Watsonville, CA

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PREMIERE RASPBERRIES, LLC,	)	Case No. 2018-CE-004-SAL
	)	
Respondent,	)	
	)	
and,	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	44 ALRB No. 9
	)	
Charging Party.	)	(August 29, 2018)
	)	

DECISION AND ORDER

This is a technical refusal to bargain case that comes before the Agricultural Labor Relations Board (ALRB or Board) on a Stipulation of Facts under which the parties agreed to waive their rights to a hearing provided by section 1160.2 of the Agricultural Labor Relations Act (ALRA or Act).[1]

Background

On August 2, 2017, the United Farm Workers of America (UFW) filed a petition for certification to represent workers at Premiere Raspberries, LLC (Premiere). The election was held on August 9, 2017, and the tally of the ballots was as follows:

Petitioner (UFW)	269
No Union	236
Void	3
Unresolved Challenged Ballots	12
Total Valid Ballots Cast	517

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

Following the election, Premiere filed four election objections alleging misconduct by the UFW and its agents pursuant to Board regulation 20365. The Board dismissed all four objections in *Premiere Raspberries, LLC* (2017) 43 ALRB No. 2. Premiere thereafter requested reconsideration of that decision, which the Board denied in *Premiere Raspberries, LLC* (Dec. 6, 2017) ALRB Admin. Order No. 2017-20. The UFW was certified as the exclusive bargaining representative of Premiere's agricultural employees effective December 6, 2017.[2]

On December 7 and 20, 2017, the UFW requested bargaining with Premiere. Counsel for Premiere responded on December 29, 2017, informing the UFW that it was engaging in a technical refusal to bargain in order to obtain judicial review of the Board's Decision in *Premiere Raspberries, supra,* 43 ALRB No. 2.

Discussion

Premiere urges the Board to reconsider its decision in the underlying representation case. The Board has considered the stipulations of the parties and their briefs, and finds no basis for reconsidering that decision.

This Board has consistently followed the practice of the National Labor Relations Board (NLRB) in proscribing the litigation in unfair labor practice proceedings of matters previously resolved in representation proceedings, absent a showing of newly

[2] The ALRB's Executive Secretary previously had issued a certification on October 11, 2017, following the Board's decision in 43 ALRB No. 2. However, the Board stayed the certification pending a decision on Premiere's reconsideration motion. (*Premiere Raspberries, LLC* (Oct. 27, 2017) ALRB Admin. Order No. 2017-15, p. 2; Cal. Code Regs., tit. 8, §§ 20380, subd. (b), 20393, subd. (c).)

discovered or previously unavailable evidence or other extraordinary circumstances. (*Artesia Dairy* (2007) 33 ALRB No. 6, p. 4, overruled on other grounds in *Artesia Dairy v. ALRB* (2008) 168 Cal.App.4th 598; *San Joaquin Tomato Growers, Inc*. (1994) 20 ALRB No. 13, p. 3; *Limoneira Company* (1989) 15 ALRB No. 20, p. 3; *Pleasant Valley Vegetable Co-op* (1986) 12 ALRB No. 31, p. 9; *Adamek &Dessert, Inc*. (1985) 11 ALRB No. 8, p. 7; *Ron Nunn Farms* (1980) 6 ALRB No. 41, pp. 3-4; *Charles Malovich* (1980) 6 ALRB No. 29, p. 3; see also *West Suburban Hosp*. (1977) 227 NLRB 1351, 1352 [technical refusal case is not a forum to litigate issues that were or could have been raised in the earlier representation proceeding].)

In asking the Board to reconsider its decision here, Premiere offers no newly discovered or previously unavailable evidence in support of its claims. Rather, Premiere reiterates arguments that the Board previously considered and resolved in its prior decision in 43 ALRB No. 2 and subsequent order denying Premiere's request for reconsideration of that decision. As Premiere has not shown any new evidence or demonstrated "extraordinary circumstances" justifying litigation of the earlier representation case, we will not reconsider it here.

Premiere's admitted refusal to bargain with the UFW, the certified bargaining representative of its agricultural employees, is a violation of Labor Code section 1153, subdivisions (e) and (a).

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Bargaining Makewhole

Labor Code section 1160.3 provides in relevant part that the Board may order an employer to make its employees whole for any loss of pay resulting from the employer's unlawful refusal to bargain "when the board deems such relief appropriate." This bargaining makewhole remedy compensates employees for the differential between their actual wages and benefits and the wages and benefits they would have earned under a contract resulting from good faith bargaining between their employer and their union. In *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, 39, the California Supreme Court found that the Board, in considering whether to award bargaining makewhole in a technical refusal case, must determine:

> … from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted.

The California Supreme Court in *George Arakelian Farms, Inc. v. ALRB* (1985) 40 Cal.3d 654, 664, approved the Board's post-*J.R. Norton* test for determining the appropriateness of the makewhole remedy in technical refusal to bargain cases, which requires "consideration of both the debatable merit of the employer's election challenge and the employer's motive for seeking judicial review." The Board has stated "[m]akewhole relief is appropriate when an employer, in deciding to contest the validity of a certification adopts a litigation posture which is either unreasonable or not pursued in good faith." *(S & J Ranch, Inc*. (1986) 12 ALRB No. 32, pp. 5-6, citing *J.R. Norton Co*. (1980) 6 ALRB No. 26, p. 3.) Thus, the employer's litigation posture must be both

reasonable and in good faith." (*Holtville Farms, Inc*. (1981) 7 ALRB No. 15, p. 6, emphasis in original.) In this respect, the Board has recognized "that an employer may act in good faith, while not having a reasonable basis for his position. An employer may also offer a reasonable basis, while not acting in good faith as shown by the totality of circumstances." (*Ibid*., quoting *J.R. Norton Co*., *supra*, 6 ALRB No. 26, p. 3.)[3]

Turning first to the issue of good faith, we note that Premiere notified the UFW early on that it intended to engage in a technical refusal to bargain to contest the Board's certification order. The Board has found this type of candid conduct indicative of an employer's good faith. (See *Artesia Dairy* (2007) 33 ALRB No. 6, p. 8, overruled on other grounds in *Artesia Dairy v. ALRB* (2008) 168 Cal.App.4th 598; *Pleasant Valley Vegetable Co-op*, *supra*, 12 ALRB No. 31, p. 11.) As the record before the Board contains no evidence suggesting bad faith on the part of Premiere, we now turn to the issue of the reasonableness of Premiere's litigation position. (*Artesia Dairy*, *supra*, 33 ALRB No. 6, p. 8; *S & J Ranch*, *supra*, 12 ALRB No. 32, p. 6.)

Premiere primarily disputes the Board's application of *Mann Packing Co., Inc*. (1989) 15 ALRB No. 11 in dismissing its election objections alleging the UFW or its agents offered money or other financial incentives in exchange for votes. In that case this

[3] While asking for makewhole relief, neither the General Counsel nor UFW provide any substantive argument on the issue. Nevertheless, the Board has authority to consider the issue of makewhole *sua sponte*. (*D. Papagni Fruit Co*. (1985) 11 ALRB No. 38, pp. 5-7; *Pleasant Valley Vegetable Co-op* (1986) 12 ALRB No. 31, p. 10, fn. 6; *S & J Ranch*, *supra*, 12 ALRB No. 32, p. 5, fn. 7; *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 233-234 ["While the general counsel does have final authority with respect to the investigation and prosecution of unfair labor practice charges, it is the Board's responsibility to decide the merits of the case and to fashion an appropriate remedy"].)

Board followed the rule adopted by the NLRB refusing to allow parties to litigate in representation proceedings issues that were the subject of unfair labor practice allegations that were dismissed by the General Counsel. (*Times Square Stores Corp*. (1948) 79 NLRB 361, 365.) Indeed, to allow the parties to do so would, as the NLRB found, "create the undesirable situation of the Board's acting in practice as a forum for considering the content of charges which the General Counsel, for reasons satisfactory to himself, has thought it proper to dismiss," in derogation of the General Counsel's final authority over the investigation and prosecution of unfair labor practice charges. (*Ibid*.; see *Martinolich Ship Repair Co*. (1955) 111 NLRB 761, 762.) The NLRB has long adhered to this rule (see, e.g., *New Process Co*. (1988) 290 NLRB 704, 713; *Jefferson Ready Mix & Material, Inc*. (1987) 284 NLRB 977, 978, fn. 2; *Service Employees' Int'l Union* (1974) 211 NLRB 982; *Capital Records, Inc*. (1957) 118 NLRB 598, 599; *Dixie Lou Frocks, Inc*. (1957) 117 NLRB 1583, 1585), which has been upheld by the federal courts. In *Lawrence Typographical Union v. McCulloch* (D.C. Cir. 1965) 349 F.2d 704, 707-708, the court concluded that the NLRB's refusal to consider evidence in a representation proceeding that formed the basis of dismissed unfair labor practice charges was not unconstitutional and did not violate any provision of the National Labor Relations Act (NLRA).

This Board has denied prior requests that it reconsider *Mann Packing Co*. (See *Gallo Vineyards, Inc*. (2008) 34 ALRB No. 6, p. 14; *Richard's Grove & Saralee's Vineyard, Inc*. (2007) 33 ALRB No. 7, pp. 2-3.) The Board in *Richard's Grove*, 33 ALRB No. 7, p. 5, reiterated:

> The import of the *Times Square Stores* and *Mann Packing Co., Inc*. cases is that in representation proceedings the Board will defer to the General Counsel's resolution of the investigation of an unfair labor practice charge where the merits of the issues necessarily decided by the investigation also are determinative of the merits of related issues in the representation case.

Thus, "in those instances where alleged misconduct prior to an election by its nature also would constitute an unfair labor practice if it in fact occurred, the General Counsel's refusal to issue a complaint based on insufficient evidence to substantiate the alleged conduct would preclude litigation of that issue in an election objection proceeding." (*Richard's Grove*, *supra*, 33 ALRB No. 7, at p. 5.) The Board similarly found in *Gallo Vineyards, Inc*., *supra*, 34 ALRB No. 6, p. 4, that "the General Counsel's refusal to issue a complaint regarding an unfair labor practice charge precludes litigation of the issues raised in those dismissed charges in a representation proceeding."

Premiere's first two election objections allege the UFW, through its agents, offered or provided money or other financial incentives to workers if they voted for the UFW. This conduct also formed the basis for an unfair labor practice charge (no. 2017-CL-008-SAL) filed by Premiere, which alleged the UFW's agents paid or offered to pay workers to vote for the UFW. The General Counsel dismissed that charge and refused to issue a complaint. Consideration of Premiere's mirror objections necessarily would have resulted in the litigation of allegations disposed of by the General Counsel, consistent with her final authority over the investigation of unfair labor practice allegations under Labor Code section 1149. The Board's application of *Mann Packing Co*. in these circumstances was consistent with longstanding precedent. There is no legal basis independent of the mirror unfair labor practice allegations dismissed by the General

Counsel upon which to find the alleged conduct objectionable. (*Gallo Vineyards, Inc*., *supra*, 34 ALRB No. 6, p. 20-23.)

As for Premiere's third and fourth election objections, both alleging immigration-related threats by UFW agents if workers did not vote for the union, Premiere offers no new evidence in support of those objections. As the Board stated in its prior decision, the Board takes allegations of deportation or immigration-related threats very seriously. (*Premiere Raspberries*, *supra*, 43 ALRB No. 2, p. 9.) However, notwithstanding the undeniable seriousness of the threats alleged, the declarations submitted by Premiere in support of its objections did not establish that the isolated threats were disseminated amongst the workforce or that other employees knew or were aware of the threats. (*Id*. at pp. 10-12.) In other words, Premiere simply failed to state a prima facie case the misconduct alleged was such that a fair election reflective of the *bargaining unit employees'* free choice could not be had. (Cal. Code Regs., tit. 8, § 20365, subds. (c)(2)(B).)

In light of the above, the Board finds an award of bargaining makewhole to be appropriate in this case based on Premiere's unreasonable litigation posture. The Board dismissed its objections concerning the alleged financial incentives offered in exchange for votes in accordance with longstanding ALRB precedent, which itself is based on settled NLRA precedent. "This Board has held that maintaining a litigation posture which conflicts with well-established precedent is generally unreasonable and warrants the imposition of makewhole relief." (*D. Papagni Fruit Co*., *supra*, 11 ALRB No. 38, p. 11; see *Gerawan Farming, Inc. v. ALRB* (2017) 3 Cal.5th 1118, 1155 [Board's

longstanding construction of the law entitled to deference]; see also *Arnaudo Brothers, LP v. ALRB* (2018) 22 Cal.App.5th 1213, 1226 ["'precedent' may be established by the United States Supreme Court, federal appellate courts, or the [NLRB]"]; Lab. Code, § 1148.) Premiere's other objections failed to satisfy the basic evidentiary requirements necessary to state a prima facie case warranting a hearing, and the Board appropriately dismissed them as mandated by Board regulation 20365, subdivision (d).

Accordingly, the Board awards bargaining makewhole relief for the period running from December 29, 2017, when Premiere first notified the UFW of its refusal to bargain, until the effective date of the mandatory mediation and conciliation (MMC) contract ordered into effect by the Board's decision and order in *Premiere Raspberries, Inc*. (2018) 44 ALRB No. 8 (August 27, 2018).[4]

ORDER

By authority of Labor Code section 1160.3, the Board orders that, Respondent, Premiere Raspberries, LLC, its officers, agents, successors, and assigns shall:

Cease and desist from:

(a) Failing or refusing to meet and to bargain collectively in good faith, as defined in section 1155.2, subdivision (a) of the Agricultural Labor Relations Act (Act),

[4] In determining the length of the makewhole period, the Board concluded that makewhole should terminate as of the effective date of an MMC contract that had been ordered into effect in a final Board order. (*Arnaudo Bros, LP and Arnaudo Bros., Inc*. (2018) 44 ALRB No. 7, p. 8; *Gerawan Farming, Inc*. (2017) 43 ALRB No. 1 p. 59.)

with the United Farm Workers of America (UFW) as the certified exclusive bargaining representative of its agricultural employees; and

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed them by section 1152 of the Act.

Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Meet and bargain collectively in good faith with the UFW, as the exclusive collective bargaining representative of its agricultural employees and, if agreement is reached, embody such agreement in a signed contract;

(b) Make whole its agricultural employees for the losses they suffered as a result of the failure to bargain beginning December 29, 2017 until August 27, 2018.

(c) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purposes set forth in this Order;

(d) Provide a copy of the attached Notice in the appropriate language(s) to each agricultural employee hired by Respondent during the 12-month period following the date this Order becomes final;

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when directed by the Regional Director, to all agricultural employees employed by Respondent during the period January 1, 2018 to August 31, 2018.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days, in conspicuous places on its property, the exact period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed. Pursuant to the authority granted under Labor Code section 1151, subdivision (a), give agents of the Board access to its premises to confirm the posting of the attached Notice;

(g) Arrange for a representative of Respondent or Board agents to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent(s) shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all non-hourly employees in order to compensate them for time lost at this reading and during the question-and-answer period; and

(h) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

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Upon request of the Regional Director, provide any records necessary to verify compliance with the terms of this Order.

DATED: August 29, 2018

GENEVIEVE A. SHIROMA, Chairwoman

CATHRYN RIVERA-HERNANDEZ, Member

ISADORE HALL III, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. The Board found that we did violate the Agricultural Labor Relations Act (Act) by refusing to bargain in good faith with the United Farm Workers of America regarding a collective bargaining agreement. The ALRB has told us to post and publish this Notice. We shall do what the ALRB has ordered us to do.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California the following rights:

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the ALRB;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT interfere with, restrain or coerce employees from exercising the rights listed above.

WE WILL bargain in good faith with the United Farm Workers as your collective bargaining representative about a contract governing your wages, hours, and conditions of employment.

DATED: _____ PREMIERE RASPBERRIES, LLC

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 342 Pajaro Street, Salinas, CA. The telephone number is (831) 769-8031.

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

PREMIERE RASPBERRIES, LLC
(Respondent)

Case No. 2018-CE-004-SAL

44 ALRB No. 9

United Farm Workers of America
(Charging Party)

Following a representation petition filed by the United Farm Workers of America (UFW) to represent workers at Premiere Raspberries, LLC (Premiere), the Agricultural Labor Relations Board (ALRB or Board) held an election on August 9, 2017. The ballot count showed that a majority of employees voted in favor of representation by the UFW. Premiere filed four election objections. The Board dismissed all four objections in *Premiere Raspberries, LLC* (2017) 43 ALRB No. 2. Premiere thereafter requested reconsideration of that decision, which the Board denied in *Premiere Raspberries, LLC* (2017) ALRB Admin. Order No. 2017-20. After the Board certified the UFW as the exclusive bargaining representative, the UFW requested bargaining with Premiere. Premiere responded that it was engaging in a technical refusal to bargain in order to obtain judicial review of the Board's Decision in *Premiere Raspberries, supra*, 43 ALRB No. 2.

The ALRB's General Counsel issued a complaint alleging that Premiere refused to bargain with the UFW in violation of the Agricultural Labor Relations Act (ALRA or Act). The parties entered into a Stipulation of Facts and agreed to waive their rights to a hearing provided by section 1160.2 of the Act.

The Board found that Premiere had not shown any new evidence or demonstrated "extraordinary circumstances" justifying reconsideration of the earlier representation case. The Board found that Premiere's admitted refusal to bargain with the UFW was a violation of Labor Code section 1153, subdivisions (e) and (a). The Board ordered bargaining makewhole as a remedy for the violation, finding that while the record contained no evidence that Premiere was seeking judicial review in bad faith, Premiere's litigation posture was unreasonable.

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