



1-1-1979

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Recommended Citation

John A. Schlosser, Comment, *The Make-Whole Remedy: California's Agricultural Labor Relations Board Deals with Refusals to Bargain*, 19 SANTA CLARA L. REV. 1093 (1979).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol19/iss4/10>

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THE MAKE-WHOLE REMEDY: CALIFORNIA'S AGRICULTURAL LABOR RELATIONS BOARD DEALS WITH REFUSALS TO BARGAIN

INTRODUCTION

Since April 26, 1978,¹ the California Agricultural Labor Relations Board (hereinafter ALRB or Board) has been exercising the express authority granted to it under the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975² (hereinafter ALRA or Act) to invoke a unique and powerful remedy in cases where employers of organized farm workers have unlawfully refused to bargain with a certified bargaining representative. Section 1160.3 of the ALRA provides, in relevant part:

If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, *and 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.³

Under this section, the ALRB has been ordering employers to compensate their employees for economic losses incurred as a result of being denied an opportunity to participate in, or benefit from, collective bargaining.⁴ This has become known as the

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1. On that date, the California Agricultural Labor Relations Board handed down the two landmark decisions that form the foundation for this comment: *Adam Dairy*, 4 A.L.R.B. No. 24 (Apr. 26, 1978) and *Perry Farms, Inc.*, 4 A.L.R.B. No. 25 (Apr. 26, 1978) *rev'd and remanded*, 86 Cal. App. 3d 448, 150 Cal. Rptr. 495 (1978).

2. CAL. LAB. CODE §§ 1140-1166.3 (West Supp. 1979).

3. CAL. LAB. CODE § 1160.3 (West Supp. 1979) (emphasis added).

4. Section 1153 of the ALRA provides: "It shall be an unfair labor practice for an agricultural employer to do any of the following: . . . (e) To refuse to bargain collectively in good faith with labor organizations certified pursuant to [the Act]" CAL. LAB. CODE § 1153 (West Supp. 1979).

The ALRB has found violations of § 1153(e) and has ordered the make-whole remedy in at least 12 cases since *Adam Dairy* and *Perry Farms*: *Sunnyside Nurseries, Inc.*, 5 A.L.R.B. No. 23 (Mar. 27, 1979); *John F. Adam, Jr.*, 4 A.L.R.B. No. 76 (Oct.

“make-whole” remedy.

A controversy exists with regard to the application of this remedy. Critics of the Board policy, including the grower/employers, argue that precise legislative intent is difficult to ascertain and that the language of the statute is ambiguous. They believe that the make-whole remedy should be more discriminately applied in cases involving a refusal to bargain. The ALRB and the farm workers' representatives, on the other hand, view the current policy of awarding make-whole as completely within the statutory scheme and necessary for the effectuation of the purposes of the Act. Additional confusion has resulted because the ALRB is directed to follow the applicable precedents of the National Labor Relations Act⁵ (hereinafter NLRA), which has no explicit authority to make employees whole in similar cases.⁶

The Supreme Court of the State of California has agreed to hear two companion cases in which the ALRB's application of the make-whole remedy is at issue.⁷ These cases will require the court to address roughly four recurring criticisms of the Board's practices. Critics contend, first, that the Board is abusing its discretion by failing to distinguish the cases where an employer refuses to bargain in order to challenge Board certification of a union as the bargaining agent⁸ from those cases where an employer is merely seeking to delay bargaining by whatever means are available. This lack of discrimination, it

20, 1978); Robert H. Hickam, 4 A.L.R.B. No. 73 (Oct. 19, 1978); Romar Carrot Co., 4 A.L.R.B. No. 56 (Aug. 18, 1978); Kyutoku Nursery, Inc., 4 A.L.R.B. No. 55 (Aug. 8, 1978); George Arakelian Farms, Inc., 4 A.L.R.B. No. 53 (July 21, 1978); C. Mondavi & Sons, 4 A.L.R.B. No. 52 (July 21, 1978); High & Mighty Farms, 4 A.L.R.B. No. 51 (July 22, 1978); Waller Flowerseed Co., 4 A.L.R.B. No. 49 (July 19, 1978); D'Arrigo Bros., 4 A.L.R.B. No. 45 (July 14, 1978); Superior Farming Co., 4 A.L.R.B. No. 44 (July 13, 1978); J.R. Norton Co., 4 A.L.R.B. No. 39 (June 22, 1978).

5. ALRA § 1148 provides: "The board shall follow applicable precedents of the National Labor Relations Act, as amended." CAL. LAB. CODE § 1148 (West Supp. 1979). It should be pointed out that the supreme court has ruled that the ALRB is not bound by any particular practice of the federal agency. *ALRB v. Superior Court*, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183 (1976).

6. Compare CAL. LAB. CODE § 1160.3 (West Supp. 1979) (see text accompanying note 3 *supra*) with 29 U.S.C. § 160(c) (1976).

7. *J.R. Norton Co. v. ALRB*, 4 Civ. 20365, *hearing granted*, Sup. Ct. Case No. L.A. 31027 (Sept. 20, 1978); *High & Mighty Farms v. ALRB*, 4 Civ. 20452, *hearing granted*, Sup. Ct. Case No. L.A. 31030 (Sept. 27, 1978).

8. The text refers to the only route by which an employer may obtain judicial review of Board certification of a bargaining representative. This procedure is discussed more fully in the text accompanying notes 23-28 *infra*. See also CAL. LAB. CODE §§ 1156.3(c), 1160.8 (West Supp. 1979).

is argued, "chills" the employer's right to judicial review.⁹ Second, the award of make-whole, extraordinary remedy that it is, requires a showing of subjective bad faith on the part of the employer who engages in the unfair labor practice merely as a prerequisite for judicial review.¹⁰ Third, applicable precedent of the NLRA prohibits any scheme by which make-whole is ordered in every case where an employer is found to be in violation of the duty to bargain.¹¹ And fourth, the award of make-whole contravenes section 1155.2 of the Act by intruding into the negotiating process.¹²

The purpose of this comment is to explore these challenges to the ALRB procedure and the rebuttals to them. More precisely, it will concentrate on the remedy as it has been applied in cases where the employer commits a "technical" section 1153(e) violation.¹³ The author concludes that the Board policy of ordering the make-whole remedy is both logical and lawful.

THE BOARD'S FIRST IMPRESSION

The ALRB announced its policy for the application of the make-whole remedy in *Adam Dairy*,¹⁴ and *Perry Farms, Inc.*¹⁵ Both cases were decided on the same day. *Adam Dairy* was the first opportunity for the Board to deal with a violation of section 1153(e) of the Act (an unlawful refusal to bargain in good faith).¹⁶ The Board concluded "that the remedy [make-whole] should be applied in any case in which employees suffer a loss of pay as a result of an employer's refusal to bargain."¹⁷ In fact,

9. See notes 33-34 and accompanying text *infra*.

10. See notes 43-64 and accompanying text *infra*.

11. See notes 35-41 and accompanying text *infra*.

12. See notes 66-77 and accompanying text *infra*.

13. A "technical" violation of § 1153(e) is a refusal to bargain intended to trigger judicial review of a board certification. The ALRB cases involving this type of violation are listed in note 4 *supra*. Only *Romar Carrot Co.* and *John F. Adam, Jr.* involve variant § 1153(e) violations. See CAL. LAB. CODE § 1153(e) (West Supp. 1979).

14. 4 A.L.R.B. No. 24 (Apr. 26, 1978).

15. 4 A.L.R.B. No. 25 (Apr. 26, 1978). The order of the ALRB in *Perry Farms, Inc.* was entirely set aside by the court of appeal on Nov. 17, 1978 and the cause remanded to the Board for further proceedings. The court, however, expressed no opinion with respect to the Board's general practice of awarding make-whole. *Perry Farms, Inc. v. ALRB*, 86 Cal. App. 3d 448, 150 Cal. Rptr. 495 (1978).

16. *Adam Dairy* was held to have violated the labor code by its failure to provide information requested by the union for bargaining purposes, numerous unilateral changes in employment practices including pay rate changes and wage increases, failure to make meaningful counter-proposals, and refusal to bargain in good faith. 4 A.L.R.B. No. 24, slip op. at 3-4.

17. *Id.* at 6.

the ALRB has applied the remedy in each and every case since *Adam Dairy and Perry Farms* where it has found a violation of section 1153(e).¹⁸

There are many different situations in which an employer can be found to have violated the proscription against refusing to bargain.¹⁹ Perhaps the least egregious of these is the employer's "technical" refusal to bargain in order to obtain judicial review of the certification process.²⁰ It is the application of the remedy in these cases that has spawned most of the objections. And some of the most thought-provoking criticism has come from within the membership of the Board.²¹

"TECHNICAL" VIOLATIONS AND MAKE-WHOLE

One objection to the invocation of the make-whole remedy was highlighted in an administrative law officer's (ALO) recommendation to the Board in the case of *Superior Farming Co.*²² The recommendation preceded the ALRB's ruling in *Adam Dairy and Perry Farms* and announced that, under the circumstances of *Superior Farming*, the make-whole remedy

18. See generally cases cited note 4 *supra*.

19. See, e.g., note 16 *supra*.

20. See note 8 and accompanying text *supra*.

21. ALRB Member McCarthy has dissented or filed a separate concurring opinion in most cases where the majority invoked make-whole for a violation of labor code § 1153(e). Particularly noteworthy are the McCarthy concurrence in *Perry Farms, Inc.*, 4 A.L.R.B. No. 25, slip op. at 25, and his dissent in *Superior Farming Co.*, 4 A.L.R.B. No. 44, slip op. at 12.

22. No. 77-CE-33-1-D (Dec. 3, 1977) (appended to 4 A.L.R.B. No. 44 (July 13, 1978)). The authority of the ALO comes from § 1142(b) of the Act that provides:

Besides the principal office in Sacramento, as provided in subdivision (a), the board may establish offices in such other cities as it shall deem necessary. The board may delegate to the personnel of these offices such powers as it deems appropriate for the purpose of collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists, to direct an election by a secret ballot pursuant to the provisions of Chapter 5 (commencing with Section 1156), and to certify the results of such election, and to investigate, conduct hearings and make determinations relating to unfair labor practices. The board may review any action taken pursuant to the authority delegated under this section upon a request for a review of such action filed with the board by an interested party. Any such review made by the board shall not, unless specifically ordered by the board, operate as a stay of any action taken. The entire record considered by the board in considering or acting upon any such request or review shall be made available to all parties prior to such consideration or action, and the board's findings and action thereon shall be published as a decision of the board.

CAL. LAB. CODE § 1142(b) (West Supp. 1979).

was not appropriate.²³ The ALO reasoned that a good-faith challenge to Board certification should not warrant the imposition of make-whole.

Superior Farming is distinguishable from other refusal-to-bargain cases that were pending before the ALRB at the time of the recommendation. None of the latter cases²⁴ involved an employer's refusal to bargain in order to obtain judicial review of the Board's certification process as provided in section 1160.8 of the Act.²⁵ The distinction comes to this: the certification process may be challenged by an employer who follows the procedure outlined in section 1156.3(c), that provides, *inter alia*, 1) the employer may petition the Board for a review of the election process within five days after an election, 2) the Board "shall conduct a hearing to determine whether the election shall be certified," and 3) the Board may certify or refuse to certify the results.²⁶ Judicial review of a Board order is provided by section 1160.8 that states, in part: "Any person aggrieved by the *final order* of the board . . . may obtain a review of such order in the court of appeal . . ." ²⁷ The problem is that a Board certification is not considered a "final order" within the meaning of the Act,²⁸ and therefore, an employer must first commit an unfair labor practice and be adjudged guilty of the violation in order to be "aggrieved by the final order of the board . . ." At that point, the court of appeal is expected to review the entire process including the certification procedure. This is also true under the NLRA.²⁹

In order to obtain judicial review of a Board certification, an employer can commit what has been referred to under the NLRA as a "technical" refusal to bargain (*i.e.*, the employer simply refuses to negotiate with the certified bargaining representative). Then, the employer is found to be in violation of the Act, is ordered to cease and desist from further unfair labor

23. No. 77-CE-33-1-D, slip op. at 21 (appended to 4 A.L.R.B. No. 44 (July 13, 1978)).

24. Other refusal-to-bargain cases that were, at the time, pending before the ALRB included: Romar Carrot Co., 4 A.L.R.B. No. 56 (Aug. 18, 1978); Perry Farms, Inc., 4 A.L.R.B. No. 25 (Apr. 26, 1978); and Adam Dairy, 4 A.L.R.B. No. 24 (Apr. 26, 1978).

25. CAL. LAB. CODE § 1160.8 (West Supp. 1979).

26. CAL. LAB. CODE § 1156.3(c) (West Supp. 1979).

27. CAL. LAB. CODE § 1160.8 (West Supp. 1979).

28. *Nishikawa Farms, Inc. v. Mahony*, 66 Cal. App. 3d 781, 136 Cal. Rptr. 233 (1977).

29. 29 U.S.C. §§ 159(c), (d), 160(e), (f) (1976).

practices, and finally (at least in the experience of the ALRB to date) he is ordered to make employees whole for losses occasioned by his unlawful refusal to bargain.³⁰ At this point, the employer "may obtain a review of such order in the court of appeal"³¹ Despite the foregoing, when *Superior Farming* reached the Board, the ALO's analysis of the applicability of make-whole was rejected by a majority of the Board members voting, member McCarthy dissenting.³²

The argument against any wholesale application of make-whole is, that since the employer *must* commit a violation of section 1153(e) in order to challenge Board certification in the courts, it is unfair and in contravention of the underlying purposes of the Act³³ to chill the exercise of this right to judicial review by holding the threat of make-whole over the head of the employer who in good faith seeks to have certification reviewed.³⁴

NLRA Precedent

It is precisely this argument that created a stir among commentators, jurists, and the NLRB about a decade ago.³⁵ The problem was stated in terms of the lack of remedial power afforded the NLRB in cases where an employer sought to undermine or defeat a union by delaying the bargaining process as long as possible.³⁶ One method used by the recalcitrant employer was to drag the certification procedure through the courts.³⁷ The Court of Appeals for the District of Columbia, in *International Union of Electrical, Radio and Machine Workers*

30. CAL. LAB. CODE § 1160.3 (West Supp. 1979).

31. CAL. LAB. CODE § 1160.8 (West Supp. 1979).

32. 4 A.L.R.B. No. 44 (July 13, 1978).

33. The California Supreme Court noted in *ALRB v. Superior Court*: "This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state." 16 Cal. 3d at 398, 546 P.2d at 691, 128 Cal. Rptr. at 187 (citing to the preamble of the ALRA).

34. *Superior Farming Co.*, 4 A.L.R.B. No. 44, slip op. at 13-14 (McCarthy, dissenting).

35. See, e.g., *Int'l Union of Elec., Radio and Machine Workers v. NLRB* (Tiidee Prod., Inc.), 426 F.2d 1243 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970); *Tiidee Prod., Inc.*, 196 N.L.R.B. 158 (1972); *Tiidee Prod., Inc.*, 194 N.L.R.B. 1234 (1972); *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970) (former NLRB Member Gerald A. Brown, dissenting in *Ex-Cell-O*, is the present chairperson of the ALRB); Note, *An Assessment of the Proposed "Make-Whole" Remedy In Refusal-To-Bargain Cases*, 67 MICH. L. REV. 374 (1968).

36. 185 N.L.R.B. at 108.

37. *Id.*

v. NLRB (Tiidee Products), decided that the NLRB had the power to make employees whole in such a case³⁸ even though power to grant the remedy was not explicit in the statute.³⁹ The issue was then narrowed to the quality of the employer's challenge to NLRB certification (*i.e.*, his "legal" reasons for committing the "technical" refusal to bargain). The court of appeals decided that the test for the application of the make-whole remedy in such cases should turn on whether the employer's challenge could be said to have been "frivolous" or debatable.⁴⁰ On remand to the NLRB, this standard was considered unworkable, and in view of the lack of express statutory authority from the Congress to grant make-whole, the national board declined to award the remedy at all.⁴¹

Superior Farming's Refusal to Bargain

In his recommendation in *Superior Farming*, the ALO pointed out that the respondent's election objections could not be deemed insubstantial or frivolous and that this claim had already been recognized by the ALRB:

The election at Superior Farming was *one of the largest elections conducted* by the Fresno Regional Office during the early days of our Act. *Numerous problems were encountered resulting in confusion and some degree of chaos* during the course of the election. Many of the problems might have been averted had the Board agents and parties been more experienced in conducting elections of this type. . . .

The parties spent much time and effort at the hearing and in their briefs detailing the alleged misconduct. *We were willing to adopt per se rules we would be compelled to set this election aside.*⁴²

Drawing from the court of appeals' position in *Tiidee Products* and from the ALRB's findings of election irregularities, the

38. 426 F.2d 1243 (D.C. Cir. 1970).

39. Compare CAL. LAB. CODE § 1160.3 (West Supp. 1979) with 29 U.S.C. § 160(c) (1976).

40. The court of appeals held that the make-whole remedy is appropriate where the refusal to bargain is premised on objections to an election that are patently frivolous and intended simply to delay collective bargaining. 426 F.2d at 1248.

41. 194 N.L.R.B. 1234 (1972). See also *Ex-Cell-O Corp.*, 185 N.L.R.B. at 109.

42. No. CE-33-1-D, slip op. at 20 (appended to 4 A.L.R.B. No. 44 (July 13, 1978)) (quoting *Superior Farming Co.*, 3 A.L.R.B. No. 35, slip op. at 2-3 (Apr. 20, 1978)) (emphasis added).

ALO concluded that, because it had not acted in bad faith, Superior Farming should not be liable for a make-whole order simply because it had refused to bargain in order to challenge the certification.⁴³

Subjective Bad Faith

There is additional confusion on the threshold question of the employer's good faith or bad faith as it pertains to make-whole. Initially, it is interesting to note the difference in the language of the NLRA and that of the ALRA in regard to the unfair labor practice "refusal to bargain." Section 8(a) of the NLRA states: "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees"⁴⁴ Section 1153 of the ALRA reads:

It shall be an unfair labor practice for an agricultural employer to do any of the following: . . . (e) To refuse to bargain collectively *in good faith* with labor organizations certified pursuant to the provisions of Chapter 5"⁴⁵

In order to supply the requirement to bargain "in good faith" to section 8(a)(5) of the national act, one must look to section 8(d).⁴⁶ Thus, the ALRA appears to stipulate (and the ALRB has so reasoned) that there cannot be a *good-faith*, unlawful refusal to bargain since the words "good faith" are included in the very definition of the unfair labor practice.⁴⁷

In *Tiidee Products*, the court of appeals recognized a distinction between an employer seeking judicial review of an NLRB certification on at least fairly debatable grounds and similar employer challenges where the grounds were "frivolous" or insubstantial.⁴⁸ Since the ALRB is directed to

43. *Id.* at 21.

44. 29 U.S.C. § 158(a) (1976).

45. CAL. LAB. CODE § 1153 (West Supp. 1979) (emphasis added).

46. NLRA § 8(d) provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment

29 U.S.C. § 158(d) (1976).

47. Therefore, one cannot commit a refusal to bargain that contravenes that section of the ALRA and still exhibit good faith.

48. See note 40 *supra*.

follow NLRA precedent whenever applicable,⁴⁹ it is arguable that the Board should exercise its discretion and refuse to apply make-whole in situations where an employer challenges certification on other than frivolous or insubstantial grounds and thus exhibits subjective good faith while violating the letter of section 1153(e).

The conclusion that the remedy should not be applied in these good-faith, technical refusal-to-bargain cases is supported by a portion of the testimony of then Secretary of Agriculture Rose Bird during a hearing before the California Senate Industrial Relations Committee⁵⁰ prior to the enactment of the ALRA. In response to an inquiry⁵¹ regarding the meaning and reach of the make-whole provision of section 1160.3, Ms. Bird said:

[T]his language was just placed in because there has been a good deal of discussion with the National Labor Relations Act that it ought to be amended to allow the "make whole" remedy, and this is something that the people who have looked at this Act carefully believe is a progressive step and should be taken. . . . Now, what we're talking here is *only where an employer bargains in bad faith*. You make whole the employee with backpay, and *that's all we're talking about*.⁵²

Ms. Bird also remarked, "What it [the ALRA] is doing here is giving discretion to the board to give backpay to employees where there has been *bad faith*, and I suggest that's an equitable remedy."⁵³ In response to a further inquiry⁵⁴ concerning the Board's discretion in remedying unfair labor practices, Ms. Bird (apparently making reference to the Board's discretion to award make-whole specifically) stated, "[W]hat I'm saying is that *the board has to be convinced of the matter* [presumably that the employer had exhibited bad faith]. . . ." ⁵⁵ But later,

49. CAL. LAB. CODE § 1148 (West Supp. 1979).

50. *Public Hearing on S.B. 1 Before the Senate Industrial Relations Committee of the California State Legislature*, 3d Extraordinary Sess. (1975).

51. The question was propounded by Jordan Bloom, who was present at the hearing on behalf of the Mid-Valley Labor Relations, Central California Farmers' Association and Harry Kubo.

52. *Public Hearing on S.B. 1 Before the Senate Industrial Relations Committee of the California State Legislature*, 3d Extraordinary Sess. 64-65 (1975) (emphasis added).

53. *Id.* (emphasis added).

54. *Id.* at 65-66.

55. *Id.* at 66 (emphasis added).

Ms. Bird summarized her position with regard to make-whole saying, "It's merely within its [the Board's] power to give backpay where there has been a failure to bargain in good faith."⁵⁶ Although this final remark seems to be a clear, unembellished statement of section 1160.3 (as it pertains to make-whole), it is at least arguable that Ms. Bird implied there must be a showing of subjective bad faith on the part of the employer before it can be ordered to make employees whole for its unlawful refusal to bargain.

The ALO in *Superior Farming* attempted to further substantiate his position by connecting Ms. Bird's remarks to an article written by Herman M. Levy, a law professor and consultant employed in drafting the ALRA.⁵⁷

Although the question of whether Congress granted this power [the make-whole remedy] to the NLRB is still debated by some labor lawyers, there is no doubt that the ALRA has given this potent remedy to the ALRB. The grant of power, however, is tempered by the phrase "when the board deems such relief appropriate." The board is not likely to use this remedial power in every refusal to bargain case, but the fact that it is available may cause employers to be more cautious in refusing to bargain for insubstantial or frivolous reasons.⁵⁸

Member McCarthy, dissenting in *Superior Farming*, seems to be in accord. Citing his concurring opinion in *Perry Farms* (companion to *Adam Dairy*), McCarthy stated:

I continue to oppose the majority's *nonselective* application of the make-whole remedy. . . . Respondent herein has in good faith pursued the only lawful means by which it may place a legally and factually debatable claim before the courts of appeal.⁵⁹

Later in his dissent, Mr. McCarthy pointed up what he perceived to be the other major deficiency in the Board's application of make-whole. He argued that, without applying the good-faith/bad-faith criterion to its use of the make-whole remedy in refusal-to-bargain cases like *Superior Farming*, the

56. *Id.* at 67.

57. Herman M. Levy is presently a professor of law at the University of Santa Clara School of Law.

58. No. 77-CE-33-1-D, slip op. at 16 n.13 (appended to 4 A.L.R.B. No. 44 (July 13, 1978)) (citing Levy, *The Agricultural Labor Relations Act of 1975—La Esperanza de California Para El Futuro*, 15 SANTA CLARA LAW. 783, 803 (1975)).

59. 4 A.L.R.B. No. 44, slip op. at 12 (McCarthy, dissenting) (emphasis added).

ALRB is abusing its discretion.⁶⁰ This stance is grounded in the precedent of the NLRA discussed above⁶¹ and in McCarthy's interpretation of the discretionary language of section 1160.3—that is, “when the board deems such relief appropriate.”

Mr. McCarthy contends that the *Adam Dairy and Perry Farms* method of applying make-whole impermissibly renders the above-quoted language of section 1160.3 surplusage.⁶² The argument is not without appeal since the majority in *Perry Farms* held the remedy applicable in *any* case in which employees suffer a loss of pay as a result of an employer's refusal to bargain.⁶³ Moreover, the Board has given no indication that circumstances exist where a make-whole order will not issue following an unlawful refusal to bargain. In his dissent in *Superior Farming*, McCarthy points out that make-whole is an equitable remedy and that “the equities in a refusal to bargain situation do not always preponderate in favor of the employees.”⁶⁴ Thus, when an employer presses for judicial review of a *colorable* claim in opposition to Board certification, McCarthy concludes that the equities may weigh in that employer's favor.⁶⁵

SECTION 1155.2 AND MAKE-WHOLE

Another challenge to the ALRB's present policy of awarding make-whole has been extrapolated from the very provisions of the Act that define and clarify the duty to bargain in good faith. Section 1155.2 states that the obligation to bargain collectively in good faith is

the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession.*⁶⁶

60. *Id.* at 13.

61. See notes 35-41 and accompanying text *supra*.

62. 4 A.L.R.B. No. 25, slip op. at 26 (McCarthy, dissenting).

63. *Id.* at 9.

64. 4 A.L.R.B. No. 44, slip op. at 13 (McCarthy, dissenting).

65. *Id.* at 15.

66. CAL. LAB. CODE § 1155.2 (West Supp. 1979) (emphasis added).

This section of the ALRA is nearly identical to section 8(d) of the NLRA, again significant in view of ALRA section 1148. The essence of the criticism is that, in awarding make-whole, the Board has overreached its authority because it is, in effect, compelling agreement and requiring concessions (at least with respect to worker compensation) for the period of the employer's unlawful refusal to bargain.⁶⁷ If the Board is overreaching, one must ask what the legislature intended since it granted the ALRB the authority to make employees whole on the one hand, while at the same time it restricted the Board from intervening in the negotiation of specific terms and conditions of employment.

Since section 1155.2(a) is so similar to section 8(d) of the national labor act, a brief review of NLRA precedent is again in order. The NLRB has sought to foster an atmosphere for collective bargaining between employees and employers which is as unburdened as possible by governmental interference. The national board and the courts have consistently affirmed the concept that the negotiating process should reflect pressures of the marketplace in a free enterprise system. In *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court said,

The theory of the [Wagner] Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.⁶⁸

More recently, in *H.K. Porter Co. v. NLRB*, the Court elaborated:

But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.⁶⁹

Another cogent statement of the problem posed by section 1155.2 appeared in the recommendation of the ALO in *Superior Farming*:

In other words, employees do not automatically achieve greater benefits from an employer's timely compliance

67. See notes 70-76 and accompanying text *infra*.

68. 301 U.S. 1, 45 (1937).

69. 397 U.S. 99, 103-04 (1970).

with his bargaining obligation where their employer engages in hard but lawful bargaining. Furthermore, although the General Counsel asserts that every UFW contract results in greater benefits, evidence in the instant proceeding does not compel that as an inevitable conclusion with respect to the Respondent, a company which purportedly prides itself already in maintaining premium wages and working conditions for its employees.⁷⁰

Member McCarthy recognized the potential conflict between the remedy and section 1155.2 in his concurring opinion in the *Perry Farms* decision. He noted, "[T]he make whole remedy tends to establish terms of a collective bargaining agreement which, even in the absence of a refusal to bargain, might never have come into existence."⁷¹

Although the Board contends that make-whole in these circumstances is not contrary to section 1155.2,⁷² the method of calculation of the award in *Adam Dairy* and the other make-whole cases indicates some erosion of the principle stated in sections 1155.2(a) and 8(d).⁷³ Essentially, the Board is looking to other agricultural employee contracts to determine the average negotiated wage rates.⁷⁴ Then, the ALRB orders the employer to make employees whole for the "net" difference between the basic wage rate in effect at the time of the unfair labor practice and the average negotiated wage.⁷⁵ The value of fringe benefits is also added to this figure.⁷⁶

It is not within the scope of this comment to fully explore all of the aspects of the method selected to effectuate the make-whole remedy but it seems that the Board has, on balance, intruded into an area protected by section 1155.2. However, the legislature has clearly authorized the ALRB to make employees whole in refusal-to-bargain situations. It remains to be determined whether this intrusion should be restricted by the courts.

70. No. 77-CE-33-1-D, slip op. at 11 (appended to 4 A.L.R.B. No. 44 (July 13, 1978)).

71. 4 A.L.R.B. No. 25, slip op. at 26-27 (McCarthy, concurring).

72. 4 A.L.R.B. No. 24, slip op. at 11.

73. *Id.* at 18-29.

74. The Board looked to 37 United Farm Workers' (UFW) contracts negotiated pursuant to ALRA certifications, 36 of which were concluded during the 12-month period following the UFW's certification as the bargaining agent for the employees of Adam Dairy. *Id.*

75. *Id.* at 20.

76. *Id.* at 24-29.

How then, in light of all the foregoing criticism, does the ALRB justify its application of make-whole "in any case in which employees suffer a loss of pay as a result of an employer's refusal to bargain"?⁷⁷ More specifically, how convincing are the Board's arguments in a situation like *Superior Farming* where the employer "technically" violates section 1153(e) to obtain judicial review of his objections to the Board's certification process?

THE PROPER APPLICATION OF MAKE-WHOLE—A DEFENSE OF ALRB POLICY

The position of the ALRB with regard to make-whole as announced in *Adam Dairy* and *Perry Farms* is correct. The remedy, as provided in section 1160.3 of the Act, is properly applied in any case where an employer unlawfully refuses to bargain and the employees suffer economic loss thereby. Each of the aforementioned criticisms of the Board's policy, although thought-provoking, can be convincingly answered.

The Right of the Employer to Judicial Review Is Not Impermissibly Chilled By Make-Whole

Very simply stated, every litigant is aware of the possibility that his cause might be a losing one. To toll the period for which make-whole is granted during the pendency of any judicial challenge to Board certification is illogical and would be prejudicial to the basic, underlying purposes of the Act. Section 1140.2 provides:

It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective bargaining rights for agricultural employees.⁷⁸

77. *Id.* at 6.

78. CAL. LAB. CODE § 1140.2 (West Supp. 1979).

And, as the court noted in *ALRB v. Superior Court*: "This enactment is intended to bring *certainty* and a sense of *fair play* to a presently unstable and potentially volatile condition in the state."⁷⁹

In addition, it is a primary contention of the ALRB that the remedy is an equitable remedy, compensatory in nature.⁸⁰ When an employer refuses to bargain for whatever reason, the employees are denied the opportunity to better their lot through collective bargaining. If the employer is finally found to have *unlawfully* refused to bargain, the equities would seem to clearly favor the aggrieved employees who have done nothing wrong. Otherwise, the employer is unjustly enriched by a delay that allows him to continue paying lower wages and also weakens his union adversary.

Discretion, Bad Faith, and NLRA Precedent

The Board has discretion to apply the remedy in all cases where employees are harmed as a result of an employer's unlawful refusal to bargain including an employer's "technical" violation intended solely to obtain judicial review of a Board certification. Discretion does not imply that there must first be a finding of bad faith on the part of the employer. Furthermore, the NLRB make-whole cases are not applicable since the NLRB clearly lacks the express authority to order the remedy.

In *Ex-Cell-O Corp.*, the NLRB refused to grant the make-whole remedy even though the court of appeals found the power to grant such relief to be implicit in the national act.⁸¹ The NLRB decided that a standard whereby challenges to Board certification would be categorized as either "frivolous" or debatable was unworkable.⁸²

It has been argued that the language of section 1160.3, giving the ALRB discretion to order make-whole, implicitly requires that the Board use some sort of a standard similar to that proposed by the court in *Tiidee Products*.⁸³ There are two responses here. First, the NLRB has never been granted the express power to make employees whole in circumstances

79. 16 Cal. 3d at 398, 546 P.2d at 691, 128 Cal. Rptr. at 189 (citing to the preamble of the ALRA).

80. 4 A.L.R.B. No. 25, slip op. at 10-11.

81. 185 N.L.R.B. 107 (1970), *rev'd and remanded sub nom.* *Auto Workers v. NLRB*, 449 F.2d 1046 (D.C. Cir. 1971).

82. 185 N.L.R.B. at 109.

83. 4 A.L.R.B. No. 44, slip op. at 14 n.2 (McCarthy, dissenting).

where an employer has refused to bargain in order to challenge a certification of that board. Therefore, section 1148 of the ALRA ("The board shall follow applicable precedents of the [NLRA] . . .")⁸⁴ does not require an application of NLRA precedent since there is none. Second, if either the NLRB or the ALRB were to utilize a standard of good-faith/bad-faith with such "technical" refusals to bargain, each would seem to be in direct contravention of a longstanding mandate of the United States Supreme Court disallowing any punitive power to the national labor board. The "authority to order affirmative action does not go so far as to confer a punitive jurisdiction . . . even though the Board [NLRB]" may feel that the "policies of the Act [NLRA] might be effectuated" thereby.⁸⁵ And again, in *Republic Steel Corp. v. NLRB*, the Court held that Board remedies must be remedial and cannot constitute a penalty or fine.⁸⁶ A two-part test to determine the character of an NLRB order was used by the Supreme Court in *Local 60, United Brotherhood of Carpenters v. NLRB*.⁸⁷ Simply stated, the test is: 1) Does the Board order remove the consequences of the violation? 2) Does it dissipate the effects of the unfair labor practice?⁸⁸ In the ALRA context, make-whole awards compensate the employees for a lost opportunity to bargain, prevent the employer from reaping the side benefit of a weakened union following unlawful delaying tactics, and are not impermissibly punitive since they do not distinguish between employers acting in good faith and those whose conduct manifests bad faith.

At least one commentator has recognized that the application of a good-faith/bad-faith distinction to an NLRB award may substantiate a claim that the award is improperly punitive rather than remedial.⁸⁹ Therefore, even if the court of appeals decision in *Tiidee Products* was "applicable precedent," it would still seem improper for the ALRB to "punish" the employer who challenges Board certification on frivolous or insubstantial grounds. On the whole, the compensation rationale of the ALRB, whereby it does not make a good-faith/bad-faith

84. CAL. LAB. CODE § 1148 (West Supp. 1979).

85. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938).

86. 311 U.S. 7, 10-11 (1940).

87. 365 U.S. 651 (1971).

88. *Id.* at 655.

89. St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039, 1043 (1968).

distinction, is preferable.

Rose Bird's remarks before the Senate Industrial Relations Committee⁹⁰ do not constitute a bar to the ALRB's policy of awarding make-whole. Even if we were to read her testimony as a clear indication of the manner in which she thought the Board would exercise its discretion, that testimony, informal as it was, should not be weighted more heavily than traditional rules of statutory interpretation. The majority opinion of the Board in *Perry Farms* reiterated the principles of interpretation as reviewed by the appellate court in *Steilberg v. Lackner*:

In determining the legislative intent, the court turns first to the words used in the statute The words, however, must be read in context, keeping in mind the nature and obvious purpose of the statute . . . , and the statutory language applied must be given such interpretation as will promote rather than defeat the objective and policy of the law Finally, in ascertaining legislative intent, the courts should consider not only the words used, but should also take into account other matters, such as the object in view, the evils to be remedied, the history of the times, legislation upon the same subject, public policy and contemporaneous construction⁹¹

Nor is this criticism of the Board's policy enhanced by connecting Ms. Bird's statements to the Levy article discussed above.⁹² Mr. Levy, referring to the grant of power to award make-whole contained in section 1160.3 of the ALRA said, "The board is *not likely* to use this remedial power in every refusal to bargain" ⁹³ It would be reading something extra into Mr. Levy's article to interpret the foregoing to in any way *limit* the ALRB's discretion to invoke the make-whole remedy.

Board policy does not render the discretionary language of section 1160.3 surplusage. Although the Board has decided to award make-whole in all cases where an employer has unlawfully refused to bargain and employees have been harmed thereby, this does not mean that the application of the remedy is *per se* nonselective. Clearly, the announced plan to implement the remedy⁹⁴ is an exercise of discretion. The Board has

90. See notes 50-56 and accompanying text *supra*.

91. 4 A.L.R.B. No. 25, slip op. at 14 (quoting from 69 Cal. App. 3d 780, 785, 138 Cal. Rptr. 378, 381 (1977)) (internal citations omitted).

92. See note 58 and accompanying text *supra*.

93. *Id.* (emphasis added).

94. 4 A.L.R.B. No. 24, slip op. at 6.

implicitly said that, in cases where the employees are not harmed, the award will not be forthcoming. This claim of implication may sound spurious, but if the economic climate in California agriculture changes so that collective bargaining is not working an economic benefit for agricultural employees, the Board would have no reason to grant compensation to those whose employer had refused to bargain. It may be that a case will emerge where the period in which the employees were denied the right to bargain is so short that the employees will not have been harmed economically by the delay. In any event, it is improper to conclude that the Board has abused its discretion or has rendered the discretionary language of section 1160.3 surplusage simply because it has so far failed to find for an employer on the issue of make-whole following an unlawful refusal to bargain.

ALRA Section 1155.2(a) and Make-Whole

The award of make-whole does not impermissibly contravene that part of section 1155.2(a) that provides: "[B]ut such obligation does not compel either party to agree to a proposal or require the making of a concession."⁹⁵

It is difficult to deny that an award of back pay based on an industry-wide average negotiated wage does, in effect, write substantive contract terms for the period in which the employer unlawfully refuses to bargain. And although there are those who argue that, statistically, employers who come to the negotiating table are very likely to reach some sort of an agreement with their employees,⁹⁶ it is clear that some who bargain do not reach a contract.⁹⁷

There are, however, two major flaws in the argument that the ALRB's system of compensating employees does too much violence to the specific restrictions of section 1155.2(a) and the long and unbroken line of authority interpreting the parallel NLRA section 8(d).

First, unlike the Congress of the United States, the California Legislature has clearly authorized the make-whole rem-

95. CAL. LAB. CODE § 1152.5(a) (West Supp. 1979).

96. See ROSS, *Analysis of Administrative Process Under Taft-Hartley*, 1966 LAB. REL. YEARBOOK 299, 306 (1966).

97. The problems inherent in one side's use of statistical evidence to prove the validity of its position were reviewed in *People v. Collins*, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968), a criminal case in which the conviction was overturned because of the prejudicial effect of statistical evidence offered by the prosecution.

edy in any refusal-to-bargain case. Thus, the major hurdle that restrains the NLRB is overcome.⁹⁸ The legislature would not have enacted two sections of the ALRA that were mutually exclusive. Second, the facts of *H.K. Porter* and the other authority detailing the prohibition contained in section 8(d) of the NLRA are distinguishable. In each instance where the NLRB was found to have overreached its authority, it had ordered an employer to include a specific term or terms within the contract negotiated by the parties.⁹⁹ In the ALRB cases, the remedy takes on the characteristics of compensation for an injury sustained, and that remedy ceases at the point at which the employer begins to bargain in good faith.¹⁰⁰ There is no intrusion into the guarded sphere of private negotiations since there are no negotiations taking place. The majority in *Adam Dairy* did not find the award of make-whole to be contrary to the language of section 1155.2(a) stating:

Instead, we read these provisions [1160.3 and 1155.2(a)], taken together, to authorize the Board to assess a make-whole remedy for periods in which an employer refuses to bargain in good faith and to order good faith bargaining in the future, without imposing a requirement that the parties reach a contract We also read these two sections as a directive to fashion a make-whole remedy which is minimally intrusive into the bargaining process and which encourages the resumption of that process.¹⁰¹

The Board does not deny that there is a tension between sections 1155.2(a) and 1160.3.¹⁰² The reach of these two provisions of the Act should therefore be examined in light of the purposes of the Act¹⁰³ and the principles of equity. Both seem to weigh in favor of the aggrieved employees.

98. See note 6 *supra*.

99. See, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), where an employer, engaged in collective bargaining, delayed the final negotiation of a contract by refusing to grant the union a clause providing for the checkoff of union dues. The NLRB order requiring the employer to include the disputed clause in its contract with the union was held to be outside the power of the NLRA.

100. 4 A.L.R.B. No. 24, slip op. at 34.

101. *Id.* at 11.

102. *Id.*

103. In *Va. Elec. and Power Co. v. NLRB*, 319 U.S. 533 (1943), the Supreme Court fashioned a test for the NLRB regarding the maximum reach of its remedial powers. The test was whether the remedy could be shown to be "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Id.* at 540. Section 1140.2 of the ALRA states:

CONCLUSION

Many commentators have decried the lack of effective remedies as the greatest single weakness of an otherwise venerable National Labor Relations Act.¹⁰⁴ In California, the framers of the ALRA saw an opportunity to provide for a more perfect balance in the area of agricultural labor relations in the state. The Act provides for more democracy within labor organizations,¹⁰⁵ recognizes the homogeneity of California farm laborers,¹⁰⁶ and seeks to promote dignity for agricultural employees. The boldness with which the ALRB is dealing with a decided inequity in our social order through its use of the make-whole remedy is both laudable and within the bounds of the Act.

John A. Schlosser

It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.

CAL. LAB. CODE § 1140.2 (West Supp. 1979).

104. See, e.g., Schlossberg & Silard, *The Need for a Compensatory Remedy in Refusal-To-Bargain Cases*, 14 WAYNE L. REV. 1059 (1968); St. Antoine, *supra* note 89; Note, *NLRB Attorneys' Fees Awards: An Inadequate Remedy for Refusals to Bargain*, 63 GEO. L.J. 955 (1975); Note, *NLRB Power to Award Damages in Unfair Labor Practice Cases*, 84 HARV. L. REV. 1670 (1971).

105. CAL. LAB. CODE § 1153(c) (West Supp. 1979).

106. Prior to the enactment of the ALRA, existing law provided for workers' rights within the state but did not contain provisions specifically relating to agricultural labor relations and agricultural employees.