification to review payroll records and verify if an employee worked enough days in a payroll period to qualify for holiday pay. Instead, the Board the Board found it reasonable to estimate holiday pay based on reasoned assumptions.

The Board also eliminated the 3% increase for vacation and miscellaneous benefits as too speculative because the averaged contracts contained various eligibility requirements of hours worked to qualify.

It is General Counsel's burden to show its backpay formula is reasonable. If this burden is satisfied, the burden shifts to Respondent to prove that General Counsel's methodology is arbitrary, unreasonable, or inconsistent with Board precedent. If a Respondent can present a more appropriate method of determining backpay, the Board may reject or modify General Counsel's formula. *J.R. Norton* (1984) 10 ALRB No. 42, page 4, fn 5, pp. 10-11, fn 9; *Hess Collection Winery* (2005) 31 ALRB No. 3, p. 6.

2. The Parties' Positions

General Counsel advances use of the CAM as a reasonable method for calculating the backpay that is owed to Respondent's employees due to Respondent's refusal to bargain in good faith with their collective bargaining representative. Respondent argues that the Goldberg MMC is a comparable contract and should be the methodology used here. Respondent argues further that the CAM methodology, as applied by Dr. Rutledge is flawed.

3. The Goldberg MMC

Since the Board will only consider alternate backpay makewhole in the absence of a comparable contract and because General Counsel advances the CAM method for calculating bargaining makewhole, the first inquiry is whether the Goldberg MMC is a comparable contract.

In determining if a single contract is comparable, the Board looks at whether the contract was with an employer in the same general area as Respondent, if the same crops were raised and if it drew from the same labor pool. *Holtville Farms, Inc.,* (1984) 10 ALRB No. 13; *O.P. Murphy Co., Inc.* (1987) 13 ALRB No. 27, p. 11. In addition, the Board considers other factors relevant in determining if a contract is comparable. The contract used for comparison must have been in effect during the makewhole period and have been negotiated by the same union. *J.R. Norton*, *supra*; *Ace Tomato Co., Inc., supra*, p. 38. The Board also disfavors comparable contracts that have been entered into after bad faith bargaining. The Board has held that where an employer delays negotiations in bad faith or engages in surface bargaining, a union is likely to suffer a significant loss of support and be bargaining from a weakened position. Such conduct

makes the contract unreliable as a comparable contract. *J. R. Norton, supra at page 15; Hess Collection Winery, supra at pages 6-7; San Joaquin Tomato Growers, supra at page 15.*

In this regard in its underlying decision herein the Board found that:

> Gerawan's decision to engage in what the ALJ accurately described as a "time consuming bargaining charade," part of which "included an unrelenting effort to discredit" its employees' representative (ALJD, p. 56), far from furthering the policies of the Act, was inimical to those purposes. In particular, Gerawan's conduct was destructive of the core rights of employees to negotiate the terms and conditions of their employment through their bargaining representative.[48]

Respondent contends that the Goldberg contract imposed in the MMC process is a comparable contract. It was effective for a three-year period beginning July 1, 2013, under the Board's order of November 19, 2013.[49]

Initially, the mediated contract was not in effect during the makewhole period and therefore fails one of the Board's criteria for comparability. In addition, Respondent engaged in bad faith bargaining during the makewhole period and continued to commit unfair labor practices during the time the parties met for sessions with the mediator. Both the ALJ and Board found Respondent continued to insist on terms and conditions that no respectable union could agree to thereby further undermining and weakening the UFW's bargaining position during the MMC period.[50]

While the Board found that the makewhole period ended with the commencement of MMC sessions on July 1, 2013, this does not preclude an independent finding that Respondent committed unfair labor practices after the commencement of the MMC, thus rendering that agreement the product of bad faith bargaining and unreliable as a comparable contract.

In its brief, Respondent suggests that the court in *Gerawan Farming. Inc. v. ALRB (Gerawan II)* (2020) 52 Cal. App. 5th 141 held that the Board's finding that Respondent engaged in bad faith bargaining during mediation does not bear on the mediator's ability to establish the terms of a collective bargaining agreement. To the contrary, the court said clearly that while Respondent's conduct during mediation sessions was not at issue in their case, the Board can adjudicate unfair labor practice charges during the MMC process and make employees whole for those unfair labor practices. The court further held that given the parties' obligation to bargain in good faith during the MMC sessions,

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[48] *Gerawan Farming, Inc.,* (2018) 44 ALRB No. 1, p54

[49] *Gerawan Farming, Inc. supra.*

[50] *Ibid.,* p. 56, ALJD pp. 49-51, 53.

an employer may be found to have refused to bargain in those sessions even though the mediator establishes the terms of a collective bargaining agreement.[51]

Respondent argues that there is no evidence that its bad faith bargaining tainted the Goldberg mediated contract. However, the Board has rejected contracts arrived at voluntarily where the employer has bargained in bad faith during negotiations. The Board does not require General Counsel to prove the resulting contract was tainted by the employer's unfair labor practices. Rather, the Board has essentially inferred that the employer's conduct has created conditions so adverse to the union that the contract is unreliable as a measure of damages.

In this case the record reflects that Respondent not only failed to bargain in good faith during the makewhole period but also during the period of the MMC sessions. It makes no sense to apply an MMC contract as the basis for a makewhole methodology that was created while Respondent continued to engage in bad faith bargaining.

I see no reason to distinguish the Board's rationale in *J. R. Norton, supra, Hess Collection Winery, supra,* and *San Joaquin Tomato Growers, supra, where* the Board refused to consider contracts comparable where they were entered into voluntarily under the shadow of employer unfair labor practices. Here the MMC contract was imposed where the Respondent was continuing to bargain in bad faith during the MMC sessions. If a voluntary contract entered into under the cloud of unfair labor practices is suspect, a contract imposed under mandatory mediation where the employer continues to bargain in bad faith is no less unreliable and should also be rejected.

Since I have found that the MMC is not a comparable contract, Dr. Mahla's backpay calculations contained in Respondent's exhibit 70 will not be given any weight.

4. Is General Counsel Bound by its Position on Makewhole Methodology in its May 2017 Brief on Exceptions in this Case?

Respondent contends that General Counsel is bound by the statement in its May 2017 brief on exceptions to ALJ Schmidt's decision in this case.

In its May 2017 brief on exceptions, General Counsel took the position that if the ALJ's decision were upheld, the Board should apply the terms of the Goldberg MMC to calculate bargaining makewhole.

In its decision, while the Board found bargaining makewhole appropriate, it declined to rule on the method that the Regional Director should use to calculate backpay. The Board noted that the makewhole methodology was not litigated in the

[51] *Gerawan II* at 165, 200.

underlying proceeding and use of a subsequent MMC contract as a measure of makewhole was a matter of first impression which should be fully briefed and litigated herein.[52]

Respondent cites several cases for the proposition that General Counsel is bound by the position taken in its May 2017 brief on exceptions that the MMC report is a reasonable method for calculating bargaining makewhole.

In *Arnaudo Brothers, LP* (2018) 44 ALRB No. 7 p. 7-8, the Board found that an admission made in a pleading such as an answer or a complaint is binding on the party that made it. While Respondent's citation to *Lueras v. BAC Home Loan Servicing, LP* (2013) 221 Cal. App. 4th 49, 93-94 is misplaced as the cited sections are dicta from a concurring and dissenting opinion, both *Ulrich v. State Farm Fire & Cas. Co*. (2003) 109 Cal. App. 4th 598, 612 and *Federer v. County of Sacramento* (1983) 141 Cal. App. 3d 184, 186 stand for the proposition that statements in briefs or pleadings can be considered admissions in dismissing complaints by demurrer.

I find the cases Respondent cites are distinguishable from the facts of this case. In each of the cases cited by Respondent the issue was one of admitting underlying liability. Here General Counsel's statements in its brief had nothing to do with the issue of liability for Respondent's unfair labor practices but were rather gratuitous statements concerning backpay issues that has yet to be pled or litigated. Had General Counsel made such an admission in its complaint concerning liability issues, it may well have been bound under *Arnaudo*. At the time General Counsel made its statement, the Board had yet to find Respondent's conduct unlawful and no specification had issued representing General Counsel's position concerning backpay. At this stage of proceedings, General Counsel should not be bound to a backpay formula when liability had yet to be determined.

Respondent contends it has been prejudiced by General Counsel's May 2017 statement. Over five years have passed since General Counsel's statement. During that time Respondent was free to settle this case and reduce its potential damages. It chose to pursue its appellate rights. The possibility that General Counsel would choose a different method for computing backpay, existed during the entire appellate process. I fail to see how Respondent has been prejudiced.

5. Is the Board and ALJ Bound by the MMC Report approved in *Gerawan Farming, Inc.,* (2013) 39 ALRB No. 17?

Respondent in its brief seems to argue that the General Counsel, the ALJ in this case and the Board are bound to apply the Board's November 2013 decision accepting

[52] *Gerawan Farming, Inc., supra* p. 57, fn. 26

the Goldberg report as the only reasonable formula for determining bargaining makewhole herein.

This theory is misplaced. This is not a case where stare decisis, res judicata, or collateral estoppel apply. The MMC procedures and the Board's duty to remedy unfair labor practices serve completely different functions. The purpose of the MMC statute was to encourage the parties to enter into initial collective bargaining agreements wholly independent of resolving and remedying unfair labor practices. That the Board on the one hand could approve an imposed MMC contract and on the other hand conclude the MMC it is not a comparable contract is not inconsistent but rather reflects the diverging purposes of encouraging initial collective bargaining contracts and remedying unfair labor practices. While the Board may have approved the second report of Mr. Goldberg, this approval is not equivalent to concluding that the Goldberg MMC is a comparable contract for the purpose of remedying an unfair labor practice. The Board's order, approving the Goldberg report has no binding effect on the unfair labor practice findings herein.

I find that the Goldberg MCC contract is not a comparable contract and that there is no evidence of other comparable contracts.

6. Is the CAM methodology reasonable?

General Counsel proffers the CAM method as the basis for calculating backpay here. I must find whether this is a reasonable method.

The Board has had the opportunity to resolve this question in *San Joaquin Tomato Growers* (2012) 38 ALRB No. 4 and *Ace Tomato Growers, Inc.,* (2015) 41 ALRB No. 5.

In *San Joaquin Tomato Growers* General Counsel based its makewhole specification on the methodology of Dr. Martin's contract averaging theories. Dr. Martin averaged wages and benefits from 22 collective bargaining agreements although the contracts did not cover employees who worked in the same geographic area or performed the same type of job. After finding no comparable contract, the Board approved the CAM for calculation of wages and benefits stating:

> We find that in the absence of comparable contracts, it is reasonable to measure the average increase in wages as reflected in a broad sample of contracts involving the same union. . . .Moreover, the use of the average increase measure for wages significantly mitigates concern over the contracts not being comparable. . . .With regard to benefits. . . .while the

> averaging of benefits from the sampling of contracts is not a perfect measure, we find it to be reasonable in these circumstances.[53]

In *Ace Tomato Growers,* General Counsel again used the Martin contract averaging formula for computing bargaining backpay. Dr. Martin reviewed 38 UFW contracts. Like in *San Joaquin Tomato* makewhole was expressed as a percentage of wages and benefits. The ALJ and Board concluded that *Ace Tomato Growers* was indistinguishable from *San Joaquin Tomato*. Again, in *Ace Tomato Growers*, after concluding there was no comparable contract, the Board reaffirmed that:

> The contract averaging formula applied in this case is a reasonable, equitable estimation of what the partis would have negotiated if Ace had not engaged in a bad faith refusal to bargain. The averaging of wage and benefit increases in contemporaneous contracts provides the best estimate of what could have been negotiated in good faith during the 1993-1994 makewhole period. Although the contracts averaged involved different commodities than tomatoes, the contracts averaged reflect prevailing wages negotiated in good faith by the UFW in the years 1993-1994.

There is no difference between the CAM makewhole formulas expressed in the above cases and the Makewhole Specification herein and I am bound by the Board's findings in the above cited cases.

In its brief Respondent suggests that the above cases fail to support a finding that the contract averaging methods of Drs. Rutledge and Martin are reasonable.[54] Contrary to Respondent's contention, the two Board cases cited above beyond a shadow of a doubt have found this methodology reasonable.

I conclude that General Counsel has established its burden of showing that the CAM is a reasonable method for calculating bargaining makewhole in this case.

7. Burden Shifts to Respondent

Having found General Counsel's CAM reasonable the burden has shifted to Respondent to show that General Counsel's methodology in unreasonable, arbitrary, or inconsistent with Board precedent or to establish there is a more appropriate method for calculating backpay.

Respondent grounds its claim that Dr. Rutledge's methodology is defective on the reports and testimony of Drs. Mahla and Sarkisian. However, a review of the facts and

[53] *San Joaquin Tomato Growers, supra* at pages 16-17.

[54] Respondent's brief at page 41.

law reflects it is Dr. Mahla and Dr. Sarkisian whose understanding of the law and facts is flawed. Based largely on Dr. Mahla's supplemental report,[55] Respondent argues that if the CAM method is found to be a reasonable formula for calculating bargaining backpay, it has been applied in an unreasonable manner. Respondent makes the following arguments in support of its contention that the General Counsel's Specification is applied in an unreasonable manner.

a. Dr. Rutledge's alleged failure to consider *J.R. Norton* factors

Respondent argues that General Counsel's CAM method is applied in an unreasonable way because it included contracts that were not in the same geographic area as Respondent's operations, because it failed to take into consideration the wage differences across the locations of the 23 averaged employers, because it failed to consider that general labor wages for farm labor are 5-7% lower in Fresno than the average in Dr. Rutledge's findings, because it does not consider Respondent's higher wages, and because it does not consider different crops harvested.

Dr. Mahla prepared a chart attached to his report[56] that purports to show that the wages in the areas covered by the 23 contracts Dr. Rutledge reviewed are higher than Fresno wages. However, this chart is not limited to 2013, is not limited to agricultural wages and includes employees not covered by a collective bargaining agreement with the UFW. This exhibit will be given little weight since it does not comport with Board requirements that the wage data is congruent with the backpay period, is not limited to agricultural work and is not limited to UFW contracts.

Moreover, these arguments reflect a misapplication of Board law. Respondent's arguments and Dr. Mahla's findings are an effort to bring the *J.R. Norton* comparable contract formula through the back door after it has been rejected. Since I have found there is no comparable contract and have found that General Counsel's CAM formula is reasonable, Respondent's above noted arguments are untenable and immaterial. This so because the Board has found when using CAM, the use of a broad geographic sampling of contracts ameliorates the problems of not having comparable contracts. A discussion of the *J.R. Norton* factors of local area wages, types of crops, size of workforce or geographic location is simply not necessary and contrary to Board law in *San Joaquin Tomato* and *Ace Tomato*.

b. The failure to consider all benefit information from all 23 contracts

In a related argument, Respondent also contends that Dr. Rutledge's report and General Counsel's backpay formula is unreasonable for failing to include data points

[55] Respondent's exhibit 71.
[56] Respondent's exhibit 71, Tab 2.

from all 23 contracts Dr. Rutledge reviewed, for failing to consider that a UFW-Respondent contract may not have included the RFK Health Plan and for not considering eligibility requirements for benefits. The same argument applies to the JDLC pension plan where Dr. Rutledge used only 10 contracts to average this benefit.

Once again it is evident Respondent and Dr. Mahla misconstrue the purpose of contract averaging and Dr. Rutledge's rationale for excluding health and pension benefits other than JFK and JDLC. Dr. Rutledge excluded health benefits that could not be calculated on an hourly basis either because the contracts did not provide such information or because it was not possible to convert lump sum or quarterly contributions to hourly amounts like in JFK and JDLC contributions. The record reflects that Dr. Rutledge's exclusion of unverifiable or unquantifiable data is a common practice among agricultural economists. Moreover, it would be pure speculation for Dr. Rutledge to project that a UFW-Respondent contract may not have included the JFK plan.

c. An alternate CAM theory

Respondent also argues for a more appropriate backpay methodology in this case. In this regard Respondent adopts Dr. Mahla's contention that only all Central Valley contracts should be considered including Airdrome Orchards, CP-Meilland, Gargiulo, Inc., Montpelier Orchards, and Pacific Triple E. Tab 3 in Dr. Mahla's supplemental report summarizes data from five contracts that the UFW had in the Central valley in 2013, showing Respondent paid more in wages and benefits than the five other employers. Respondent argues that this evidence shows that any prospective contract between Respondent and the UFW would be unlike the 23 contracts averaged by Dr. Rutledge which makes the Specification speculative.

This argument also fails since this alternate backpay formula consists of a sample size too small to ameliorate the differences in employer operations. Large sample size improves on not having comparable contracts. See *San Joaquin Tomato and Ace Tomato supra.*

d. The failure to consider total costs and actual negotiations

Respondent argues further that the Specification formula is unreasonable since Dr. Rutledge made his findings regarding benefits in a "vacuum" and failed to consider how actual negotiations take place. It is argued that Dr. Rutledge should have considered the total cost of benefits and wages to an employer in reaching his averages.

This argument calls for Dr. Rutledge to engage in speculation without any probative evidence concerning this subject and is rejected.

e. Failure to consider Respondent's high wages

Respondent's argument that Dr. Rutledge failed to factor in Respondent's high wages is without merit. In *San Joaquin Tomato Growers, supra at p.14,* the Board found no merit in the argument that nothing more would have been obtained because of good faith bargaining since the employer paid the highest rate in a geographic area. To the contrary, the Board held that even if Respondent paid the highest wage rates, effective collective bargaining could have achieved even higher wages and benefits. Thus, Respondent's argument that Dr. Rutledge failed to consider Respondent's higher wage rate paid during the makewhole period, vacation pay of $0.0192 hour per hour worked to its eligible cultural and crew employees and a $.015 bonus to these employees must fail.

Ultimately the Board has held that the standard for determining backpay is that the methodology is reasonableness not perfection. In this regard in *J. R. Norton, supra at page 13* the Board held it does not require exactitude where a plethora of jobs and transitory nature of work make it unacceptably time consuming to calculate backpay. It is axiomatic that trying to calculate a bargaining makewhole remedy is going to be speculative. In this regard the court in *Holtville Farms* held that in making employees whole, ". . . the Board may use as close approximations as possible and may adopt formulas reasonably designed to produce such approximations."[57] The court concluded that the Board in choosing one among several valid methods of computing backpay is hardly an abuse of discretion even if the court found contrary findings equally reasonable.[58]

In this case I find that Respondent has failed to rebut the reasonableness of the makewhole formula the General Counsel used in this case, nor has it shown that General Counsel's backpay formula is contrary to established Board law. Aside from the MMC contract, Respondent has not proffered an alternative contract that may be comparable, nor has it advanced a more appropriate method for calculating bargaining makewhole.

8. The application of the CAM to Wages and Benefits

a. Wages

The Board has held that use of average increase measure for wages in multiple contracts significantly mitigates concerns over the contracts not being comparable.[59] The increase in wages in the Specification reflects an increase of $0.06 or 0.65% of hourly pay.

I find this amount is a reasonable amount to reimburse employees for lost wages.

[57] *Holtville Farms v. ALRB* (1985) 168 Cal. App. 3d 388, 391.
[58] Ibid at 390.
[59] *San Joaquin Tomato Growers, Inc.,* (2012) 38 ALRB No. 4, p. 17.

Here the increase for wages shown in the Specification are reasonable based on Dr. Rutledge's formula and Mr. Creal's calculations.

b. Health Plan[60]

As noted above, Dr. Rutledge averaged health benefits from 20 of the contracts he reviewed. He used the hourly contributions to the RFK plan but did not include those contracts which had a monthly contribution since he had no data showing how many hours those employees worked to convert the contribution to a per hour value. He also excluded non RFK health plans since they too had no per hour contributions listed. When a contract was clear it excluded a health benefit, Dr. Rutledge, following the Martin method, assigned a zero. However, when a contract was unclear about health or pension benefits, he assigned a blank space since he could not assume whether the contract did or did not provide health benefits. Dr. Rutledge said it would be inappropriate to assign a data value for unclear contracts. Many of the 23 contracts included side agreements not available to Dr. Rutledge covering benefits, including health benefits.[61] Dr. Rutledge said using zeros was a common practice in the field of agricultural and resource economics. Using Dr. Rutledge's calculations, the Specification here provides for health benefit backpay an average of $2.23 per hour or 23.09% of the base labor rate in July 2012. This figure represents the average increase in health benefit contributions in the 11 contracts averaged.

In *Ace Tomato*, supra, the Board modified the Regional Director's specification for health benefits since the per hour health and pension contributions would amount to $2 per hour or twice what averaged contract contributions were. The Board found this unreasonable. The same rationale does not apply here since the amount in the Specification is the same amount as that in the averaged contract contributions.

I find the amounts set forth in the Specification for health benefits are reasonable.

c. Pension Plan

Of the 23 contracts reviewed, 13 provided contributions to the JDLC Pension plan. Dr. Rutledge included these data points in his calculations but excluded any 401(k) or independent fund contributions.[62] Dr. Rutledge left blanks in contracts that represented non JDLC plans or if there was no pension information available.

[60] The Board has approved the use of only UFW contracts with per hour contributions to the JFK and JDLC plans. *San Joaquin Tomato Growers, supra*.

[61] General Counsel's exhibits 8, 10, 11, 13, 15.

[62] General Counsel's exhibit 4.

The amounts averaged reflected an hourly increase of $0.13 per hour or 1.34% of wages.

I find the amounts set forth in the Specification for Pension are reasonable.

d. Vacation Pay

In *San Joaquin Tomato*[63], the Board modified the vacation benefits contained in the Regional Director's specification, reasoning that the data provided was too speculative to conclude any employee would have received these benefits. The Board noted that given the evidence of the nature and timing of the work performed by tomato pickers the increase for vacation and miscellaneous benefits should be eliminated. The Board found that the award for vacation pay was based on Dr. Martin's assumption that respondent's employees would be eligible for half of the annual vacation benefit at half the rate of a 15-year employee. Dr. Rutledge reduced the Martin rate to that of a 5-year employee. The Board found this assumption too speculative. In *Ace Tomato*, the Board eliminated vacation pay consistent with *San Joaquin Tomato*, since it was too speculative to calculate eligibility given the different averaged contract vacation eligibility requirements, including seniority and hours worked.[64]

The facts of this case are distinguishable from *San Joaquin Tomato*. Here, most of the 23 contracts provided some vacation pay with various eligibility requirements including hours worked in the previous year. The averaged contract's vacation eligibility requirements varied from no hours per annum in five contracts,[65] to 500-700 hours per annum in six contracts[66] and to 1000 to 1300 hours per annum in five contracts.[67] Almost every contract provided vacation eligibility after one year of service. In this case I find it reasonable to average the middle group of contracts which produces an average of 575 hours worked for vacation eligibility.

To calculate the number of hours Respondent's employees worked, Mr. Creal's summaries are helpful. The makewhole summaries[68] prepared by Mr. Creal reflect the total amounts earned per employee for the period January 18, 2013, to June 30, 2013. Dividing those totals by $9.71[69] or $10.00[70] would produce the number of hours worked per employee for the first six months of 2013. Since the summer and fall is usually a time in agriculture where employees work the greatest number of hours, it would be a

[63] *San Joaquin Tomato Growers, Inc.,* (2012) 38 ALRB No. 4, p. 19.
[64] *Ace Tomato Growers, Inc.,* (2015) 41 ALRB No. 5 pp. 41-43.
[65] General Counsel's exhibits 8, 14, 16, 22, 25.
[66] General Counsel's exhibits 1, 2, 13, 15, 21, 24.
[67] General Counsel's exhibits 7, 9, 10, 20, 28.
[68] General Counsel's exhibit s 35, 36.
[69] The averaged amount of wages during the backpay period.
[70] The amount Respondent claimed it paid in average labor wages.

reasonable assumption that the number of hours reported in Mr. Creal's summaries would double if the period of June 30, 2012, to January 18, 2013, were included.

This case appears distinguishable from the facts in *San Joaquin Tomato* and *Ace Tomato i*n that there is a reasonable way to calculate which employees would be eligible for vacation pay by averaging the hours worked per annum requirements from the 23 contracts and calculating which of Respondent's employees would have met those requirements by calculating their hours worked for the year June 30, 2012, to June 30, 2013. Thus, there is a reasonable method both for calculating an eligibility requirement (575 hours) and calculating which of Respondent's employees would have met that eligibility standard.

I will recommend that the Regional Director recalculate the employees' vacation benefits from the formula stated above.

e. Holiday Pay

Dr. Rutledge concluded that 1.82 paid holidays were provided on average in the 23 reviewed contracts. Dr. Rutledge did not have access to payroll records to determine which employees would be eligible for holiday pay. His calculation assumes that not all employees would be eligible and thus used only half the average number of holidays or .091 holidays.

Of the contracts reviewed in this case most required that the employees worked both their scheduled days before and after the holiday to qualify for holiday pay. Most of the contracts provided for eight hours of holiday pay. In the backpay period here, the recognized holidays include President's Day, MLK Day, Cesar Chavez Day and Memorial Day. Not all contracts provided the same holidays. Most provided Cesar Chavez Day and Memorial Day.

In *San Joaquin Tomato, supra*[71] the Board found it unclear how many employees qualified for the holidays that occurred during the backpay period. The Board directed that the payroll records be reviewed to establish which employees worked 5 days in the two weeks preceding the holidays. The Board directed that if the records established they had worked the five days, they were to be given 8 hours of pay at the employee's assumed rate of pay.

In *Ace Tomato* the Board found not enough data in payroll records to verify which days employees worked and that it was reasonable to estimate holiday pay based on

[71] *San Joaquin Tomato Growers, Inc.,* (2012) 38 ALRB No. 4, p. 19.

reasoned assumptions, but the Board found the assumption the employees would be eligible for 3 holidays per year unreasonable given the short length of the harvest season.

Like the facts in *San Joaquin Tomato* here there is a method to determine which employees would be eligible for holiday pay. Unlike the facts in *Ace Tomato*, there is no evidence that the harvest season is so short that two holidays would be an unreasonable number to use.

I find it reasonable to use the most common requirement for holiday pay eligibility in the 23 contracts, i.e., that the employee worked their scheduled days before and after the holiday. Respondent's payroll records in General Counsel's exhibit 37 show the week and number of hours employees worked before and after the holiday. The Regional Director can select two of the above-mentioned holidays which employees may meet eligibility and use this formula to calculate holiday pay eligibility. The rate of pay would be 8 hours at $9.71 per hour.

I will recommend that the Specification be returned to the Regional Director to calculate holiday backpay in conformance with this formula.

Conclusions of Law

That the CAM backpay methodology used by General Counsel in her Specification is a reasonable formula for calculating bargaining makewhole in this case. The amount of backpay per employee for the makewhole period of January 18, 2013, to June 30, 2013, will be:

Wages $0.06 or 0.65% of July 1, 2012, $9.65 base wage.

Health plan $2.23 or 23.09% of July 1, 2012, $9.65 base wage.

Pension plan $0.13 or 1.34% of July 1, 2012, $9.65 base wage.

Paid holidays to be determined

Vacation to be determined.

That the Regional Director should recalculate the Specification's amounts for vacation and holiday backpay in accordance with the modifications in this decision.

That the amount of interest due should be recalculated based upon the renewed Specification amounts.

ORDER

The Regional Director shall issue a revised bargaining makewhole specification calculated in accordance with the Board's decision in this case. Pursuant to California Code of Regulations, Title 8, section 20292, Respondents shall have the opportunity to file answers to the revised specification, which shall also be filed with the Board in accordance with Board Regulations section 20164. In the event no exceptions are filed, this Decision will become the Decision of the Board. Any denials of facts contained in the answers to the revised specification shall be limited to claims that the specification does not fully or accurately reflect the Board's decision and/or that mathematical errors were made in applying the Board's approved formula to the payroll records. Thereafter, the Board shall issue a final order in this matter that is subject to review, pursuant to Agricultural Labor Relations Act section 1160.8.

Dated: January 20, 2023:

John J. McCarrick
Administrative Law Judge

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE
(1013a, 2015.5 C.C.P.)

Case Name: GERAWAN FARMING, INC., and UNITED FARM WORKERS OF AMERICA,

Case Nos. 2012-CE-041-VIS, 2013-CE-007-VIS, 2013-CE-010-VIS

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is 1325 "J" Street, Suite 1900-B, Sacramento, California 95814.

On **January 20, 2023**, I served **1) NOTICE OF TRANSFER 2) DECISION AND RECOMMENDED ORDER**

on the parties in the above-entitled action as follows:

By Email to the persons listed below and addressed as follows:

Julia Montgomery, General Counsel
Franchesca C. Herrera, Regional Director
Jessica Arciniega
ALRB Office of the General Counsel
Julia.Montgomery@alrb.ca.gov
Franchesca.Herrera@alrb.ca.gov
Jessica.Arciniega@alrb.ca.gov

Xavier Sanchez, Assistant General Counsel
Veronicas Cervantes, Assistant General Counsel
ALRB Visalia Regional Office
1642 West Walnut Avenue
Visalia CA 93277-5348
xavier.sanchez@alrb.ca.gov
veronica.cervantes@alrb.ca.gov

David Sandoval, Assistant General Counsel
Michael Marsh, Assistant General Counsel
ALRB Salinas Regional Office
342 Pajaro St.
Salinas CA 93901
david.sandoval@alrb.ca.gov

Edgar I. Aguilasocho
Martinez Aguilasocho & Lynch, APLC
P. O. Box 1998
Bakersfield, CA 93303
eaguilasocho@farmworkerlaw.com
info@farmworkerlaw.com
LaborLaw@TheEmployersLawFirm.com

Ronald H. Barsamian
Patrick Moody
Seth G. Mehrten
Barsamian & Moody
Fresno, CA 93711-3704
ronbarsamian@aol.com
pmoody@theemployerslawfirm.com
smehrten@theemployerslawfirm.com

David A. Schwarz
Sheppard, Mullin, Richter & Hampton LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067-6055
dschwarz@sheppardmullin.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **January 20, 2023**, at Sacramento California.

Lori A. Miller
Lori A. Miller