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) 49 ALRB No. 2 (June 22, 2023)

DECISION AND ORDER

In *Gerawan Farming, Inc*. (2018) 44 ALRB No. 1, the Agricultural Labor Relations Board (ALRB or Board) found that respondent Gerawan Farming, Inc. (Gerawan) violated section 1153, subdivision (e) of the Agricultural Labor Relations Act (ALRA or Act)[1] by engaging in bad faith "surface bargaining" during the period from January 2013 to August 2013. In addition, the Board found that Gerawan violated section 1153, subdivision (e) by proposing and insisting on the exclusion of workers employed by farm labor contractors (FLCs) from the terms of any collective bargaining agreement reached between Gerawan and charging party United Farm Workers of America (UFW). As a remedy for these violations, the Board ordered that a bargaining makewhole remedy be paid to Gerawan's agricultural employees who worked during the period from January

[1] The ALRA is codified at Labor Code section 1140 et seq.

18, 2013, to June 30, 2013, in addition to our usual noticing remedies. (*Gerawan Farming, Inc., supra*, 44 ALRB No. 1, p. 59.) Gerawan sought review of the Board's decision and order in the Fifth District Court of Appeal, and the court affirmed the Board's order. (*Gerawan Farming, Inc. v. ALRB* (2020) 52 Cal.App.5th 141, rev. den. Oct. 8, 2020, S264099.)

This matter was released to the Board's Visalia Regional Office for compliance with the Board's order on October 30, 2020.[2] On December 13, 2021, the Regional Office issued a makewhole specification setting forth a makewhole amount of $4,867,702.54, plus interest, payable to 4,636 employees. The formula used to calculate this amount was based on average wages and benefits found in 23 collective bargaining agreements between the UFW and various employers that were in effect during the makewhole period. This formula or methodology for calculating makewhole is referred to throughout the parties' filings as the contract averaging method or CAM.

Gerawan's January 24, 2022 answer to the makewhole specification opposed the Region's method of calculating the specification, and argued that the terms of the parties' 2013 mandatory mediation and conciliation (MMC) contract supplied most reasonable measure of makewhole owed the workers.[3] Gerawan's alternative

[2] On December 9, 2020, the Regional Director filed a motion with the Board to extend the bargaining makewhole period beyond June 30, 2013. The Board concluded it lacked jurisdiction to modify its remedial order after its enforcement by the court of appeal and denied the motion. (*Gerawan Farming Inc*. (Feb. 2, 2021) ALRB Admin. Order No. 2021-02.)

[3] As discussed in our underlying decision in this matter (see *Gerawan Farming, Inc*., *supra*, 44 ALRB No. 1, p. 4), the parties participated in MMC proceedings with a

specification calculated the makewhole amount as approximately $569,839.00, plus interest.

A hearing on the makewhole specification was held from August 15-18, 2022, and the administrative law judge (ALJ) issued a recommended decision on January 20, 2023. The ALJ found the Regional Director met her burden of establishing that the makewhole formula used to calculate the remedy was reasonable, and that Gerawan failed to meet its burden of showing that the Regional Director's formula was unreasonable, arbitrary, or inconsistent with Board precedent. The ALJ also concluded that Gerawan failed to establish that there was a more appropriate method of calculating bargaining makewhole.

Gerawan filed numerous exceptions to the ALJ's recommended decision, the Regional Director filed a single exception, and the UFW filed none. Both the Regional Director and the UFW filed replies to Gerawan's exceptions, and Gerawan filed a reply to the Regional Director's exception.

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mediator during the summer of 2013, including two "on-the-record" sessions in August 2013. The mediator issued a report to the Board in September 2013 resolving the terms in dispute between the parties and setting the terms of a final contract. Gerawan sought review of the mediator's report, which the Board granted in several respects. (*Gerawan Farming, Inc*. (2013) 39 ALRB No. 16.) On remand from the Board, the parties met with the mediator and resolved the final outstanding terms of the contract. The mediator then issued another report to the Board, and on November 19, 2013, the Board ordered the MMC contract into effect between the parties. (*Gerawan Farming, Inc*. (2013) 39 ALRB No. 17.) Gerawan thereafter sought judicial review of the Board's order and challenged the constitutionality of the MMC statute. The California Supreme Court upheld the MMC statute in *Gerawan Farming, Inc. v. ALRB* (2017) 3 Cal.5th 1118. Ultimately, the contract was never implemented, and the UFW subsequently was decertified as the exclusive bargaining representative of Gerawan's agricultural employees in *Gerawan Farming, Inc*. (2018) 44 ALRB No. 10.

After careful consideration of the record in this matter, we have concluded that Gerawan met its burden of showing that the MMC contract is the more appropriate measure of bargaining makewhole based on the unique circumstances of this case. Accordingly, we remand this matter to the Visalia Regional Office to recalculate the makewhole specification based on the data in the MMC contract.

DISCUSSION

1. Overview of the Board's Approach to Calculating Bargaining Makewhole.

Bargaining makewhole "is a compensatory remedy that reimburses employees for the losses they incur as a result of delays in the collective bargaining process." (*Gerawan Farming, Inc.*, *supra*, 52 Cal.App.5th at p. 198, quoting *Tri-Fanucchi Farms v. ALRB* (2017) 3 Cal.5th 1161, 1167-1168; Lab. Code, § 1160.3.) The Board's task in determining the amount of makewhole owed by the employer "is to arrive at a reasonable approximation of what the employees lost as a result of the employer's refusal to bargain in good faith, not to arrive at a perfect calculation of the loss." (*Hess Collection Winery* (2005) 31 ALRB No. 3, p. 5; *J.R. Norton Co., Inc*. (1984) 10 ALRB No. 42, p. 13 ["we do not require exactitude in our quest to make employees whole," including because "the pursuit of exactitude [can be] prohibitively time-consuming"]; *Perry Farms, Inc*. (1978) 4 ALRB No. 25, pp. 16-17 [adopting a generalized approach to calculating makewhole to avoid complexities and delays in "costing-out" contract terms].) The respondent employer bears "the burden of any uncertainty concerning what wage rates the parties likely would have agreed upon in negotiations." (*Kyutoku Nursery, Inc*. (1982) 8 ALRB No. 73, p. 10; *Abatti Farms, Inc.* (1988) 14 ALRB No. 17, pp. 14-15

["The Board does not, and indeed cannot, determine that the parties would have agreed to the exact wage rates and benefits the Board is imputing. The damages assessed are of necessity a reasonable estimate of the employees' losses"]; see *Gerawan Farming, Inc.*, *supra,* 52 Cal.App.5th at p. 199 [bad faith bargaining finding gives rise to presumption parties would have reached a contract providing higher employee pay had the employer negotiated in good faith].)

As a starting point, our precedent clearly states a preference for calculating the amount of makewhole owed based on "comparable" contracts with similarly situated employers. (*Hess Collection Winery, supra,* 31 ALRB No. 3, p. 4; see *J.R. Norton Co., Inc.*, *supra*, 10 ALRB No. 42, p. 10 [providing "the reference point" for determining the amount of compensation owed employees as a result of their employer's bad faith conduct "is contracts achieved by the Union in bargaining with employers similarly situated"].) A "detailed showing of contract comparability" is not required (*Martori Brothers* (1985) 11 ALRB No. 26, p. 11), and the inquiry whether a contract is comparable for purposes of measuring makewhole focuses "on a similarity of operations with regard to such factors as crops, locale, nature of the industry, methods of operations, and work force." (*Ventura County Fruit Growers, Inc.* (1989) 15 ALRB No. 18, p. 7; *Martori Brothers*, *supra*, 11 ALRB No. 26, p. 11; *J.R. Norton Co., Inc.*, *supra*, 10 ALRB No. 42, pp. 10-11; *Holtville Farms, Inc.* (1984) 10 ALRB No. 13, p. 3, affd. (1985) 168 Cal.App.3d 388.) The Board also considers the time period covered by a contract in assessing whether it is comparable for purposes of calculating makewhole. (*Hess Collection Winery*, *supra*, 31 ALRB No. 3, p. 5; *Martori Brothers*, *supra*, 11 ALRB No.

26, p. 11; *J.R. Norton Co., Inc*., supra, 10 ALRB No. 42, pp. 10-11; *Holtville Farms, supra*, 10 ALRB No. 13, p. 3; cf. *Ace Tomato Co., Inc*. (2015) 41 ALRB No. 5, p. 38 [rejecting use of an alleged comparable contract that did not cover the same timeframe as the makewhole period].)

When no comparable contract exists, alternative formulas may be used to determine the amount of a makewhole remedy, such as the contract averaging method. (*Ace Tomato Co., Inc*., *supra*, 41 ALRB No. 5, p. 39; *San Joaquin Tomato Growers, Inc*. (2012) 38 ALRB No. 4, pp. 15-16.) The Board has found contract averaging to be an effective method for calculating makewhole awards where comparable contracts do not exist, and has concluded that this approach of averaging wages and benefits over a larger sampling of contracts effectively mitigates concerns over the contracts not being "comparable" for makewhole purposes. (*San Joaquin Tomato Growers, Inc*., *supra*, 38 ALRB No. 4, p. 17.) Nevertheless, reflecting our preference for efficient proceedings and to avoid time-consuming delays in calculating a fair approximation of what the employees reasonably may have received had a timely contract been negotiated by their employer in good faith, we have rejected the use of more complex alternative methods for calculating makewhole where there exists only a single comparable contract, even if negotiated by a different union. (*Hess Collection Winery*, *supra*, 31 ALRB No. 3, pp. 4-5; see *O.P. Murphy Co., Inc*. (1987) 13 ALRB No. 27, p. 11; *Holtville Farms, Inc.*, *supra*, 10 ALRB No. 13, pp. 2-4; *Kyutoku Nursery, Inc*., *supra*, 8 ALRB No. 73, pp. 11-12.)

The Board will adopt the Regional Director's makewhole calculation where it is "established at hearing that the makewhole amounts were calculated in an amount

that is reasonable and conforms to the standards set forth in our decisions." (*Martori Brothers, supra*, 11 ALRB No. 26, p. 10.) However, we may reject or modify the Regional Director's method for calculating makewhole where a charging party or respondent can demonstrate the method used by the Regional Director "is arbitrary, unreasonable, or inconsistent with Board precedent[], or that some other method of determining the makewhole amount is more appropriate." (*Id*. at pp. 10-11.) A party need not establish the Regional Director's methodology is "arbitrary, unreasonable, or inconsistent with Board precedent[]" as a condition to proposing an alternative methodology alleged to be more appropriate. (*O.P. Murphy Co., Inc*., *supra*, 13 ALRB No. 27, p. 10, citing *Kyutoku Nursery, Inc*., *supra*, 8 ALRB No. 73, p. 11.) In other words, the standard is disjunctive, and the Board is not required to find the Regional Director's formulas or calculations to be arbitrary, unreasonable, or inconsistent with precedent "before exercising our discretion to determine whether a different computation submitted by a respondent is a preferable alternative." (*Ibid*.)

2. The ALJ's Rejection of the MMC Contract for Purposes of Calculating Bargaining Makewhole.

As previously mentioned, the Regional Director determined in this case there was no comparable contract to measure the amount of bargaining makewhole owed by Gerawan, and the Regional Director thus adopted a contract averaging method to calculate the amount of makewhole owed. Gerawan disputes the Regional Director's use of the CAM approach and insists the parties' MMC contract provides the most

appropriate basis for measuring makewhole. The ALJ rejected Gerawan's arguments urging use of the MMC contract for two reasons.

First, the ALJ concluded that the MMC contract was not a comparable contract for the purposes of calculating the makewhole remedy because it was not in effect during the makewhole period. In this respect, the Board ordered the makewhole period to run until June 30, 2013, in order to avoid overlap and duplication with the term of the MMC contract, which was ordered to have taken effect beginning July 1, 2013.

The ALJ also found the Board's bad faith bargaining findings against Gerawan in our underlying decision (44 ALRB No. 1) tainted the MMC contract and rendered it unreliable as a basis for measuring makewhole. The ALJ rejected Gerawan's argument that there was no evidence its bad faith conduct tainted the MMC contract, and found there was no basis for distinguishing cases where the Board refused to rely on contracts negotiated after a bad faith bargaining violation because the union would have been bargaining from a weakened position. (*San Joaquin Tomato Growers, Inc.*, *supra*, 38 ALRB No. 4, p. 15; *Hess Collection Winery*, *supra*, 31 ALRB No. 3, pp. 6-7; *J.R. Norton Co., Inc.*, *supra*, 10 ALRB No. 42, pp. 14-15.)

3. The MMC Contract Provides the Most Appropriate Measure for Calculating Bargaining Makewhole in This Case.

Gerawan contends in its exceptions to the ALJ's decision that the MMC contract is the most appropriate measure of makewhole, as it is not merely a comparable contract but represents the *actual* contract between these parties ordered into effect by the Board and based on criteria similar to those used by the Board in calculating a

makewhole remedy. As we explain below, we agree the MMC contract provides the most appropriate and reasonable measure of makewhole in this case.

A. The MMC Contract Covers a Timeframe Sufficiently Related to the Makewhole Period.

The MMC contract ordered into effect by the Board in *Gerawan Farming, Inc*., *supra*, 39 ALRB No. 17, had a July 1, 2013 effective date. In defining the makewhole period in this case, we concluded the makewhole period must terminate upon the effective date of the contract so as to avoid any duplication or overlap between the makewhole remedy and the contract. (*Gerawan Farming, Inc*., *supra*, 44 ALRB No. 1, p. 59.) We thus ordered the makewhole period to run through June 30, 2013 — the eve of the MMC contract's effective date.

We find that the ALJ overstated the importance of the timing of the MMC contract in concluding that it failed one of the Board's comparability criteria because it was not in effect during the makewhole period. We have never demanded perfect concurrency between a comparable contract and a makewhole period, and we have approved the use of contracts as comparable where they "were in effect during part of the makewhole period." (*J.R. Norton, supra*, 10 ALRB No. 42, p. 11, fn. 10 ["Contracts need not cover the entire makewhole period in order to be relevant to our determination of a basic wage rate"].) The Regional Director's citation to *Ace Tomato Co., Inc*. is not persuasive. The Board did not hold in that decision that an overlapping time period was the most important factor in determining whether a contract was comparable for makewhole purposes. Rather, the Board was describing Dr. Philip Martin's explanation

that "contemporaneous time period was the largest factor" he used "in determining which contracts were included" in his contract averaging formula. (*Ace Tomato Co., Inc.*, *supra*, 41 ALRB No. 5, p. 38.)

We have rejected attempts by respondents to base a makewhole calculation on contracts with effective dates subsequent to the makewhole period. In *San Joaquin Tomato Growers, Inc*., *supra*, 38 ALRB No. 4, at page 14, we refused to use a tentative agreement reached in 1998 where the makewhole period covered a time-period in 1993-1994, and which also was preceded by bad faith bargaining and constituted only a non-binding, unexecuted agreement. In *Ace Tomato Co., Inc*., *supra*, 41 ALRB No. 5, at page 38, we also refused to use a contract reached in 1995 when the makewhole period covered a time-period in 1993 to mid-1994, and which also was preceded by bad faith bargaining.

We are not dealing here with a contract that went into effect years or even months after the close of makewhole period. In cases where a proffered comparable contract bears no temporal proximity to a makewhole period it is fair to assume wage rates or economic conditions would evolve or otherwise be subject to fluctuations in the interim timeframe. Such is not the case here. We deliberately defined the makewhole period to terminate immediately upon the commencement of the MMC contract's effective date.[4] The makewhole period runs directly up to and abuts the effective date of

[4] Subsequent to our decision in the underlying case, we held in *Premiere Raspberries, LLC* (Mar. 6, 2020) ALRB Admin. Order No. 2020-05-P, at page 3, that a bargaining makewhole period may extend beyond the effective date of a contract ordered

the MMC contract, and that contract is sufficiently contemporaneous for use as a measure of makewhole in the circumstances of this case.

B. Gerawan's Bad Faith Bargaining Tactics Do Not Foreclose Our Use of the MMC Contract as the Makewhole Measure.

The ALJ's primary ground for rejecting use of the MMC contract in this case is that Gerawan's bad faith bargaining fatally compromised the use of the subsequent MMC contract as a measure for the makewhole remedy. As the ALJ, Regional Director, and UFW correctly observe, we consistently have rejected the use of contracts reached after findings of bad faith bargaining for purposes of calculating the amount of a bargaining makewhole remedy. (*Ace Tomato Co., Inc*., *supra*, 41 ALRB No. 5, p. 38; *San Joaquin Tomato Growers, Inc*., *supra*, 38 ALRB No. 4, p. 15; *Hess Collection Winery*, *supra*, 31 ALRB No. 3, pp. 6-7; *J.R. Norton Co., Inc*., *supra*, 10 ALRB No. 42, pp. 14-15.) The reasons underlying this rule cannot be understated. Indeed, such tactics undermine the union's status in the eyes of the employees, lead to a loss of support by virtue of the union's perceived ineffectiveness in achieving a contract for the employees who selected it, and force the union to deal with the employer from a weakened position.

However, we find the MMC process, as set forth in statute and our implementing regulations, includes numerous safeguards and protections to foreclose the

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into effect following MMC proceedings in circumstances where an employer fails or refuses to implement the contract. As previously stated, however, following the court's enforcement of our underlying order we lacked jurisdiction to modify the makewhole period in this case. (*Gerawan Farming, Inc*., *supra*, ALRB Admin. Order No. 2021-02.)

undue effects of an employer's bad faith negotiating tactics, equalize the parties' bargaining strength, and ensure a level playing field to enable the efficient conclusion of a collective bargaining agreement. Therefore, we find our earlier cases rejecting the use of contracts reached after findings of bad faith bargaining to be distinguishable from the case presently before us where the parties participated in MMC and a contract was ordered into effect.

i. The MMC Statute

More than 25 years after enacting the ALRA, the Legislature adopted the MMC statute (Labor Code section 1164 et seq.) in 2002 upon "determin[ing] that additional legislation was necessary to fulfill the goals of the ALRA because it had proven ineffective at facilitating the negotiation and completion of collective bargaining agreements." (*Gerawan Farming, Inc*., *supra,* 3 Cal.5th at p. 1130.) The Legislature thus intended the MMC statute to "ensure a more effective collective bargaining process between agricultural employers and agricultural employees." (*Ibid.,* citing Stats. 2002, ch. 1145, § 1, p. 7401; *Hess Collection Winery v. ALRB* (2006) 140 Cal.App.4th 1584, 1591.) Indeed, proponents of the statute asserted it was necessary to confront "the refusal of agricultural employers to come to the bargaining table once an election has occurred." (Off. of Assem. Floor Analyses, analysis of Sen. Bill No. 1156, as amended Aug. 30, 2002 (2001-2002 Reg. Sess.) Aug. 31, 2002, p. 7.) Proponents argued that elections for employees to choose labor union representation were "meaningless" if employers refused to negotiate contracts, and that the MMC process was needed to deter and combat the bad faith bargaining tactics used by employers to prevent the achievement of first collective

bargaining agreements. (*Ibid*.; see *Gerawan Farming, Inc*., *supra,* 3 Cal.5th at pp. 1132-1133; *Hess Collection Winery, supra,* 140 Cal.App.4th at p. 1593.)

"The MMC statute sets forth a process, known as compulsory interest arbitration, 'in which the terms and conditions of employment are established by a final and binding decision of an arbitrator.'" (*Gerawan Farming, Inc*., *supra,* 3 Cal.5th at p. 1133, quoting Fisk & Pulver, *First Contract Arbitration and the Employee Free Choice Act* (2009) 70 La. L. Rev. 47, 50; *Hess Collection Winery*, *supra*, 140 Cal.App.4th at p. 1597 ["notwithstanding section 1164's use of the word 'mediator,' [fn. omitted] the process amounts to compulsory interest arbitration"].) "The MMC process results in 'quasi-legislative action' by which '[t]he terms of the "agreement" determined by the arbitrator [are] imposed upon [the employer] by force of law.'" (*Gerawan Farming, Inc*., *supra,* 3 Cal.5th at p. 1133, quoting *Hess Collection Winery*, *supra*, 140 Cal.App.4th at p. 1597.)

ii. Overview of the MMC Process

A labor union (or an agricultural employer) may file a request with the Board for referral to MMC, generally any time 90 days after a request to bargain. (Lab. Code, § 1164, subd. (a).) The other party may file an answer within three days, after which the Board shall order the parties to MMC if it finds the statutory requirements met. (Board regs. 20401, subd. (a), 20402, subds. (b)-(c); Lab. Code, § 1164, subd. (b).)[5] Upon referral to MMC, the parties must select a mediator within seven days of receiving a list

[5] The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

from the California State Mediation and Conciliation Service (SMCS), or they may mutually agree on a mediator from a list of all mediators maintained by the SMCS. (Lab. Code, § 1164, subd. (b); Board reg. 20403.)

Within 15 days after the Board directs the parties to MMC, each party has "the right to demand … that the other party provide a list of witnesses it intends to call designating which witnesses will be called as expert witnesses and a list of documents it intends to introduce on the record at the mediation." (Board reg. 20406, subd. (a).) After the appointment of the mediator, the parties also may "issue subpoenas requiring the attendance and testimony of witnesses and/or the production of any materials, including, but not limited to, books, records, correspondence or documents in their possession or under their control." (Board reg. 20406, subd. (b).) Failure to comply with discovery requests or subpoenas subjects a party to an array of consequences, including adverse inferences or other evidentiary sanctions. (Board reg. 20406, subd. (d).)

In addition to these discovery provisions, within seven days after referral to MMC the parties are required to "identify for the mediator those issues that are in dispute and those that are not in dispute, identify the standards which they propose to resolve the disputed issues, and provide agreed upon contract language for those issues not in dispute." (Board reg. 20407, subd. (a)(1).) During MMC the parties also "must provide the mediator with a detailed rationale for each of its contract proposals on issues that are in dispute, and shall provide on the record supporting evidence to justify those proposals." (*Ibid*.) "The failure of any party to participate or cooperate in the mediation and conciliation process shall not prevent the mediator from filing a report with the Board

that resolves all issues and establishes the final terms of a collective bargaining agreement ….” (*Ibid*.; see *Premiere Raspberries, LLC* (2018) 44 ALRB No. 8, pp. 4-5 [mediator’s refusal to stay MMC proceedings while employer pursued a technical refusal to bargain did not constitute grounds for Board review of the mediator’s report under Labor Code section 1164.3]; *Premiere Raspberries, LLC* (2018) 44 ALRB No. 2, pp. 3-4.)

During MMC the parties have the right “to be heard, to present evidence and to cross-examine witnesses appearing at the hearing,” and the mediator is empowered to “rule on the admission and exclusion of evidence and on questions of procedure and shall exercise all powers relating to the conduct of the mediation.” (Board reg. 20407, subds. (2), (4).)

Within 21 days after the conclusion of the 30-day mediation period, the mediator must file a report with the Board “that resolves all of the issues between the parties and establishes the final terms of a collective bargaining agreement.” (Lab. Code, § 1164, subd. (d); Board reg. 20407, subd. (c).) In resolving disputed terms, the mediator’s report must include “the basis for the mediator’s determination,” and “[t]he mediator’s determination shall be supported by the record.” (Lab. Code, § 1164, subd. (d); Board reg. 20407, subd. (a)(2) [“The mediator shall cite evidence in the record that supports his or her findings or conclusions”].) The MMC statute further defines the criteria and factors the mediator shall consider in resolving disputed contract terms, including (1) the parties’ stipulations; (2) the employer’s financial condition; (3) “corresponding wages, benefits, and terms and conditions of employment in other

collective bargaining agreements covering similar agricultural operations with similar labor requirements;" (4) "corresponding wages, benefits, and terms and conditions of employment prevailing in comparable firms or industries in geographical areas with similar economic conditions, taking into account the size of the employer, the skills, experience, and training required of the employees, and the difficulty and nature of the work performed;" and (5) the average consumer prices for goods and services, and the cost of living, in the area where the work is performed. (Lab. Code, § 1164, subd. (e); Board reg. 20407, subd. (b).)

After the filing and service of the mediator's report, the parties may petition the Board to review specified provisions of the report. (Lab. Code, § 1164.3, subd. (a); Board reg. 20408, subd. (a).) The Board will review the mediator's resolution of disputed terms where it is shown (1) a provision involved a nonmandatory subject of bargaining; (2) "is based on clearly erroneous findings of material fact;" or (3) "is arbitrary or capricious." (Lab. Code, § 1164.3, subd. (a).) The Board will remand the matter to the mediator to modify the affected terms of a contract when it finds such circumstances to exist. (Lab. Code, § 1164.3, subd. (c).) In addition, parties may seek review of a mediator's report on grounds it (1) "was procured by corruption, fraud, or other undue means;" (2) the mediator was corrupt; or (3) a party's rights "were substantially prejudiced by the misconduct of the mediator." (Lab. Code, § 1164.3, subd. (e).) Upon making any such findings, the Board will vacate the mediator's report and order the appointment of a new mediator to conduct further mediation proceedings. (*Ibid*.)

After the Board orders a contract into effect, a party may seek judicial review of the Board's order. (Lab. Code, § 1164.5.) Likewise, a party may file an action in superior court to enforce the Board's order where the other party fails or refuses to implement the MMC contract, even if that party is pursuing an appeal of the Board's order. (Lab. Code, § 1164.3, subd. (f)(1).)

iii. The MMC Process Is Designed to Combat and Mitigate the Effects of Bad Faith Tactics and Includes Numerous Safeguards to Protect the Parties.

As can be seen, the MMC process contains significant procedures and safeguards to both protect the parties from unfair action and ensure the reasonableness of a final collective bargaining agreement. MMC itself constitutes "part and parcel of the negotiating process" and operates to "formalize the usual give and take of contractual negotiations" with the assistance of a mediator. (*Gerawan Farming, Inc. v. ALRB* (2019) 40 Cal.App.5th 241, 270-271; *Gerawan Farming, Inc.*, *supra,* 3 Cal.5th at p. 1156.) In doing so, the MMC process effectively insulates the parties from tactics that tend to undermine the bargaining process — including the types of tactics that were the subject of our prior bad faith findings against Gerawan.

For example, the mandatory timeframes in the statute and regulations prevent the kind of delays that tend to erode a union's bargaining strength. Moreover, an employer's refusal to negotiate or participate, whether due to the employer's pursuit of a technical refusal to bargain to obtain judicial review of a union's certification or some other ill-conceived purpose, will not delay or prevent the finalization of a contract.

(*Premiere Raspberries, LLC*, *supra*, 44 ALRB No. 8, pp. 4-5; Board reg. 20407, subd. (a)(1).)

The parties are also afforded significant discovery rights, including via subpoena, to obtain information and records relevant to formulating or supporting their own bargaining positions or upon which the other party may rely to support its own proposals and positions. Failure to comply with a party's discovery requests subjects a party to serious consequences, including adverse inferences or evidentiary sanctions that may result in its inability to present or support positions it has taken. Thus, common tactics where an employer refuses to produce information requested by a union during the course of negotiations or otherwise delays the production of information to stall the bargaining process similarly will not impede the MMC process and finalization of a contract.

In addition, the mediator can quickly reject unreasonable or unsupported bargaining proposals designed to frustrate the negotiating process. Indeed, the parties in MMC must present the mediator their respective proposals on disputed terms and all evidence and argument upon which they rely to support their positions. This effectively allows the mediator to discard unreasonable or unsupported positions, which often involves the types of proposals that are the subject of surface bargaining allegations. In fact, the mediator did so in this case, including criticizing Gerawan's general view of what status or role the UFW should have under a finalized collective bargaining agreement. (Mediator's Report, Case No. 2013-MMC-003, Sept. 28, 2013, pp. 4-5, 11-12

[rejecting Gerawan's "right to work" proposal], 27 [rejecting Gerawan's "economic action" proposal], 51-52 [rejecting Gerawan's "union obligations" proposal].)

Finally, the MMC process has built-in measures to ensure that the terms of a MMC contract are supported by the record, based on comparable contracts and relevant economic data, reflect the individualized circumstances of the parties, and are not arbitrary and capricious.

In sum, we find it clear the MMC process sufficiently insulates parties, particularly labor organizations seeking to achieve a first collective bargaining agreement, from the typical types of bad faith negotiating tactics employers use not only to delay or prevent finalizing a contract but also to weaken a union's bargaining strength and standing in the eyes of the employees. The process is specifically designed to level the playing field and equalize the parties' bargaining strength. (See *City and County of San Francisco* (2009) PERB Dec. No. 2041-M, at prop. dec. pp. 26-27 [noting that interest arbitration "holds the prospect of leveling the bargaining field for small unions" and "allows the union a direct role in choosing the decisionmakers," and finding "it is commonly known that many unions believe interest arbitration to serve their interests"]; *Dodgeland School Dist*. (Feb. 14, 2007) Wisc. Emp. Rels. Comm. Dec. No. 31098-C [2007 WI ERC LEXIS 157, *48-49] [finding interest arbitration "neutralizes the negative effects" of an employer's unlawful conduct "upon the union's negotiating power"].)

In this respect, interest arbitration to facilitate the completion of collective bargaining agreements is most commonly found in the public sector where employees may not be able to strike. The court in *Hess Collection Winery, supra,* 140 Cal.App.4th at

page 1600, observed "[t]he power to take collective action through a strike serves to equalize the bargaining position of the parties." Where employees lack recourse to traditional economic weapons to obtain leverage during a bargaining dispute with their employer, interest arbitration effectively levels the playing field and serves "to balance the bargaining positions" of the employer and employees. (*Snyder County Prison Bd. v. Pa. Labor Rels. Bd*. (2006) 912 A.2d 356, 367; see also *Metro. Seattle v. Public Employment Relations Com*. (1992) 118 Wn.2d 621, 631-632 [826 P.2d 158, 162-163].)

In the context of our agricultural industry, our Legislature "could reasonably conclude that the power to strike is illusory" based on the nature of the work, the workforce, and industry. (*Hess Collection Winery*, *supra*, 140 Cal.App.4th at p. 1600.) The legislative history of the MMC statute demonstrates the concerns of labor unions seeking an interest arbitration procedure to directly combat employer bad faith bargaining tactics that prevented unions from achieving first contracts under the ALRA. The MMC process accomplishes this objective, and in doing so effectively blunts, mitigates, and sometimes preempts, the possible effects of an employer's unlawful negotiating tactics and neutralizes the parties' respective bargaining positions. (*Perez Packing, Inc.* (2014) 40 ALRB No. 1, pp. 7-8 [finding a "key policy at the heart of" the MMC process "is to diminish delay, a phenomenon always at war with the effective implementation of labor law"]; Fisk & Pulver, *supra*, 70 La. L. Rev. at p. 76 [noting interest arbitration serves "the goal of equalizing power in labor-management relations," including by militating against common employer tactics of "delay and bad faith negotiation"]; Note, *Overcoming the First Contract Hurdle: Finding a Role for*

Mandatory Interest Arbitration in the Private Sector (2008) 23 Lab. Law. 323, 334 [arguing mandatory interest arbitration should be available where employers engage in bad faith bargaining tactics in order to level the playing field]; Anderson & Krause, *Interest Arbitration: The Alternative to the Strike* (1987) 56 Fordham L. Rev. 153, 157 ["Interest arbitration enables the labor participants to retain the leverage necessary to bargain effectively in negotiating a contract"].)

iv. The MMC Contract Supplies the Most Appropriate Method for Calculating the Makewhole Award Based on the Facts of This Case.

In light of the above, and based on the facts of this case, we conclude the record before us supports use of the MMC contract to measure the amount of the makewhole award owed by Gerawan.

First, and consistent with the foregoing discussion of the various procedural safeguards inherent in the MMC process, the record does not establish Gerawan's bad faith as found by us in our underlying decision infected or tainted the MMC process as to render that contract unreliable as a measure of makewhole.[6] Second, use of the MMC contract here is consistent with the purpose of the bargaining makewhole remedy. Generally speaking, "makewhole is designed to give an employee the benefit of a collective bargaining agreement that would have been entered into but for the unfair labor

[6] Moreover, we note our prior bad faith findings were confined to Gerawan's conduct during the course of the parties' negotiations outside the presence of the mediator. (*Gerawan Farming, Inc*., *supra*, 44 ALRB No. 1, p. 7, fn. 7.) In affirming the Board, the appellate court emphasized its "conclusions in this case are limited that situation," i.e., Gerawan's "conduct during negotiations held outside the mediator's presence." (*Gerawan Farming, Inc*., *supra*, 52 Cal.App.5th at p. 201.)

practices of either the employer or the union, and is measured by the rates of pay and benefits the collective bargaining agreement would have provided." (*Bertuccio v. ALRB* (1988) 202 Cal.App.3d 1369, 1396-1397, citing *Highland Ranch v. ALRB* (1981) 29 Cal.3d 848, 866, fn. 7.) We believe the MMC contract recommended by the mediator and ordered into effect by the Board accomplishes this purpose. (See Fisk & Pulver, *supra*, 70 La. L. Rev. at pp. 75-76 [stating the arbitrator's function during interest arbitration proceedings "is to devise a contract that the parties likely would have reached had the process not broken down"].)[7]

In setting the recommended economic terms of the contract, the mediator considered the parties' respective proposals and positions, contracts involving similarly situated employers, and other relevant wage and economic data in the geographic area. The parties had a full and complete opportunity to participate in the MMC process and to furnish to the mediator all evidence or data upon which they relied to support their positions, and they did so. Although the UFW now objects to using the MMC contract to calculate makewhole, we find this position inconsistent with its conduct both during and after the earlier MMC proceedings with Gerawan.[8]

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[7] The dissent argues the purpose of a bargaining makewhole remedy is not to "create a contract." (Dis. opn., *infra*, p. 35.) We do not dispute this. However, as the dissent also observes, the purpose of the bargaining makewhole remedy is "to make workers whole by providing them with the benefits they would have received under a collective bargaining agreement had the employer not unlawfully bargained in bad faith." (*Ibid*.; see *Hess Collection Winery*, *supra*, 31 ALRB No. 3, p. 5.) For the reasons we explain, use of the MMC contract in this case most reasonably achieves this objective.

[8] We also acknowledge the General Counsel previously urged the Board to adopt the MMC contract as the measure for calculating the amount of the makewhole remedy in

During MMC and after the mediator issued his first report to the Board, the UFW did not seek review of or otherwise object to any portion of the report. After the Board ordered the MMC contract into effect, the UFW commenced a superior court action seeking to enforce it.[9] The UFW also filed unfair labor practice charges against Gerawan based on its failure to implement the contract, which led the General Counsel to commence an action in superior court seeking injunctive relief to compel Gerawan to implement the contract.[10] Moreover, after Gerawan pursued judicial review to challenge the MMC statute and contract, the UFW (like the Board) aggressively defended both the statute and contract. (See *Gerawan Farming, Inc.*, *supra*, 3 Cal.5th at p. 1151 ["We agree with the Board and the UFW that the statute provides numerous procedural safeguards throughout the MMC process to protect the parties from arbitrary or unfair action"].)

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this case. (*Gerawan Farming, Inc.*, *supra*, 44 ALRB No. 1, p. 57, fn. 26.) Gerawan insists the Regional Director in these compliance proceedings is bound to this position previously taken by the General Counsel. Because we agree with Gerawan on the merits that the MMC contract supplies the most appropriate basis for calculating makewhole in this case, it is unnecessary for us to reach that issue. However, we encourage the General Counsel and Regional Directors to exercise caution when reconsidering positions previously taken during the course of a case, including explaining its rationale when doing so in order that the parties and the Board fairly may understand its reasoning in such circumstances. (See, e.g., *Rincon Pacific, LLC* (2020) 46 ALRB No. 4, p. 8.)

[9] *UFW v. Gerawan Farming, Inc.*, Super. Ct. Sac. County, case no. 34-3013-00153803, filed Nov. 21, 2013.

[10] Unfair labor practice charge no. 2014-CE-003-VIS, filed Jan. 31, 2014; *ALRB v. Gerawan Farming, Inc.*, Super. Ct. Fresno County, case no. 14CECG00987, filed Apr. 8, 2014.

Ultimately, as Gerawan states, the MMC contract is not simply a comparable contract, it is the actual contract the Board ordered into effect between these parties.[11]

The Regional Director argues that a contract generated through the MMC process is not a comparable contract for makewhole purposes because MMC and bargaining makewhole serve two different purposes. The Regional Director further asserts bargaining makewhole is a remedy for the unfair labor practice of bad faith bargaining, while the mediator in an MMC proceeding does not have the authority to remedy an unfair labor practice. Our dissenting colleagues reiterate these assertions.

The UFW adds that the legislative history of the MMC amendments makes it clear that the purpose of MMC is to solve the problem of employers refusing to come to the table and negotiate contracts. The UFW contends the Legislature could have specified that a MMC contract could be used in calculating a makewhole remedy, but it did not. In addition, the UFW states that while the Board used a comparable contracts method of calculating makewhole in the past, the Board now "disfavors" that approach.

We do not find merit in these arguments. Nothing in the statute, the legislative history, our regulations, or our precedent supports the conclusion that MMC contracts should not be used to calculate a makewhole specification, either as comparable contracts or as contracts averaged using the CAM approach. A collective bargaining agreement achieved though MMC is not an inferior contract, and a MMC contract stands

[11] Although the contract was never implemented, this is not attributable to any fault of the MMC process itself but rather a consequence of the UFW's subsequent decertification. (*Gerawan Farming, Inc.*, *supra,* 44 ALRB No. 10.)

on the same footing and holds the same value as a collective bargaining agreement voluntarily reached through negotiations between a union and employer.

The fact a mediator conducting MMC proceedings lacks authority to issue unfair labor practice remedies has no bearing on our inquiry here in determining whether the MMC contract provides the most appropriate basis for measuring the makewhole remedy. Our focus at this stage of the proceedings is determining the best approximation of the type of contract the parties would have reached had the employer fulfilled its bargaining obligation, and compensating the employees for what they reasonably lost as a result of being deprived such a contract. And while a mediator cannot exercise our remedial authority under Labor Code section 1160.3 (*Gerawan Farming, Inc*., *supra*, 44 ALRB No. 1 p. 56), the mediator undoubtedly has wide authority and power to address, and rectify, the various types of bad faith bargaining tactics ordinarily used by employers to impede achievement of a contract, even if the mediator lacks authority to make formal unfair labor practice findings.

The UFW's statement that the Board now disfavors using comparable contracts to calculate makewhole in favor of contract averaging is not accurate. Our precedent is clear that contract averaging is appropriate for purposes of calculating makewhole only after it is found there are no comparable contracts. (*Ace Tomato Co., Inc*., *supra*, 41 ALRB No. 5, p. 39; *Hess Collection Winery, supra*, 31 ALRB No. 3, p. 4 ["There is no question that Board precedent reflects that the preferred method of calculating bargaining makewhole is to utilize comparable contracts"].) Indeed, the Board has expressed a preference for using only a single comparable contract as opposed to

using many agreements covering employees working under dissimilar conditions. (*San Joaquin Tomato Growers, Inc., supra*, 38 ALRB No. 4, p. 16 and ALJ Dec. at p. 9, citing *Holtville Farms, Inc., supra*, 10 ALRB No. 13 and *Kyutoku Nursery, Inc., supra*, 8 ALRB No. 73.)[12] The dissent's stated preference for using the Region's contract averaging methodology in this case also stands in contrast to established precedent that such an approach is appropriate only after it is determined no comparable contract exists. (Dis. opn., *infra*, at p. 38, fn. 4.)[13]

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[12] Gerawan argues the contract averaging method for determining makewhole is unreasonable. We reject this argument. (*Ace Tomato Co., Inc., supra*, 41 ALRB No. 7, p. 39; *San Joaquin Tomato Growers, Inc., supra*, 38 ALRB No. 4, p. 17.) The ALRA does not specify a formula for the Board to use in making the makewhole calculation. The method of calculating makewhole has, by necessity, varied over the years as the availability and type of information used to make the calculation has also changed. Board regulation 20290, subdivision (b)(3) allows for alternative formulas where comparable contracts are not available. (See *Hess Collection Winery, supra*, 31 ALRB No. 3, pp. 4-5.)

[13] The dissent's preference for using contract averaging in this case is persuaded by the admittedly stark difference in the final result of the makewhole remedy as compared to that presumably reached under the MMC contract. However, our threshold inquiry regarding whether a comparable contract exists or whether resort to an alternative formula is necessary "has nothing to do with what wages and benefits are contained within" the proffered comparable contract. (*Ventura County Fruit Growers, supra*, 15 ALRB No. 18, p. 7.) Instead, in conducting a typical comparable contract inquiry the Board focuses its attention on the similarities of the employers and their operations. If the subject employer and its operations are deemed similar, "the contract (with whatever its wages and benefits happen to be) then is applied to the makewhole employer." (*Ibid.*) In other words, we may not focus on the likely end-result of a prospective remedy based on the terms and provisions of the MMC contract versus the result reached by contract averaging, an inquiry that is premature at this stage. (See also *Perry Farms, Inc., supra*, 4 ALRB No. 25, pp. 16-17 [warning of delays and complexities that result from "costing-out" contract terms]; *Adam Dairy* (1978) 4 ALRB No. 24, p. 16.) And while the dissent observes the higher result reached by contract averaging here is largely due to the omission of a health benefit in the MMC contract, there is no basis in the record before us to conclude the omission of that benefit in the MMC contract is attributable to Gerawan's

4. Conclusion.

Gerawan's unlawful, bad faith negotiating conduct was a serious violation of the Act, and nothing in our decision today undermines our previous findings during the underlying unfair labor practice proceedings. However, under the unique circumstances of this case, where the parties quickly entered MMC, the Board ordered a contract into effect, the charging party labor organization never disputed the terms of the contract and subsequently defended and sought to enforce it, and where the procedural safeguards throughout the MMC process protected both parties from arbitrary or unfair action, we find that the MMC contract can be distinguished from a contract voluntarily entered into by parties after bad faith bargaining for purposes of calculating a makewhole award.

ORDER

The Board hereby remands this matter to the Region for the issuance of a revised bargaining makewhole specification calculated in accordance with this Decision. Pursuant to Board regulation 20292, the parties shall have the opportunity to file an answer to the specification, which also shall be filed with the Board. Any denials of the facts alleged in the answer to the revised specification shall be limited to claims that the

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"egregious bad faith bargaining." Rather, the mediator rejected the union's proposed health benefit based on the union's failure to analyze and cost-out its proposal, as well as evidence suggesting the benefit was prohibitively expensive" and offset by higher base wages. (Mediator's Report, *supra*, p. 49.) In these circumstances, the contract averaging approach produces a result drastically out of line with the contract ordered into effect through MMC and exceeds the scope of our remedial powers by awarding the union and employees far more than they would be due under the MMC contract. (*Gerawan Farming, Inc*., *supra*, 52 Cal. App. 5th at p. 198, quoting *Tri-Fanucchi Farms*, *supra*, 3 Cal.5th at pp. 1167-1168; *Bertuccio*, *supra*, 202 Cal.App.3d at pp. 1396-1397, citing *Highland Ranch*, *supra*, 29 Cal.3d at p. 866, fn. 7.)

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 will be subject to review pursuant to Labor Code section 1160.8.

DATED: June 22, 2023

Victoria Hassid, Chair

Isadore Hall, III, Member

Barry D. Broad, Member

CHAIR HASSID, concurring:

I understand the dissent to have two central concerns with using the MMC contract as the measure of the makewhole remedy in this particular case. The first being that MMC was never designed to remedy, and in fact the mediator is prohibited from remedying, the effects of an unfair labor practice. The second being that the MMC process is not designed or intended to redress the effects of past bargaining violations in specific cases or that it can accomplish those aims. While the dissent presents several compelling arguments for rejecting use of the parties' MMC contract as the makewhole measure in this case, after careful consideration I remain with the majority opinion.

Turning to the first concern regarding the ability of MMC to remedy unfair labor practices. As discussed in the majority opinion, the MMC process is in some ways envisioned to be a hybrid enforcement tool and remedy to combat, mitigate and preempt bad faith and surface bargaining tactics. The process is designed to move rapidly, delay being one of the major nefarious tactics utilized in bad faith bargaining. Furthermore the parties need only convince a neutral arbitrator of the merits of their proposal. The other party doesn't even need to put forward counter arguments or even participate in the process and the proposal may still be rejected if it's not well supported or outside the bounds of common practice or other similar contracts.

The dissent notes in their second footnote that they "need not and do not rely on MMC bargaining conduct in reaching" their conclusions. However if that is not the case it is not clear what they do rely on. We can reasonably anticipate that there will be a high correlation between invoking the MMC process and an allegation and likely finding of bad faith bargaining between a union and an employer. Are there circumstances where the dissent would find an MMC contract to be the appropriate measure for a bargaining makewhole remedy? How can the MMC process be satisfactory enough to create a valid contract but that contract is not sufficient to be the measure of a makewhole remedy? These questions as applied to the facts of this case are where I feel the dissent falls short.

The dissent identifies a critical issue in that both Gerawan and the UFW changed their litigation position on the validity of the MMC contract over the course of this litigation and that such a change in position should not be weighed for or against

utilization of the MMC contract. However, under the facts of this case it's not hard to discern the motivations behind some of the parties' litigation positions. In the case of Gerawan they are stuck with the MMC contract, and, as they argue, they reduce their liability by the millions of dollars by arguing that MMC be the measure. It is less clear why UFW has changed positions. It is understandable why the UFW eventually sought to enforce the MMC, versus no contract at all, but it is not clear why they did not except to the MMC contract itself if they disagreed with the mediator's resolution of any provisions in it. So why should the Board supplement its judgment for the UFW's on the merits of the MMC contract now and reverse course?

Focusing back on the first concern – that the MMC process cannot remedy an unfair labor practice – how does that change the impact on *this* case? Would that have meant that the UFW's health plan proposal was accepted? How does this limitation lessen the value of this MMC contract and make it an inappropriate measure for makewhole in this case? What would be the remedy here? That all the union's proposals were accepted?

This case has unfolded in a highly unusual manner. A typical evolution would be an organizing campaign, a workforce affirming they want the union to serve as their collective bargaining representative via an election, a certification of an election and an election bar, bargaining, and if necessary, invocation of the MMC. Because of the history between these two parties the MMC negotiations ran in parallel to an organizing campaign. In this instance the alleged unfair labor practices committed in the course of the election campaign and decertification have been litigated and resolved separately

from this case. *This* matter is about whether the MMC contract can serve as the basis for a makewhole calculation for surface bargaining, and unless there is something deficient about the MMC contract process or in the particular contract itself, there is no reason it should not be the measure, in this case or in others.

MEMBERS LIGHTSTONE AND FLORES, dissenting:

It is well-established under the Board's precedents that, when determining the amount of bargaining makewhole owed to agricultural employees as a remedy for an employer's bargaining violation, the Board will not base makewhole on a contract that was preceded by an unremedied bargaining violation. In this case, the Board is called upon to decide whether that general rule applies when the contract in question was arrived at through the mandatory mediation and conciliation (MMC) process. The Board majority in this case finds that the MMC contract between respondent Gerawan Farming, Inc. (Gerawan) and charging party United Farm Workers of America (the UFW), which was ordered into effect pursuant to the MMC process, but which was never implemented, should provide the measure for makewhole in this case, although it was immediately preceded by Gerawan's serious and unremedied surface bargaining violation. For the reasons set forth below, we respectfully disagree and dissent from the majority's decision.

When calculating the amount of an award of makewhole, the Board has consistently held that a contract should not be used as the basis of the calculation where

the contract was preceded by an unremedied bargaining violation, whether that violation consisted of an outright refusal to bargain or bad faith surface bargaining. (*J.R. Norton Co, Inc*. (1984) 10 ALRB No. 42, pp. 14-15; *Abatti Farms, Inc*. (1988) 14 ALRB No. 8, pp. 32-33; *Hess Collection Winery* (2005) 31 ALRB No. 3, pp. 6-7; *San Joaquin Tomato Growers, Inc*. (2012) 38 ALRB No. 4, pp. 14-15.) This rule applies even when the contract in question is the parties' own subsequent contract.

The basis of the Board's exclusion of these contracts is the long-recognized fact that bargaining violations tend to diminish support for the union among employees, leading to a weakening of the union's bargaining power. The Board stated this principle in *Abatti Farms, Inc*., *supra,* 14 ALRB No. 8 where the Board rejected the use of a contract that the parties signed after the makewhole period had concluded when the employer had resumed good faith bargaining. The Board concluded that "the refusal to bargain itself affects the parties' bargaining positions." (*Id*. at pp. 32-33.) When the employer thwarts the bargaining process, "[e]mployee interest can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining . . .. Thus the employer may reap a second benefit from [its] original refusal to comply with the law: [it] may continue to enjoy lower labor expenses either because the union is gone or because it is too weak to bargain effectively.[1] (*Id*. at p. 33, quoting *International Union*

[1] The Board's citation to the increased likelihood that the union will be "gone" as a result of the corrosive effect of a refusal to bargain in good faith is particularly prescient in this case. Fewer than 11 months after Gerawan's surface bargaining began, the UFW was indeed "gone," having been ousted through a decertification petition.

of Electrical, Radio and Machine Workers, ALF-CIO (Tiidee Products, Inc.) v. NLRB (D.C. Cir. 1970) 426 F.2d 1243, 1249 (bracketed material added).)

In this case, Gerawan was found to have engaged in unlawful surface bargaining prior to the creation of the contract that it proposes to use for makewhole calculation.[2] Under these circumstances, the rule of the above-cited cases would ordinarily apply and the contract would be excluded as a basis for calculating makewhole. However, the Gerawan/UFW contract was created, not through the normal "voluntary" bargaining process, but through the MMC process. In the Board majority's view, this fact distinguishes this case from cases where the Board has excluded post-violation "voluntary" contracts.

The majority correctly points out that the MMC statute contains procedural safeguards designed to prevent the mediator from acting in an arbitrary manner or from basing the MMC report on improper considerations. These include giving the parties the opportunity to present evidence to the mediator, to present arguments concerning the other party's evidence and proposals, and to cross-examine adverse witnesses. (Board reg. 20407, subd. (a)(4).) The mediator is required to base all determinations on the record and to apply the factors stated in Labor Code section 1164, subdivision (e) which consist of "factors commonly considered in similar proceedings," including the

[2] The majority notes that the Board's bad faith findings in this case were limited to conduct occurring in bargaining sessions outside the presence of the MMC mediator. We need not and do not rely on MMC bargaining conduct in reaching our conclusions herein.

employer's financial condition, wages, benefits, and terms and conditions of employment contained in comparable collective bargaining agreements and prevailing among comparable employers, and the average prices of goods and services and cost of living in the relevant area. (Lab. Code, § 1164, subd (e).)[3] The majority concludes that these safeguards insulate the parties from arbitrary or unfair action. Furthermore, the majority cites the fact that the UFW did not seek to appeal the mediator's decision to the Board and filed a superior court action seeking to have the MMC contract implemented, positions that the majority finds inconsistent with the UFW's current position.

We acknowledge the procedural safeguards built into MMC and affirm their essential role in achieving the objectives of the MMC statute. However, as well-suited as these procedures may be to carrying out the purposes of MMC, we do not agree that those contract-creation procedures perform a function that they were never intended to perform: remedying the effects of unfair labor practices.

One of the core policy objectives of the ALRA is to protect the right of agricultural employees to collectively negotiate the terms and conditions of their employment and to be free of interference, restraint, and corrosion in the exercise of that right. (Lab. Code, § 1140.2.) Towards this, the Act authorizes the Board to make employees whole for their economic losses when employers engage in unlawful bad faith bargaining. (Lab. Code, § 1160.3). Separately, under prescribed circumstances, the Board

[3] The Board's regulations also set forth these factors. (Board reg. 20407, subd. (b).)

is authorized to order parties to participate in mandatory mediation and conciliation (MMC) as a means to forge a first contract. (Lab. Code, § 1164 et seq.)

Bargaining makewhole and MMC share many of the same underlying policy goals, but they are distinct in their application and functions. An award of bargaining makewhole under Labor Code section 1160.3 is designed to remedy the effects of unlawful bad faith bargaining. Through the makewhole remedy, the Board seeks to make workers whole by providing them with the benefits they would have received under a collective bargaining agreement had the employer not unlawfully bargained in bad faith. The makewhole remedy does not create a contract – that is not its purpose. Rather, it, along with the Board's non-monetary remedies, is designed to both compensate employees for the economic losses caused by unlawful bargaining practices and to encourage collective bargaining by "reduc[ing] the employer's financial incentive for refusing to bargain in order to avoid the expenses [it] would be required to pay if [it] had entered into a collective bargaining agreement." (*Bertuccio v. ALRB* (1988) 202 Cal.App.3d 1369, 1390-1391.)

The MMC process has objectives that are complementary but, in important ways, distinct from makewhole. Through MMC, the ALRA seeks to "build a labor negotiation relationship between the parties" by "accomplish[ing] the creation of the first contract" and "further[ing] negotiations between the parties in the future." (*Gerawan Farming, Inc*. (2013) 39 ALRB No. 13, p. 7.) Through the creation of a first contract, MMC seeks "to change attitudes toward collective bargaining by compelling the parties to operate for at least one term with . . . a collective bargaining agreement" in the

expectation that "employers who have been resistant to collective bargaining will learn that collective bargaining can be mutually beneficial." (*Hess Collection Winery v. ALRB* (2006) 140 Cal.App.4th 1584, 1600-1601.) In a mirror image of makewhole, which compensates employees for the economic harms caused by unlawful behavior but does not create a contract, MMC creates a first contract but is not designed to remedy unfair labor practices or compensate employees for the effects of unfair labor practices.

Indeed, the Board has recognized that MMC mediators are *prohibited* from attempting to provide remedies for unfair labor practices, as such remedies lie within the exclusive provenance of the Board under Labor Code section 1160.3. (*Gerawan Farming, Inc*. (2018) 44 ALRB No. 1, p. 56 ["The mediator's authority in the MMC process is limited to resolving the final terms of a collective bargaining agreement regarding mandatory subjects of bargaining" and the mediator "has no authority under the MMC process to order unfair labor practice remedies; that authority remains exclusively with the Board"]; *Arnaudo Brothers, LP* (2014) 40 ALRB No. 7, pp. 6-8 [mediator was not permitted to rely on matters of representation, such as his views concerning whether employees might continue to support the union, when ruling on contract terms, as such matters were within the Board's exclusive jurisdiction and not appropriate factors for the mediator to consider].)

This is not to say that the application of MMC has no effect on the harms caused by bad faith bargaining. The MMC process is designed to address the problem of bad faith bargaining in a broad sense. Because many employers were refusing to come to the table and bargain in good faith, many employees were "languish[ing] without the

negotiated contracts they . . . elected to secure" while "negotiations for union contracts drag[ged] on without hope of progress." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1156 (2001–2002 Reg. Sess.) as amended Aug. 30, 2002, p. 7.) The MMC statute addresses this problem by creating an expedited process that results in a first contract. However, that the MMC process combats bad faith bargaining through the creation of first contracts does not mean that the process is designed or intended to redress the effects of past bargaining violations in specific cases, or that it actually accomplishes those ends. Given that the MMC process is neither designed to remedy the effects of unfair labor practices, nor are MMC mediators permitted to even attempt to provide such remedies, we do not agree that the Board should assume that the application of the MMC process expunges the recognized effects of bad faith bargaining so that the resulting contract should be viewed as immune from those effects.

The majority asserts that there is nothing in the record establishing that Gerawan's prior bad faith bargaining infected or tainted the MMC process in a manner that would render the resulting contract unreliable as a measure of makewhole. However, in the Board's prior cases rejecting post-violation "voluntary" contracts, the Board did not examine the particular terms of the contracts or the process through which they were negotiated but relied on the known effects of bad faith bargaining. We find the majority's approach inconsistent with precedent and do not agree that the Board should accept the risk that its makewhole award perpetuates the known effects of unlawful conduct unless the record discloses the particular manner in which the conduct impacted the proceedings

or the contract terms.[4] (*William Dal Porto & Sons, Inc. v. ALRB* (1987) 191 Cal. App.3d 1195, 1207 ["The effect on the bargaining process of an unfair labor practice [is often] difficult if not impossible to ascertain" and "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"]; *J.R. Norton Co, Inc., supra,* 10 ALRB No. 42, p. 15 ["We do not feel it is appropriate to take into account a variable which is attributable to the employer's unlawful act"].)

The majority cites the fact that, in the Gerawan MMC case, the UFW did not challenge the MMC report before the Board and later asked a superior court for an order implementing the contract. The majority views these actions as inconsistent with the UFW's current position. We note, however, that just as the UFW previously argued that the contract should be implemented, Gerawan previously took the position that the contract and the MMC process itself was invalid and unconstitutional. We do not find reliance on the parties' litigation choices in the MMC case to be a useful means for determining whether the Board should use the contract to calculate makewhole. This is particularly so given the complex and multifaceted context within which those litigation

[4] We note, however, that the use of the MMC contract as the measure of makewhole in this case is expected to produce a makewhole amount dramatically lower than the amount that would be produced through the contract averaging method, a method that the Board has found to be reasonable in other cases. That difference is largely due to the fact that the MMC contract lacked health benefits, even though the mediator agreed that health benefits are "customary" in UFW contracts. Thus, the fact is that Gerawan's egregious bad faith bargaining was followed by a contract that diverged sharply from the industry standard in a manner that heavily favored the employer. We are not willing to assume that the effects of the violation played no role in producing this result.

choices were made, featuring the intersection of unfair labor practice allegations, MMC proceedings, and a decertification election.

Furthermore, we do not agree that the UFW's positions in the MMC case are inconsistent with its present position. As the majority notes, the grounds on which a party may appeal an MMC contract are highly constrained. (Lab. Code, § 1164.3, subds. (a), (e).) We do not believe that the Board must accept the conclusion that the MMC contract was unaffected by Gerawan's prior violation because the UFW, for reasons of its own, chose to challenge or not to challenge particular provisions of the contract within that limited framework. Likewise, we do not believe the UFW's effort to implement the contract (the alternative being no contract at all) is inconsistent with the conclusion that the use of the contract averaging method is preferable to the use of a contract created in the context of unremedied bargaining violations. Whether an MMC contract should be implemented at the conclusion of the MMC process and whether that contract should be used to calculate makewhole are different questions with potentially different answers.

None of the foregoing should be construed as undermining or devaluing the MMC process. MMC is a critical tool for counteracting a problem that has been far too prevalent in the history of the Act: employers preventing the negotiation of first contracts by refusing to bargain or engaging in bad faith bargaining. However, it is no slight against the MMC process to acknowledge that it does not perform a function that it is not designed or intended to perform: expunging the effects of unfair labor practices. For this reason, we conclude that the Gerawan/UFW contract's status as an MMC-created contract does not justify diverging from the Board's established precedent that a contract

created in the shadow of an unremedied bargaining violation should not be used to calculate the makewhole remedy for that violation. Thus, we respectfully dissent from the majority and would affirm the ALJ's decision approving the use of the contract averaging method in this case.

CASE SUMMARY

GERAWAN FARMING, INC.
(United Farm Workers of America)

Case Nos. 2012-CE-041-VIS
2013-CE-007-VIS
2013-CE-010-VIS
44 ALRB No. 1
49 ALRB No. 2

Background

In *Gerawan Farming, Inc*. (2018) 44 ALRB No. 1, the Board found that Gerawan Farming, Inc. (Gerawan) violated the Agricultural Labor Relations Act (ALRA or Act) by engaging in bad faith "surface bargaining" during the period from January 2013 to August 2013. The Board ordered a bargaining makewhole remedy be paid to Gerawan's agricultural employees who worked during the period January 18, 2013, to June 30, 2013. The matter was released to the Board's Visalia Regional Office for compliance with the Board's order on October 30, 2020.

On December 13, 2021, the Regional Office issued a makewhole specification setting forth a makewhole amount of $4,867,702.54, plus interest, payable to 4,636 employees. The formula used to calculate this amount was based on average wages and benefits found in 23 collective bargaining agreements between charging party United Farm Workers of America and various employers that were in effect during the makewhole period. Gerawan's January 24, 2022 answer to the makewhole specification opposed the Region's method of calculating the bargaining makewhole remedy, and argued that the terms of the parties' 2013 mandatory mediation and conciliation (MMC) contract supplied most reasonable measure of makewhole owed the workers.

ALJ Decision

The administrative law judge (ALJ) issued a recommended decision on January 20, 2023. The ALJ found the Regional Director met her burden of establishing that the makewhole formula used to calculate the remedy was reasonable, and that Gerawan failed to meet its burden of showing that the Regional Director's formula was unreasonable, arbitrary, or inconsistent with Board precedent. The ALJ also concluded that Gerawan failed to establish that there was a more appropriate method of calculating bargaining makewhole. The ALJ rejected Gerawan's arguments urging use of the MMC contract. The ALJ concluded that the MMC contract, which had an effective date of July 1, 2013, was not a comparable contract for the purposes of calculating the makewhole remedy because it was not in effect during the makewhole period. The ALJ also found the Board's bad faith bargaining findings against Gerawan in the Board's underlying decision (44 ALRB No. 1) tainted the MMC contract and rendered it unreliable as a basis for measuring makewhole.

Board Decision

The Board reversed the ALJ and concluded that the MMC contract provides the most appropriate and reasonable measure of makewhole in this case. The Board found that the MMC contract covers a timeframe sufficiently related to the makewhole period. The Board further concluded that Gerawan's prior bad faith bargaining tactics did not foreclose the use of the MMC contract as the makewhole measure. The Board reasoned that the MMC process, as set forth in statute and implementing regulations, includes numerous safeguards and protections to foreclose the undue effects of an employer's bad faith negotiating tactics, equalize the parties' bargaining strength, and ensure a level playing field to enable the efficient conclusion of a collective bargaining agreement. Therefore, the Board found the MMC contract distinguishable from a contract voluntarily entered into by parties after bad faith bargaining for purposes of calculating a makewhole award. Moreover, Board precedent is clear that contract averaging is appropriate for purposes of calculating makewhole only after it is found there are no comparable contracts. The Board remanded the matter to the Region for issuance of a revised bargaining makewhole specification calculated in accordance with its Decision.

Dissent:

Members Lightstone and Flores dissented from the majority opinion, arguing that it was well-established that the Board will not base the calculation of makewhole on a contract that followed an unremedied bargaining violation. The question was whether the fact that the post-violation contract in this case was created through the MMC process justified departing from that rule. Members Lightstone and Flores concluded that the general rule should apply. Although the MMC process contains procedural safeguards designed to ensure that the mediator bases the MMC report on the record and does not rely on arbitrary or improper considerations, MMC is not designed or intended to remedy the effects of past bargaining violations in specific cases and, in fact, the mediator is prohibited from attempting to remedy unfair labor practices. Given this, the Board should not assume that contracts created through MMC are immune from the effects of prior bargaining violations. Thus, members Lightstone and Flores would have affirmed the Administrative Law Judge's decision approving the use of the contract averaging method in this case.

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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**

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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
(Code Civ. Proc., §§ 1013a, 1013b, 2015.5)

Case Name: 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)

I am over the age of 18 years and not a party to this action. I am employed in the County of Sacramento. My business address is 1325 J Street, Suite 1900-B, Sacramento, California 95814.

On June 22, 2023, I served this **DECISION AND ORDER** on the parties in this action as follows:

- **By Email** to the parties pursuant to Board regulation 20169 (Cal. Code Regs., tit. 8, § 20169) from my business email address lori.miller@alrb.ca.gov:

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Executed on June 22, 2023, at Sacramento, California. I certify under penalty of perjury that the foregoing is true and correct.

Lori A. Miller
Legal Secretary