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Make-Whole Under the Agricultural Labor Relations Act: Its Applicability and Scope

by

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Make-Whole Under The Agricultural Labor Relations Act: Its Applicability and Scope*

Introduction

IN 1975, THE CALIFORNIA LEGISLATURE enacted the Agricultural Labor Relations Act[1] (ALRA). The purpose of the ALRA is to "ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations."[2] To

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* This comment was set in galleys prior to the recent decision of the California Supreme Court in J.R. Norton Co., 26 Cal. 3d 1, 603 P.2d 1306, 160 Cal. Rptr. 711 (1979). *J.R. Norton Co.* was the first decision of the Agricultural Labor Relations Board, ordering the make-whole remedy under California Labor Code § 1160.3, to come before the court. The court rejected the Board's test for determining when the remedy was appropriate, *see* text accompanying notes 7-9 *infra*, on the narrow grounds that it constituted a per se remedy. In the court's view, the effect of the Board's standard was to limit the control, through judicial review, of an abuse of discretion on the part of an administrative agency. 26 Cal. 3d at 38-39, 603 P.2d at 1329, 160 Cal. Rptr. at 732. The case was remanded to the Board to "determine from the totality of the employer's conduct whether it went through the actions 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 . . . had the election been properly conducted. *Id.* at 39, 603 P.2d at 1328, 160 Cal. Rptr. at 732. The decision in *J.R. Norton Co.* affects only the determination of when the remedy is appropriate, not the duration or the method of calculation of the make-whole award adopted by the Board. *See* text accompanying notes 148-73 *infra*.

As discussed in this comment, many of the arguments in *J.R. Norton Co.* concerning make-whole are constitutionally-based. Further, recent proposals to amend the National Labor Relations Act to allow for make-whole, *see* text accompanying notes 15-29, have thus far been unsuccessful. The arguments presented by the *J.R. Norton Co.* case, together with California's experience with the remedy, should therefore prove to be a valuable contribution to the debate over whether to include the make-whole remedy in federal labor law.

1. CAL. LAB. CODE §§ 1140-1166.3 (West Supp. 1978). Unless otherwise indicated, all statutory references are to the California Labor Code. For an excellent commentary on the ALRA in general, see Levy, *The Agricultural Labor Relations Act of 1975—La Esperanza De California Para El Futuro*, 15 SANTA CLARA L. REV. 783 (1974-1975) (Professor Levy served as a labor law consultant to the Agriculture and Services Agency in the drafting of the ALRA). *See also* Yates, *The "Make Whole" Remedy for Employer Refusal to Bargain: Early Experience Under the California Agricultural Labor Relations Act*, 29 LABOR L.J. 666 (1978).

2. Sections 1, 1.5 of Stats. 1975, 3d EX. Sess., c.1 at 4013. Section 1 further provides that:

> This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state. The Legislature recognizes that no law in itself resolves social injustice and economic dislocations. However, in the belief the people affected desire a resolution to this dispute and will make a sincere effort to work through the procedures established in this legislation, it is the hope of the Legislature that farm laborers, farmers, and all the people of California will be served by the provisions of this act.

further its policy of promoting collective bargaining between employers and employees,[3] the ALRA defines the rights of agricultural employees and unfair labor practices on the part of agricultural employers.[4]

One of the most controversial provisions of the ALRA authorizes the Agricultural Labor Relations Board (ALRB) to order that an employer make-whole its employees when an employer has been adjudged guilty of an unfair labor practice.[5] Section 1160.3 provides,

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3. CAL. LAB. CODE § 1140.2 (West Supp. 1978). 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.

4. *Id.* § 1153. Section 1153 sets forth the acts that constitute unfair labor practices on the part of an agricultural employer. Section 1153(e) specifically provides that it shall be an unfair labor practice for an employer to "refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5 . . . ." See § 1155.2(a) for a definition of the scope of the duty to bargain in "good faith."

5. *Id.* § 1160.3. Section 1160.3 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 or is engaging in any such unfair labor practice, the board shall . . . 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.

As used herein, the term "make-whole" refers to a remedial order of the ALRB. An award of make-whole is directed at the compensation of injuries suffered by an employee during the period of delay attributable to the employer's unlawful refusal to bargain. As a practical matter, an award of make-whole consists of the difference between the basic wage rate (including the monetary value of fringe benefits) received by an employee during the period of unlawful delay and the wage rate negotiated by other employers who bargained in good faith with the union during the applicable period. For a more precise method of computation of the make-whole award, see notes 148-165 *infra* and accompanying text.

Section 1160.3 has been the subject of two recent proposed amendments, one in the Senate and the other in the Assembly. *See* Senate Bill 577, introduced by Senator Vuich on March 15, 1979 and Assembly Bill 840, introduced by Assemblyperson Mori on March 12, 1979. S.B. 577, Cal. Leg. 1979-80 Reg. Sess.; A.B. 840, Cal. Leg. 1979-80 Reg. Sess. Both contain comparable provisions limiting the discretion of the ALRB to determine the appropriateness of make-whole, for example, "[a]n order making employees whole shall not be appropriate in those situations where the employer refuses to bargain in order to seek judicial review of the certification of an election by the board." A.B. 840 at 2:18-21. Both A.B. 840 and S.B. 577 are presently buried in committee and have little chance for legislative consideration this session. See text accompanying notes 64-147 for a discussion of *J.R. Norton Co.*, now before the California Supreme Court, in which the employer argued, on a number of

inter alia, that the ALRB shall "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. . . ."[6] Beginning with *Adam Dairy* and *Perry Farms*,[7] the ALRB has construed the above language, "when . . . appropriate," to mean that make-whole will be ordered in every case in which an employer's refusal to bargain has resulted in financial loss to the employee,[8] regardless of the employer's motivation in refusing to bargain. In its adherence to this test, the ALRB has overturned decisions of its administrative law officers (ALOs) when those decisions employed different tests for the appropriateness of the remedy.[9] Each of these overturned tests, to varying degrees, took account of the employer's reasons for its refusal to bargain.

Under the ALRA, once a union has been certified by the ALRB, the only means by which an employer can secure judicial review of its objections to certification is by refusing to bargain, thus becoming subject to a complaint for unfair labor practices.[10] A refusal to bargain solely to challenge certification of the union is characterized as a technical refusal to bargain.[11] If an employer's objections to certification are found to be without merit, the ALRB's order of make-whole covers the entire period from the initial refusal to bargain until the commencement of good faith bargaining.[12] Employers

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grounds, that the ALRB abused its discretion in ordering that it make-whole its employees where the employer refused to bargain solely to seek judicial review of its objections to certification of the union.

6. CAL. LAB. CODE § 1160.3 (West Supp. 1978) (emphasis added).

7. Adam Dairy, 4 A.L.R.B. No. 24 (1978); Perry Farms, Inc., 4 A.L.R.B. No. 25 (1978), *rev'd and remanded*, 86 Cal. App. 3d 448, 150 Cal. Rptr. 495 (1978). These decisions were rendered concurrently on April 26, 1978. Much of the discussion concerning make-whole is cross-referenced between the two decisions and, therefore, they should be read together.

8. 4 A.L.R.B. No. 24 at 6; 4 A.L.R.B. No. 25 at 9.

9. *See, e.g.*, 4 A.L.R.B. No. 24 at 49 (substantial harm test); P&P Farms, No. 76-CE-23-M (June 14, 1977) at 31 (totality of the circumstances test) (the decision of the ALO in *P&P Farms* was never reviewed by the ALRB since the employer terminated its operations). *Id.* at 4.

10. See Chapter 5 of the ALRA, found at §§ 1156-1159, regarding the election and certification procedures.

11. As used herein, the term "technical refusal" refers to the situation created when an employer's objections to the certification of the union have been overruled by the ALRB and the employer then refuses to bargain with the certified union, solely on the basis of its belief that the union was improperly certified and in order to secure judicial review of its objections. Employers argue that where a refusal to bargain is undertaken for this reason an award of make-whole is inappropriate. *See* text accompanying notes 64-147 *infra*.

12. 4 A.L.R.B. No. 24 at 16-17. *See* text accompanying note 164 *infra*.

argue that make-whole is clearly inappropriate in situations of technical refusals to bargain[13] and, further, that section 1160.3 mandates a case-by-case approach. The ALRB and the unions contend, on the other hand, that regardless of the penultimate merits of the employer's challenge to certification, the employees must not be the ones to bear the cost of protracted litigation. The California Supreme Court has yet to evaluate the merits of the ALRB's test for the appropriateness of the make-whole remedy.[14]

The purpose of this comment is to determine whether the ALRB's construction of section 1160.3 in ordering make-whole, as articulated in *Adam Dairy* and *Perry Farms*, is constitutionally sound and in furtherance of ALRA policies. The first section of this comment will discuss the background to make-whole under the ALRA. The second section will treat relevant decisions of the ALRB construing section 1160.3. The third section will consider the arguments presented by the parties in *J.R. Norton Co.*, now before the California Supreme Court. Finally, section four will discuss the calculation and duration of make-whole liability. From this analysis, it will be concluded that make-whole is constitutionally sound and, as ordered by the ALRB, in furtherance of ALRA policies and objectives.

I. BACKGROUND TO MAKE-WHOLE UNDER THE ALRA

The National Labor Relations Act[15] (NLRA) contains no express provision for a make-whole remedy when an employer has unlawfully refused to bargain. Nevertheless, unions have requested the remedy in cases involving refusals to bargain in violation of section 8(a)(5) of the NLRA.[16] However, the National Labor Relations Board (NLRB) has consistently refused to award make-whole on the grounds that it lacks the statutory authority. In *Ex-Cell-O*

13. *See* J.R. Norton Co., 4 A.L.R.B. No. 39 (1978), *hearing granted*, Cal. Sup. Ct. No. LA 31027 (Sept. 20, 1978).

14. *Id. J.R. Norton Co.* is the first case of the ALRB ordering make-whole, pursuant to § 1160.3, to come before the California Supreme Court. However, it is uncertain whether the court will reach the issue of make-whole. *See* text accompanying notes 64-69 *infra*.

15. The National Labor Relations Act is set out at 29 U.S.C. §§ 151-169 (1973).

16. 29 U.S.C. § 158(a)(5)(1973). The request for make-whole relief was based on §10(c) of the NLRA, 29 U.S.C. § 160(c) (1973), which provides that "[t]he Board shall . . . issue . . . an order requiring such person to cease and desist . . . and take such affirmative action . . . as will effectuate the policies of this subchapter."

Corp.,[17] an employer's objections to the conduct of the election were overruled and the union was certified. The employer then refused to bargain in order to secure judicial review of the NLRB's decision. As a result of its refusal to bargain, the employer was charged with unfair labor practices. Two and one-half years following the election, the NLRB issued its decision finding the employer guilty of unfair labor practices. In considering the union's request for make-whole, the NLRB conceded the inadequacy of its conventional cease-and-desist bargaining orders,[18] but held, in a three-to-two decision, that it lacked the statutory authority to order a make-whole remedy.[19]

The two dissenting members[20] sharply disagreed with the majority's narrow view of the NLRB's remedial powers. The dissent cited prior decisions of the NLRB in which it had ordered backpay for employees who had suffered losses as a result of various statutory violations.[21] The dissent argued that an award of make-whole would not write a contract between the parties.[22] Further, such a remedy

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17. 185 N.L.R.B. No. 20 (1970), 449 F.2d 1058 (D.C. Cir. 1971).

18. The cease-and-desist bargaining orders provided for in § 10(c) of the NLRA, *see* note 16 *supra*, have only a prospective impact upon bargaining and lack any remedial efficacy. The NLRB recognized this statutory deficiency, stating:

> A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay . . . . It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from a loss of employee strength attributable to the delay.

Id. at 108.

19. *Id.* (*citing* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970)). The NLRB felt that, absent express statutory authority for the remedy, to order make-whole would have the effect of writing a contract between the parties in violation of §8(d) of the NLRA, 29 U.S.C. §158(d) (1973). Section 8(d) provides that the duty to bargain does not compel the parties to reach agreement or require the making of a concession. See § 1155.2(a) of the ALRA for an identical provision. See also text accompanying notes 129-40 for a discussion of the issue of whether make-whole, as ordered by the ALRB, has the effect of writing a contract between the parties.

20. One of the dissenting members, Gerald Brown, is now the chairperson of the ALRB.

21. 185 N.L.R.B. No. 20 at 111-19. *See, e.g.*, Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. No. 1 (1935), *enf'd*, 303 U.S. 261 (1938) (ordering backpay for an illegal discharge); Virginia Electric & Power Co. v. NLRB, 319 U.S. 533 (1943) (reimbursement for union dues checked off in favor of company-dominated union); NLRB v. George E. Light Board Storage, 373 F.2d 762 (5th Cir. 1976) (reimbursement for economic loss due to employer's failure to execute a collective bargaining agreement); Fibreboard Paper Prod. Corp., 138 N.L.R.B. No. 550 (1962), *enf'd*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 397 U.S. 203 (1964) (reimbursement for loss of earnings as a result of employer's unilateral decision to contract out its maintenance operations).

22. 185 N.L.R.B. No. 20 at 117-19.

was necessary to prevent frustration of the statutory policy of encouraging collective bargaining as well as to compensate employees for their financial losses resulting from the refusal to bargain.[23] However, the NLRB has adhered to the position that its statutory authority does not include the power to award make-whole.[24]

In *International Union of Electrical Radio & Machine Workers v. NLRB (Tiidee Products, Inc.)*,[25] the Court of Appeals for the District of Columbia held that, despite the lack of express statutory authority, make-whole is appropriate in certain instances. The court suggested that where the refusal to bargain was a "clear and flagrant violation" of the NLRA, make-whole would be an appropriate remedy.[26]

To cure this lack of statutory authority to award make-whole under the NLRA, a specific amendment was proposed as a part of the Labor Law Reform Act of 1977. However, this bill has been the subject of repeated filibusters and, for all present intents and purposes, appears to be dead. Make-whole is, however, available as a remedy elsewhere in federal law. Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972,[27] provides for make-whole relief for class litigants in unlawful discrimination cases. In *Albermarle Paper Co. v. Moody*,[28] the United States Su-

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23. *Id.*

24. *See, e.g.*, Hecks, Inc., 191 N.L.R.B. No. 146 (1971), where the NLRB stated:

> We have in this connection fully considered the views of the court of appeals concerning the Board's power in this area . . . . With all due respect to these views . . . we remain convinced, as we stated in our decision in *Ex-Cell-O*, that the Board lacks statutory authority to grant such relief. We will therefore adhere to our position in this matter unless and until the Supreme Court decides otherwise.

Id. at 888. *See also* Betra Mfg. Co., ___ N.L.R.B. No. ___, 97 L.R.R.M. 1005 (May, 1978). The effect of remand by the federal courts that have concluded that the NLRB has within its remedial powers the power to award make-whole is important to the issue whether there exists federal precedent that controls the application of make-whole under § 1160.3 of the ALRA. *See generally* Lipman Motors v. NLRB, 451 F.2d 823 (2d Cir. 1971); Bartenders Local 703 v. NLRB, 488 F.2d 664 (9th Cir. 1973), *cert. denied*, 417 U.S. 946 (1973); United States Steel Workers v. NLRB, 451 F.2d 823 (5th Cir. 1974). *See also* text accompanying notes 119-28 *infra*.

25. 426 F.2d 1243 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970), 194 N.L.R.B. No. 198 (1972), 196 N.L.R.B. No. 27 (1972). Tiidee Products was the respondent in the original NLRB proceeding, the decision and order of which are reported at 174 N.L.R.B. No. 103 (1969).

26. *Id.* at 1248. On remand to the NLRB, the court directed the NLRB to *consider* the award of make-whole. The court was without the power to *order* the NLRB to grant make-whole since the NLRA contains no specific provision for the remedy.

27. 42 U.S.C. §§ 2000e-2000e-16 (1973).

28. 422 U.S. 405 (1975).

preme Court stated that it was the consequences of the unlawful discrimination, and not the unlawful motivation, that the remedy sought to compensate.[29]

II. MAKE-WHOLE UNDER THE ALRA

In enacting the ALRA, the California Legislature had before it the history of both the NLRB's refusal to award make-whole and the demonstrated inadequacy of the conventional cease-and-desist bargaining orders under section 10(c) of the NLRA.[30] The inclusion of section 1160.3 in the ALRA, authorizing make-whole when appropriate, was a deliberate attempt to ensure that the ALRB would have the authority which the NLRB felt it lacked.[31] Rose Bird, then Secretary of the Agriculture and Services Agency and now Chief Justice of the California Supreme Court, indicated as much at a public hearing on the proposed ALRA (then entitled Senate Bill 1) on May 21, 1975 before the Senate Industrial Relations Committee. In response to growers' objections, which echoed the majority's position in *Ex-Cell-O*, she stated:

> [T]his language [*i.e.*, "when . . . appropriate"] 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. And we decided since we were starting anew here in California, that we would take that progressive step.[32]

The language of section 1160.3, authorizing the ALRB to order make-whole when it deems such relief appropriate, appears to indicate, however, that the legislature left to the discretion of the ALRB the determination of when the remedy is proper.[33]

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29. *Id.* at 422.

30. *See* note 16 *supra.*

31. 4 A.L.R.B. No. 24 at 5.

32. Hearing on S.B. 1 Before the Senate Ind. Rel. Comm., 3rd Ex. Sess. at 64-65 (May 21, 1975).

33. The legislative history of § 1160.3 is important to a determination of whether: (1) the legislature intended to leave to the discretion of the ALRB the determination of the appropriateness of the remedy; or (2) the legislature, relying upon the decisions of certain federal courts of appeals holding that the NLRB's remedial powers included the power to award make-whole in instances of "clear and flagrant" refusals to bargain, intended that make-whole under the ALRA was not to be awarded in technical refusal to bargain cases.

Adam Dairy and *Perry Farms*,[34] decided concurrently, were the first cases before the ALRB in which it was called on to consider violations of section 1153(e), for refusal to bargain, and the demand for make-whole under section 1160.3. In *Adam Dairy*, the ALO adopted a substantial harm test for determining when the remedy was appropriate.[35] The ALO suggested a variety of factors to be taken into account in assessing the substantiality of harm to an employee,[36] noting that such a test shifted the perspective regarding the remedy from the employer to the employee in accordance with the policies of the ALRA.[37] In its brief to the ALRB, general counsel for the ALRB agreed with the award of make-whole, but not with the rationale, that is, the substantial harm test designed by the ALO.[38] In place of the substantial harm test, the general counsel proposed, and the ALRB adopted, the following test: make-whole is appropriate in *every* case in which an employee suffers a loss of "pay"[39] as a result of an employer's refusal to bargain.[40] ALRB mem-

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However, a definitive legislative history and intent as regards § 1160.3 does not exist. *See* text accompanying notes 119-28 and 141-47 *infra*.

34. 4 A.L.R.B. No. 24 (1978); 4 A.L.R.B. No. 25 (1978), *rev'd and remanded*, 86 Cal. App. 3d 448, 150 Cal. Rptr. 495 (1978).

35. 4 A.L.R.B. No. 24 at 49.

36. *Id.*

37. *Id.*

38. Brief in Support of General Counsel's Exceptions to the Decision of the Administrative Law Officer at 5, *In Re* Adam Dairy & United Farm Workers of America, Nos. 76-CE-15-M, 76-CE-36-M. In litigation before the ALRB, the office of the general counsel of the ALRB represents the interests of the charging party or real party in interest. The general counsel in *Adam Dairy* urged the ALRB to reject the substantial harm test employed by the ALO on the grounds that it was too cumbersome to apply and called for necessarily subjective assessments regarding what degree of harm is substantial. *Id.* at 30-31. It was noted also that if the result of the refusal to bargain was not substantial to begin with, the charging party would not have filed the complaint and the general counsel would not litigate it. Thus, such a test is redundant. *Id.*

39. For the ALRB's interpretation of the term *pay*, found in § 1160.3, see text accompanying notes 158-62 *infra*.

40. 4 A.L.R.B. No. 24 at 6; Brief of General Counsel, *supra* note 38, at 12. In support of this test, general counsel made the following arguments in support of its position that such a test was necessary to accomplish the statutory objectives of the ALRA. Like the discussions of the ALRB relative to the adoption of this test, the arguments of the general counsel, paraphrased below, are helpful to a clearer understanding of make-whole as ordered by the ALRB.

> (A) Failure to adopt this test (*i.e.*, to award make-whole in every case in which employees suffer economic loss as a result of the refusal to bargain) will cost employees money. Every contract negotiated with the UFW has resulted in increased wages and benefits. Even when no agreement is reached, a net increase is still realized as the employer, at the point of impasse, usually implements its proposals for increased wages and benefits. But when an employer

ber McCarthy concurred in the result, but dissented to the adoption of the above test, arguing instead for a case-by-case application of the remedy.[41]

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refuses to bargain at all, everything the employer gains by the refusal, the employee loses. This is true regardless of the reason for the refusal to bargain;

(B) failure to adopt this test will penalize employers who bargain in good faith. On the assumption that good faith bargaining results in a contract, an employer who follows the law will be placed at a competitive disadvantage. As a result, failure to adopt this test will provide all employers with an incentive not to bargain;

(C) failure to adopt this test will also deprive employees of significant non-economic benefits. During the period of the unlawful delay, employees are without the protection of grievance procedures or mechanisms for arbitration of disputes. As a result, they lack the protection of seniority rights and health and safety measures. Thus, the harm from delay transcends direct economic injury;

(D) failure to adopt this test will deprive the union of its strength to bargain effectively with the employer at a later date. During the period of delay, the union may lose strength through natural attrition and the disenchantment of employees resulting from the union's apparent failure to secure increased wages and benefits. This deleterious effect of delay was recognized by the court in *Tiidee Products, Inc.*:

> Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain . . . the union may find that it represents only a small fraction of the employees. . . . Thus the employer may reap a second benefit . . . he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively. 426 F.2d at 1249.

(E) failure to adopt this test will result in increased litigation before the ALRB. The longer the period of delay, the greater the financial benefit to the employer. As a result, it is to the employer's advantage to create issues during the election which it could in turn claim as potential grounds for objection to the certification of the union. Thus, if good faith were to immunize the employer from make-whole liability, the employer would stand to gain financially, even though it may eventually lose on the merits.

(F) failure to adopt this test will only aggravate the unstable conditions that the ALRA was designed to resolve. Prior to the creation of a statutory duty to bargain under the ALRA, the employees' only form of redress was economic pressure in the form of strikes. Strikes result in hardship to both sides and the consumer public. Yet, if the employer is not deterred from unlawful refusals to bargain by the certainty of having to make-whole its employees, employees will again be forced to resort to strikes. While the ALRB, under § 1166, is prohibited from discouraging strikes, a test for the appropriateness of the remedy that discourages an employer from complying with its duty to bargain will have the effect of encouraging strikes.

41. Arguing from rules of statutory construction, McCarthy maintained that the majority's approach to the question of appropriateness rendered the language "when . . . appropriate" superfluous. He did not propose an alternative test, emphasizing instead "the importance of proceeding cautiously in a critical area where the Board lacks guidance in the form of precedent or empirical evidence." 4 A.L.R.B. No. 25 at 26. A case-by-case approach was

In *Perry Farms*, the ALO was satisfied that make-whole was appropriate whenever a refusal to bargain was made out.[42] Before the ALO and again before the ALRB, the employer's principal argument was that federal precedent limited the application of the remedy to those cases in which it could be demonstrated that the employer's conduct manifested a "clear and flagrant refusal to bargain for patently frivolous reasons."[43] The ALRB rejected this approach to the question of appropriateness, concluding instead that "the appropriateness of this remedy is utlimately to be determined by an analysis of the competing interests affected and a balancing of their respective weights in light of the goals and policies of the Act."[44] In adopting this approach, the ALRB took as its starting point the fact of harm to the employee.[45] The refusal to bargain with the certified representative of the employee was characterized as striking at the heart of the system of management-labor relations created by the legislature under the ALRA.[46] The ALRB observed that the harm to the employee was the same whether the employer's refusal to bargain was designed solely to gain judicial review of objections to certification[47] or was of the wilful and flagrant variety.[48] Thus, the

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to be preferred because it recognized: (1) that make-whole as a remedy tends to establish the terms of a collective bargaining agreement; (2) that the due process rights of an employer who objects in good faith to the certification of the union might be adversely affected insofar as the only means of obtaining judicial review of these objections is by a refusal to bargain; and (3) that make-whole is equitable in nature and therefore it is only by taking into account all of the circumstances surrounding the refusal that an increased probability of fairness will result. *Id.* at 26-27. See Superior Farming Co., 4 A.L.R.B. No. 44 (1978) (dissenting opinion), where McCarthy indicates that make-whole is inappropriate in technical refusal to bargain cases.

42. 4 A.L.R.B. No. 25 at 8. Although not clearly indicated as such, the conclusion of the ALO is identical to the test for appropriateness decided upon by the ALRB in *Adam Dairy* and *Perry Farms*. In *Perry Farms*, the employer refused to meet with the union following its certification and refused to provide the union with the bargaining information that it had requested at the time of its demand to commence bargaining. *Id.* at 2. The employer failed to file in a timely fashion its objections to certification, as required by § 1156.3(c), and was barred from raising them in the unfair labor practices proceeding.

43. *Id.* at 8.

44. *Id.* at 8-9. From this balancing process, the ALRB concluded that make-whole is appropriate whenever an employer has refused to bargain, in violation of § 1153(a) and (e), and employees have suffered an economic loss as a result. Significantly, the ALRB stated that loss to an employee, where the employer has refused to bargain, may be "presumed." *Id.* at 9. This presumption of loss has been challenged on the grounds that it violates the rule against awarding speculative damages. *See* text accompanying notes 167-73 *infra*.

45. *Id.* at 10. "This identity of harm is the crux of the question concerning when the remedy ought to be applied." *Id.*

46. *Id.*

47. *Id.* On this point, the ALRB stated:

ALRB impliedly refused to recognize a distinction between *technical* and *clear and flagrant* refusals to bargain. The ALRB rejected, at the same time, the employer's argument that the imposition of make-whole in technical refusal cases has the effect of penalizing an employer who seeks further judicial review of its objections to certification of the union.[49]

The majority in *Perry Farms* took issue with ALRB member McCarthy's dissenting argument that rules of statutory construction compelled a case-by-case approach to the question of appropriateness of the remedy.[50] Further, the majority maintained that its

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> As between innocent employees and the employer which, having once had the full opportunity to litigate meritorious representation objections before the Board, now seeks a second review in the courts by a refusal to bargain, traditional principles of equity and the goals and policies of the Act require that the employer bear the actual burden of its own conduct.

Id.

48. In response to the objection that an award of make-whole in technical refusal to bargain cases would be punitive, the ALRB referred to the decision of the United States Supreme Court in Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), where the Court disposed of a similar attempt to narrowly construe the make-whole remedy in Title VII cases:

> If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith."

Id. at 422.

49. 4 A.L.R.B. No. 25 at 11. The ALRB found authority for its position in Consolo v. Federal Maritime Comm'n, 383 U.S. 607 (1966). In that case, the Maritime Commission had ordered a carrier to pay compensatory damages to a shipper which had been denied reasonable access to the carrier's vessels. The commission had previously ruled that such contracts were illegal. The court of appeals held the imposition of the compensatory award inequitable on the grounds that the carrier might have in good faith believed that its conduct was lawful, in light of the unsettled status of the law at the time. The Supreme Court upheld the award, characterizing the carrier's conduct as the product of a calculated gamble that precedent to the contrary could successfully be distinguished. "At any rate, it has never been the law that a litigant has been absolved from liability for that period during which litigation is pending." *Id.* at 624-25. The Court also noted that during the course of the appeal, the carrier had been able to postpone termination of its unlawful conduct and the shipper's injuries continued. *Id. See also* NLRB v. Electric Vacuum Cleaner Co., 315 U.S. 685 (1942); APW Prod., Inc., 137 N.L.R.B. No. 7 at 29-30, *enf'd*, 316 F.2d 899 (2d Cir. 1963). *See* text accompanying notes 104-18 *infra*.

50. 4 A.L.R.B. No. 25 at 14. The majority maintained that other principles of statutory construction, taken together, supported its interpretation of § 1160.3. See Steilberg v. Lackner, 69 Cal. App. 3d 780, 138 Cal. Rptr. 378 (1977), wherein the court set forth the rules of statutory construction:

> In construing a statute, the court should ascertain the intent of the Legislature, so as to effectuate the purpose of the law. . . . In determining the legislative intent, the court turns first to the words used in the statute. . . . The words,

decision did not deprive an employer of due process in testing its legal obligations. An employer was still free to pursue an appeal; the effect of the majority's decision was only that "the Employer's right to seek such determinations [would] not be financed by his employees."[51] Finally, the majority recognized that it was "venturing close to the collective bargaining process itself,"[52] but disagreed with the argument that this fact alone compelled it to proceed in a case-by-case manner. Instead, the majority maintained that it was vested with "the obligation to give coordinated effect to the policies of the Act."[53] Under the ALRA, this obligation required the ALRB to accommodate the parallel statutory directives to make employees whole, under section 1160.3, while not compelling the parties to agree to a contract or particular terms, as prohibited by section 1155.2(a).[54] At the same time, this obligation ensured that whatever remedial course the ALRB adopted would promote future bargaining between the parties in accordance with the policies of the ALRA as set forth in section 1140.2.[55]

In subsequent decisions, the ALRB has consistently followed the test for appropriateness adopted in *Adam Dairy* and *Perry Farms*. In *Superior Farming Co.*,[56] the ALRB overturned the decision of the ALO which held that make-whole was not appropriate in the context of a technical refusal to bargain.[57] In *Superior*

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however, must be read in context, keeping in mind the nature and obvious purpose of the statute, and the statutory language must be given such interpretation as will promote rather than defeat the objective and policy of the law. . . . Finally, in ascertaining the 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 construction.

Id. at 785, 138 Cal. Rptr. at 381 (citations omitted).

51. 4 A.L.R.B. No. 25 at 13.

52. *Id.* at 15.

53. *Id.* (*citing* NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1958)).

54. *See* text accompanying notes 129-40 *infra*.

55. *See* note 3 *supra*.

56. 4 A.L.R.B. No. 44 (1978).

57. *Id.* at 3. The decision of the ALO was rendered prior to the decision of the ALRB in *Adam Dairy* and *Perry Farms*. In *Superior Farming*, the employer refused to bargain solely in order to gain judicial review of its objections to certification of the union. The ALO understood federal precedent, that is, the clear and flagrant test suggested by the court of appeals in *Tiidee Products, Inc.*, to be controlling on the issue of the appropriateness of the remedy. In support of his conclusion that make-whole was not appropriate in cases of technical refusals to bargain, the ALO made the following observation, not treated elsewhere:

[A]n employer's obligation under our Act to bargain does not commence until

Farming, ALRB member McCarthy dissented on the grounds that make-whole was clearly inappropriate in cases of technical refusals to bargain: "[A]pplication of make-whole relief without inquiry as to whether an employer is acting in good faith is an unreasonable restraint on the right of review as long as the refusal to bargain remains the employer's only recourse to the courts for the purpose of challenging a Board certification."[58] However, in response to McCarthy, the majority reaffirmed its holdings in *Adam Dairy* and *Perry Farms*, stating:

> In place of a remedy designed to compensate employees, the dissent's approach would substitute a punitive device; that is, one designed to punish a class of employers because of the relative offensiveness of their behavior. In the words of the Court in *Albermarle* . . . the remedy would become "a punishment for moral turpitude." The exercise of discretion based upon such subjective considerations will, in our view, "produce different results for breaches of duty in situations that cannot be differentiated in policy". . . .[59]

> the employee representative is certified by the Board, and the Act makes clear that certification is open to judicial review by way of a refusal to bargain. . . . Accordingly, it is not so clear that an employer should be responsible . . . until review of his objections . . . are laid to rest and his affirmative duty to bargain is finally established. . . .

Id. at 15 n.12.

Cf. Perry Farms, Inc., 4 A.L.R.B. No. 25 (1978) (where the ALRB relied on the case of Consolo v. Federal Maritime Comm'n, 383 U.S. 607 (1966), in support of its position that an award of make-whole does not penalize an employer who seeks further judicial review of its objections to certification of the union). *See* note 49 *supra*. In *Superior Farming*, the ALRB, incorporating its discussion of the appropriateness of the remedy in *Perry Farms*, did not respond to the above observation of the ALO.

58. 4 A.L.R.B. No. 44 at 13. McCarthy argued that selective application of make-whole was required to avoid this chilling effect on judicial review while at the same time serving as a deterrent to dilatory delay. *Id.* at 14. McCarthy argued also that the majority's reliance upon Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), for the proposition that good faith is irrelevant when make-whole is considered, has been undercut by the recent decision of the United States Supreme Court in City of Los Angeles v. Manhart, 435 U.S. 702 (1978). In *City of Los Angeles*, the Court held that backpay was not to be awarded automatically in every case. Rather, courts are to be sensitive to equitable considerations, including the impact make-whole will have on certain types of employers who are acting in good faith. *Id.* at 719-23. McCarthy argued that in Title VII cases, losses are easily demonstrated and capable of precise calculation. In contrast, cases before the ALRB contain no assurances of any future agreement between the parties and a determination of what an employee's compensation would have been is speculative at best. "Thus, even more than in the Title VII setting, the make-whole remedy under our Act requires sensitivity to equitable considerations." 4 A.L.R.B. No. 44 at 14 n.2. However, the majority took issue with the significance that McCarthy attributed to the decision in *City of Los Angeles*, noting that the Court therein expressly cited with approval its decision in *Albermarle Paper Co. Id.* at 5 n.4.

59. *Id.* at 5 (citations omitted). It is apparent that the fact of harm to the employee

In *D'Arrigo Brothers*,[60] the employer sought review, in an unfair labor practices proceeding, of the prior dismissal of its objections to certification.[61] The ALRB reaffirmed its position, taken in *Perry Farms*, that it would not allow the relitigation of representation issues in the course of an unfair labor practices proceeding.[62] The ALRB awarded make-whole at the union's request. Interestingly, McCarthy concurred in the decision, apparently on the grounds that none of the employer's objections had any legal merit; hence, make-whole was appropriate.[63]

III. *J.R. NORTON COMPANY*

J.R. Norton Co.[64] is the first decision of the ALRB construing section 1160.3 to come before the California Supreme Court. *J.R. Norton Co.* is a case involving a technical refusal to bargain.[65] The employer raised two issues on appeal: (1) that the denial of a Writ of Review by the court of appeal was in error;[66] and (2) that an award of make-whole in a technical refusal to bargain situation was inappropriate.[67] Due to the preliminary issue of whether the union was properly certified, it is uncertain whether the court will reach the

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remains paramount in the mind of the ALRB. "A worker's injury is no less real simply because his employer did not inflict it in 'bad faith'." *Id.* at 4-5 (*citing* Albermarle Paper Co. v. Moody, 422 U.S. at 422).

60. 4 A.L.R.B. No. 45 (1978).

61. The two grounds stated for review by the ALRB were: (1) that the overruling of its objections to certification was in error for not following applicable NLRA precedent as required by § 1148; and (2) that § 1156.3(c) required the ALRB to conduct a hearing prior to the dismissal of these objections. *Id.* at 4.

62. *Id.*

63. *Id.* at 11. However, McCarthy carefully noted his rejection of any *automatic* application of make-whole. *See also* Waller Flower Seed Co., 4 A.L.R.B. No. 49 (1978) (dissenting opinion).

64. 4 A.L.R.B. No. 39 (1978), *hearing granted*, Cal. Sup. Ct. No. LA 31027 (Sept. 20, 1978).

65. Following the election, the ALRB conducted a hearing on two of the employer's 17 objections, dismissed them, and certified the union. Solely on the basis of its objections to certification, the employer refused to bargain and, as a result, was subject to a complaint for unfair labor practices pursuant to § 1160.3. The employer was ordered to make-whole its employees. The employer's Petition for a Writ of Review by the court of appeal was denied and hearing by the California Supreme Court was granted on September 20, 1978. Oral argument was heard in April, 1979.

66. The grounds for this contention are that the ALRB erred in not hearing all 17 of the objections to the election interposed by the employer. See Chapter 5 of the ALRA, found at §§ 1156-1159, for the provisions governing the election and certification of the union.

67. The arguments in support of this contention are presented and discussed fully *infra*. *See* text accompanying notes 70-149 *infra*.

issue of make-whole.[68] Nevertheless, it appears probable that the court's decision will not be the final judicial determination of either the constitutionality of section 1160.3 or the ALRB's test for the appropriateness of the remedy.[69] However, apart from the decision of the California Supreme Court, *J.R. Norton Co.* is an excellent vehicle for a consideration of the issue of make-whole under the ALRA in view of the comprehensive set of arguments, both for and against (some of which were raised for the first time on this appeal), which this case presents.

A. The Constitutionality of Section 1160.3 and Make-Whole as Ordered by the ALRB

The employer in *J.R. Norton Co.*, together with *amici curiae*,[70] argued that section 1160.3 in general, and make-whole as ordered by the ALRB in particular, are constitutionally infirm on three grounds: (1) the provisions of section 1160.3, authorizing the ALRB to order make-whole, constitute the exercise of judicial power by an administrative agency in violation of the doctrine of separation of powers;[71] (2) the statutory provision for an award of make-whole as against an employer, but not the union, violates the equal protection clauses of the United States and California Constitutions;[72] and (3) the award of make-whole itself functions as an impermissible burden upon the exercise of appellate review in violation of the due process requirements of the fourteenth amendment.[73]

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68. More specifically, if it is found that the ALRB had "sufficient grounds" to refuse certification, the employer would then be under no duty to bargain and, as a result, would be relieved of its liability for make-whole. See § 1156.3(c) for the grounds upon which an employer may interpose its objections to certification. *See also* Radovich v. ALRB, 72 Cal. App. 3d 36, 140 Cal. Rptr. 24 (1977) (regarding the standard for review of dismissals by the ALRB of an employer's objections to certification).

69. At this juncture, three alternatives are possible: (1) the court will agree with the employer's first argument, in which case it probably will not reach the issue of make-whole; (2) the court will reach the issue of make-whole and, if the ALRB's test for appropriateness is not sustained, will remand the question of appropriateness to the ALRB; or (3) the court will deny one or both of employer's arguments in which case, in view of the fact that a number of its challenges are constitutionally-based, a further appeal would seem probable.

70. *Amicus curiae* briefs were filed by Superior Farming Company, California Food Producers, Nisei Farmers League and San Joaquin Nisei Farmers League, Montebello Rose Company and Mount Arbor Nurseries, and the California Farm Bureau Federation.

71. *See* text accompanying notes 74-85 *infra*.

72. *See* text accompanying notes 86-103 *infra*.

73. *See* text accompanying notes 104-18 *infra*.

1. Separation of Powers

Article VI, section 1 of the California Constitution[74] enumerates the courts in which judicial power is vested. Article III, section 3 details the separation of powers between the legislative, executive, and judicial branches of California government. Article III, section 3 further provides that "persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."[75] Chapter 6 of the ALRA[76] empowers the ALRB to act as a judicial tribunal in the adjudication of agricultural labor disputes.[77] Section 1160.3 specifically authorizes the ALRB or its members to take testimony, to engage in fact finding and to draw conclusions therefrom, and to dispose of the controversy before it by issuing appropriate orders.[78] In view of article VI, section 1 and article III, section 3, the issue arises whether the legislature, in conferring the above adjudicative powers upon the ALRB, acted pursuant to a constitutional provision authorizing the exercise of judicial power by an administrative agency in the area of agricultural labor disputes.[79]

In *Tex-Cal Land Management, Inc. v. ALRB*,[80] the court of appeal was satisfied that the authority for the legislature's conferral

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74. CAL. CONST. art. VI, § 1. That section provides: "The judicial power in this State is vested in the Supreme Court, Courts of Appeal, Superior Courts, Municipal Courts and Justice Courts."

75. CAL. CONST. art. III, § 3. That section provides: "The powers of state government are Legislative, Executive and Judicial. Persons charged with the excercise of one power may not excercise either of the others except as permitted by this Constitution."

76. *See* CAL. LAB. CODE §§ 1160-.9 (West Supp. 1978).

77. Section 1160.3 provides in relevant part:

> Thereafter, in its discretion, the board, upon notice, may take further testimony or hear argument. 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 . . . 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. . . .

78. While the ALRB has the statutory authority to issue appropriate orders, as set forth in § 1160.3, it has no powers of enforcement. Section 1160.8 provides that the superior court in the county in which the unfair labor practice occurred, or the person charged in the complaint resides or transacts business, has the power to enforce the orders of the ALRB. If the court finds that the order was issued pursuant to the procedures established by the ALRB, the court shall enforce the order by way of writ on injunction or "other proper process." See 8 CAL. ADMIN. CODE §§ 20100-21255 for the procedural rules and regulations of the ALRB. *See also* Tex-Cal Land Mgt., Inc. v. ALRB, 24 Cal. 3d 335, 595 P.2d 579, 156 Cal. Rptr. 1 (1979).

79. In the absence of such a constitutional provision, the legislature is without the power to make such a conferral. *See* Laisne v. California State Bd. of Optometry, 19 Cal.2d 831, 123 P.2d 457 (1942); Standard Oil Co. v. State Bd. of Equal., 6 Cal. 2d 557, 59 P.2d 457 (1942).

80. 77 Cal. App. 3d 794, 144 Cal. Rptr. 149 (1978).

of judicial power upon the ALRB was to be found in article XIV, section 1.[81] As regards the issue of the constitutionality of the exercise of judicial power by the ALRB, the decision of the court of appeal was left undisturbed by the recent decision of the California Supreme Court in the same case.[82] Before the court of appeal, the employer in *Tex-Cal* argued that the ALRA is outside the scope of the provisions of article XIV, section 1. Relying on the history of this section, the employer argued that the framers could hardly have intended that some sixty years later the section would be utilized to support a grant of judicial power to an administrative agency having jurisdiction over agricultural labor relations.[83] This argument was rejected on the basis of well-recognized rules of constitutional interpretation, for example, where "the explicit meaning of language used in a constitutional provision is broader (*i.e.* more extensive) than the actual intent of the framers of the provision, we must accept the explicit meaning of the language used."[84] The employer in *J.R. Norton Co.* relied on the aforementioned argument raised by the employer in *Tex-Cal.* However, the recent decision of the California Supreme Court in *Tex-Cal,*[85] leaving undisturbed the decision of the court of appeal which rejected this argument, suggests that the order of make-whole by the ALRB in *J.R. Norton Co.* is a constitutionally sound exercise of judicial power.

2. *Equal Protection*

The employer's second challenge to the constitutionality of the

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81. CAL. CONST. art. XIV, § 1. That section provides: "The legislature may provide for minimum wages and for the general welfare of employees and for these purposes may confer on a commission legislative, executive and judicial powers."

82. 24 Cal.3d 335, 595 P.2d 579, 156 Cal. Rptr. 1 (1979).

83. 77 Cal. App. 3d at ____, 144 Cal. Rptr. at 153.

84. *Id.* In applying this rule of interpretation to art. 14, § 1, the court of appeal further stated:

> When the framers included the phrase, "and general welfare of any and all employees" in conjunction with the authority to enact laws pertaining to "minimum wages" and for the "comfort, health, safety" of employees, the door was opened to the Legislature to enact any law which it deemed to be of benefit to employees. Just as the amendment's language cannot be restricted to industrial employees to the exclusion of agricultural employees, it cannot be restricted to wages, hours and conditions of work to the exclusion of self-representation and collective bargaining rights of employees. After all, a primary goal of collective bargaining is to improve wages, hours and conditions of work.

Id. at ____, 144 Cal. Rptr. at 153-54.

85. *See* note 82 *supra.*

make-whole award in *J.R. Norton Co.* was made on the grounds that section 1160.3 treats agricultural employers differently than the union representing agricultural employees in violation of the equal protection clauses of the United States[86] and California[87] Constitutions. While section 1160.2[88] states that any person may be subject to a complaint for unfair labor practices, section 1160.3[89] provides that only an employer, and not the union, is subject to make-whole liability.

In order to invoke the strict scrutiny of the court on review, it was first claimed that an award of make-whole infringes upon a fundamental right.[90] The fundamental right identified by the employer was the right to acquire, own, and enjoy property. However, it is unlikely that the aforementioned interest of the employer will be found to be fundamental under these circumstances.[91] On the contrary, the better view is that the ALRA is no more than a comprehensive attempt at economic regulation. As a result, the consti-

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86. U.S. CONST. amend. XIV, § 1. That amendment provides, in relevant part: "[N]or shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

87. CAL. CONST. art. IV, § 16(a). That section provides: "All laws of a general nature shall have a uniform operation."

88. Section 1160.2 states in relevant part: "Whenever it is charged that *any person* has engaged in or is engaging in any unfair labor practice, the board . . . shall have power to issue . . . a complaint . . . ." (emphasis added).

89. Section 1160.3 provides in part:

> [T]he 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, and 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*. . . .

(emphasis added).

90. In order for a right to be deemed fundamental, the right must be "explicitly or implicitly guaranteed by the Constitution." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972). An allegation of a deprivation of a fundamental right or interest shifts the burden to the state to demonstrate a compelling state interest in the differential treatment of agricultural employers and the union in awarding make-whole.

91. The interest claimed to be fundamental is not among those heretofore recognized as fundamental by the United States Supreme Court, for example, the right to travel, the right to vote, the right to privacy. As authority for its claim that a fundamental right was at stake, the employer relied exclusively upon the twin cases of Shelley v. Kraemer, 334 U.S. 1 (1948) and Sei Fujii v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952). In both *Sei Fujii* and *Kraemer*, at issue was the constitutionality of enforcement of racially restrictive covenants in real property. The enforcement of such covenants places an absolute restriction upon the ownership of real property. An award of make-whole against an employer who has been adjudged guilty of unfair labor practices does not represent either the same degree or type of restriction.

tutionality of section 1160.3 is dependent only upon a finding of a rational relationship between the objectives of the ALRA and the means chosen by the legislature to realize those objectives.[92] Furthermore, in the area of economic regulation, there exists a presumption of constitutionality.[93]

To rebut this presumption of constitutionality, the following argument was raised. Whereas the ALRA was designed to promote the rights of agricultural employees,[94] actions by either the employer or the union will advance or hinder these rights. Yet, only the employer, and not the union, is subject to the sanction of make-whole liability. It was argued that the lack of a comparable sanction[95] upon the union adversely affects the interests of employees since, for example, employees under the ALRA are prohibited from decertifying the union unless there is a contract in existence[96] and there is no time limit on the employer's duty to bargain in good faith.[97] Additionally, it was suggested that, in instances where the union feels it might not achieve a favorable contract, the union's insulation from make-whole liability provides it with the opportunity to design dilatory tactics to bring the employer into violation of its duty to bargain and thereby obtain an award of make-whole.[98]

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92. In the area of economic regulation, the principle of equal protection is violated only by invidious discrimination or by legislative classifications that are arbitrary or capricious, bearing no relation to the object of such legislation. *See* McGowan v. Maryland, 366 U.S. 582 (1961).

93. *See* Railway Express Agency v. New York, 336 U.S. 106 (1949); Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

94. *See* CAL. LAB CODE § 1140.2 (West Supp. 1978); §§ 1, 1.5 of Stats. 1975, 3rd Ex. Sess., c.1, §2.

95. Sections 1154 and 1154.5 set forth the acts that constitute an unfair labor practice on the part of a "labor organization" (*i.e.*, the union). Under § 1160.3, a labor organization is subject to the same sanctions as the employer, with the exception of make-whole.

96. Unlike § 9(C)(1)(a) of the NLRA, 29 U.S.C. § 159(C)(1)(a) (1973), pursuant to which employees can vote to decertify a union if they feel the union has failed to adequately represent their interests, under § 1155.3(a) of the ALRA employees have no such unqualified right.

97. Section 1155.2(b) provides that upon receipt of a petition, filed not later than 60 days preceeding the expiration of the 12 month period following the initial certification, the ALRB shall determine whether the employer has bargained in good faith. If the ALRB finds that the employer has not bargained in good faith, it may extend certification for up to one additional year. It was contended that such extensions were granted "automatically" by the ALRB. Such extensions, it was claimed, functioned to eliminate any competition from rival unions.

98. The suggestion that the union's lack of exposure to make-whole liability provides it with the opportunity to bring an employer into violation of its duty to bargain and thereby obtain an award of make-whole is without foundation. This suggestion overlooks the fact that it is the collective agreement itself that is the cornerstone of the union's viability *vis-a-vis*

As previously noted, the dominant purpose behind the enactment of the ALRA is the encouragement of collective bargaining between agricultural employers and the employees' representative union. It is obvious that actions by either the employer or the union will have the effect of advancing or hindering the bargaining process. However, as between the employer and the union, the incentive to delay the bargaining process for as long as possible rests with the employer and not the union. The existence of an incentive to delay bargaining on the part of the employer, together with the adverse effects suffered by employees as a consequence of such delay, has been recognized by both the NLRB[99] and the ALRB. In *Adam Dairy,* the ALRB took note of the history of refusals to bargain under the NLRA:

> Every board member in *Ex-Cell-O* conceded the inadequacy of the board's 8(a)(5) remedies. The losses to employees . . . who are deprived for 1, 2 or sometimes many more years of the right to be represented are palpable. . . . The savings to respondent employers from delaying the onset of bargaining can be enormous. Until this basic profit . . . is removed, the incentive to mock the statute's promises is apparently compelling.[100]

The mere fact of differential treatment of persons similarly situated is insufficent to render a legislative classification infirm on the grounds that it violates the equal protection clause.[101] In view of the economic incentive to delay on the part of the employer, the provision for make-whole as against the employer, and not the union, evidences the requisite rational relationship between the objectives of the ALRA and the means adopted by the legislature to realize those objectives. Even assuming that the employer is correct in its argument that a union's lack of exposure to make-whole liability provides it with the license to engage in activities that may prove to be equally adverse to the interests of the employees it represents, the restriction of the make-whole remedy to a certain class of potential wrongdoers does not itself violate the principles of equal protection:[102]

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the employees it seeks to represent. It is difficult to imagine a situation where any amount of a make-whole award would compensate employees for the lack of an agreement.

99. *See* note 18 *supra.*

100. 4 A.L.R.B. No. 24 at 4 (quoting from comments made by former NLRB chairperson McCulloch in the course of a 1976 oversight committee hearing).

101. *See* Williamson v. Lee Optical, 348 U.S. 483 (1955).

102. *Id.*

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or, so the legislature may think . . . . Or the reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting others.[103]

3. Due Process

Once the election of the union has been held by the ALRB,[104] and the ALRB has overruled the objections to certification interposed by the employer,[105] the only means by which an employer can secure judicial review of its objections is refusal to bargain.[106] If the employer's objections to certification are found to be without merit by the court of appeal,[107] and the employer had previously been ordered by the ALRB to make-whole its employees, the employer remains liable for make-whole until it commences to bargain in good faith.[108] In *J.R. Norton Co.*, the employer argued that the threat of make-whole liability, felt by the employer while it pursues its objections to certification in the courts, constitutes an impermissible burden[109] upon the right to appellate review in violation of due pro-

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103. *Id.* (citations omitted).

104. Chapter 5 of the ALRA, found at §§ 1156-1159, governs the election and certification process.

105. Section 1156.3(c) provides that upon receipt of an employer's petition, within five days of the election, the ALRB shall conduct a hearing on the objections contained in the petition. The grounds for objection by an employer include: (1) that the allegations contained in the employees' petition for a representative election, as set forth in §§ 1156(a)(1)-(4), are incorrect; (2) that the ALRB improperly determined the geographical scope of the bargaining unit; or (3) that misconduct of the election itself, or misconduct on the part of interested individuals, affected the election results. If no objections are filed within five days of the election, or if the ALRB lacks "sufficient grounds" to refuse certification, the ALRB must certify the union.

106. As previously noted, when the employer refuses to bargain, it becomes subject to a complaint for unfair labor practices. The employer may not raise the representation issue in the context of the unfair labor practices proceeding. *See* note 42 *supra*. However, on appeal of the unfair labor practices charge, the employer may raise the issue of representation as an affirmative defense to the unfair labor practices charge. See Radovich v. ALRB, 72 Cal. App. 3d 36, 140 Cal. Rptr. 24 (1977) (for the standard for review of dismissals of objections to certification by the ALRB).

107. Section 1160.8 provides for direct review by the court of appeal of objections to orders of the ALRB. The enforcement of ALRB orders is vested in the superior court.

108. As ordered by the ALRB, an employer's liability for make-whole runs from the date of first refusal to bargain following certification of the union until the employer commences to bargain in good faith. *See* text accompanying note 164 *infra*.

109. The burdens upon appellate review claimed by the employer include the high cost

cess.[110]

The authority relied upon in support of this contention is of questionable relevance to a determination of the constitutionality of the ALRA's structure for hearing and review of an employer's objections to certification. In *Ex Parte Young*,[111] for example, the United States Supreme Court considered a statute that required a railway to defy the maximum rates imposed by the governing commission in order to secure judicial review of those rates.[112] Failure on appeal meant that the railway would be subject to a felony charge. In each of the cases relied upon by the employer, the party alleging the unconstitutional burden faced the dilemma of either conducting its business in a certain manner or risking a substantial penalty for noncompliance with the statute.

However, the structure for consideration of an employer's objections to certification under the ALRA is significantly different than that presented in the above situations. Unlike the situation in *Ex Parte Young*, involving the threat of criminal penalties, an award of make-whole is designed to compensate employees for injuries suffered as a result of the refusal to bargain, not to punish the employer.[113] Further, in contrast to the cases relied upon by the employer, under the ALRA an employer has the opportunity to

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of litigation before the ALRB in addition to the amount of the make-whole award (the final amount of which includes the period of delay occupied by seeking judicial review).

110. U.S. CONST. amend. XIV, § 1. That section provides in relevant part: "[N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ." See CAL. CONST. art. I, § 13 for a similar provision. In view of what is claimed to be an unconstitutional burden upon the excercise of appellate review, it was argued that make-whole liability, in the event that an employer's objections are found to be without merit on appeal, should be measured only from a date subsequent to a complete exhaustion of the appellate process. The consequence of such a proposal is, however, to encourage appeals. Even frivolous appeals consume time and the resources of the opposing party. Such a result is contrary to the purposes of the ALRA, for during the period of delay occupied by appeal, the status quo remains intact. There is no bargaining between the parties, the employer gains an economic and bargaining advantage, the union stands to lose employee support, and the employees remain uncompensated for their injury.

111. 209 U.S. 123 (1908). *See also* United States v. Morton Salt Co., 338 U.S. 632, 654 (1950); Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920); United States v. Pacific Coast Europ. Confer., 451 F.2d 712 (9th Cir. 1971); Ford Motor Co. v. Coleman, 402 F. Supp. 475 (D.C. 1975).

112. In reaching its decision that the effect of the statute at issue was to impose an unconstitutional burden upon the right to review, the Court observed that "to impose . . . the burden of obtaining a judicial decision . . . only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts. . . ." 209 U.S. at 148.

113. *See* text accompanying note 49 *supra*.

contest the certification prior to seeking judicial review.[114] It is only after dismissal of an employer's objections by the ALRB, and the decision by the employer to refuse to bargain in order to seek further review of these objections, that an employer is subject to the possibility of make-whole liability.[115] Finally, the duty to bargain under the ALRA does not require an employer to reach an agreement or make a concession.[116] As a result, under the ALRA the employer's choice is either to bargain in good faith, as defined in section 1155.2(a), or refuse to bargain and face make-whole.[117] In view of the ALRA's provisions for hearing and review of meritorious objections to certification, it is apparent that the employer's decision whether to seek judicial review of these objections is indistinguishable from the risk inherent in any decision to appeal. "At any rate, it has never been the law that a litigant has been absolved from liability for that period during which litigation is pending."[118]

B. *The Role of NLRA Precedent*

Section 1148 of the ALRA provides that "the board shall follow applicable precedents of the National Labor Relations Act, as amended." In *J.R. Norton Co.*, the employer argued that for purposes of determining when make-whole is appropriate, section 1148 requires that the ALRB follow the decision of the United States Court of Appeals in *Tiidee Products, Inc.*[119] In that case, the court held that make-whole would be appropriate under the NLRA where the refusal was a "clear and flagrant violation" undertaken for "patently frivolous" reasons.[120]

The contention that federal precedent should control the ALRB's determination of the appropriateness of the remedy rests on

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114. *See* note 105 *supra*. The procedural safeguards set forth in § 1156.3(c) ensure that an employer will obtain a review by the ALRB of all legally sufficient objections to certification.

115. *See* note 49 *supra*.

116. Section 1155.2(a) provides, in relevant part: "[S]uch obligation does not compel either party to agree to a proposal or require the making of a concession."

117. Thus, the situation faced by an employer under the ALRA is readily distinguishable from that faced, for example, by the railway company in *Ex Parte* Young, 209 U.S. 123 (1908). *See* note 111 *supra*. There, the choice was either to challenge the rates in question (and face a felony charge in the event that the appeal proved unsuccessful) or conduct its business under arguably confiscatory rates.

118. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 624-25 (1966).

119. 426 F.2d 1243 (D.C. Cir. 1970).

120. *Id.* at 1248.

the premise that section 10(c) of the NLRA,[121] as interpreted by the court in *Tiidee Products, Inc.*, is the equivalent of section 1160.3 of the ALRA. However, unlike section 1160.3, section 10(c) of the NLRA is a general remedial statute. Thus, in reaching its decision that make-whole was appropriate under the NLRA in certain circumstances despite the lack of any statutory authorization, it was fitting that the court in *Tiidee Products, Inc.* supplied some guidance for the application of make-whole. This is especially true in view of the fact that the court was fashioning a new remedy without the legislative guidance of the Congress and in opposition to the administrative agency, established by Congress, with expertise in the area of labor relations.[122] Furthermore, notwithstanding judicial approval of make-whole under the NLRA, the NLRB has consistently refused this invitation to award make-whole on the grounds that it lacks the statutory authority.[123] The NLRB's refusal to acquiesce to the rulings of the federal courts of appeal on this point suggests that federal law, as regards make-whole, remains unsettled and, hence, lacks any precedential value.

Therefore, by its terms, section 1148 does not compel the ALRB to adopt the test for appropriateness suggested by the court in *Tiidee Products, Inc.* This conclusion is further strengthened by the presence in section 1148 of the qualifying phrase "applicable precedents." In *ALRB v. Superior Court*,[124] the California Supreme Court recognized that section 1148 did not direct the ALRB to uncritically adopt the positions of the NLRB:

> [W]e observe that section 1148 directs the Board to be guided by the "applicable" precedents of the NLRA, not merely the "precedents" thereof. From this language the Board could fairly have inferred that the Legislature intended it to select and follow only those federal precedents which are relevant to the par-

121. *See* note 16 *supra*.

122. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242-43 (1959).

123. *See* Ex-Cell-O Corp., 185 N.L.R.B. No. 20 (1970). Despite this fact, the employer in *J.R. Norton Co.* argued that, by operation of the doctrine of "law of the case," on remand to the NLRB the decision of the court of appeal in *Tiidee Products, Inc.* became binding on the NLRB. This reliance upon the doctrine of "law of the case" is misplaced insofar as, on remand, the NLRB itself observed that a "close analysis of the court's opinion reveals that the court did not decide that the Board *must* issue a make-whole remedial order in these cases." 194 N.L.R.B. No. 198 (1972) at 1234 (emphasis added). In fact, the NLRB concluded that an order of make-whole on the facts before it was "not practicable." *Id.* at 1235.

124. 16 Cal.3d 392, 546 P.2d 687, 128 Cal. Rptr. 183 (1976).

ticular problems of labor relations on the California agricultural scene.[125]

The very existence of the ALRA is itself a recognition that agricultural labor relations are faced with problems often distinct from those of labor relations in general. As between agricultural employers and employees, the disparity in relative bargaining strengths is perhaps greater than that encountered in any comparable sector of labor relations. Considering the particular character of agricultural labor relations, and the language of section 1160.3 which provides that the ALRB *shall* order make-whole when *it* deems such relief to be appropriate, it is reasonable to assume that the legislature vested the ALRB with the discretion to determine the appropriateness of the remedy. As previously noted, the ALRB was convinced that its test for the appropriateness of the remedy[126] was justified in light of the incentive to delay bargaining on the part of the employer.[127] In addition, the harm to the employee as a result of the delay was found to be the same regardless of the reason for the delay.[128] In view of the discretion vested in the ALRB by the legislature, the ALRB's test for the appropriateness of the remedy should not be disturbed on the basis of a claim that section 1148 dictates a different conclusion.

C. *Make-Whole: Damages, Not a Contract*

Both the NLRA and the ALRA provide that the statutory duty to bargain does not compel the parties to reach agreement or to make a concession.[129] Section 8(d) of the NLRA has been interpreted by the United States Supreme Court to mean that the NLRB "may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining

125. *Id.* at 412-13, 546 P.2d at 700, 128 Cal. Rptr. at 196.

126. *See* note 40 *supra.*

127. *See* text accompanying notes 99-100 *supra.*

128. *See* text accompanying notes 47-48 *supra.*

129. Section 1155.2(a) of the ALRA, containing a definition of the duty to bargain virtually identical to that found in § 8(d) of the NLRA, provides that:

> [T]o bargain collectively in good faith is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

agreements."[130] As previously noted, the ALRA was enacted with a view towards the corpus of federal labor law and section 1148 of the ALRA specifically requires the ALRB to follow the applicable precedents of the NLRA.[131] The aforementioned proscription is then equally applicable to the posture of the ALRB as regards the collective bargaining process.

In *J.R. Norton Co.*, it was argued that the ALRB violated this proscription in ordering make-whole. As ordered by the ALRB,[132] make-whole was objected to on the twin grounds that it both directly and indirectly interfered with the contract rights of the employer. It was claimed to result in a direct interference insofar as the amount of the award was predicated upon a method of calculation that considers what an employee "would have received" had the employer bargained in good faith.[133]

It should first be noted that the make-whole remedy found in section 1160.3 is an award of damages.[134] As such, there are serious problems with the attempt to characterize sections 1155.2(a)[135] and 1160.3 as inconsistent with one another.[136] In arriving at the conclusion that make-whole was appropriate under the NLRA, the court in *Tiidee Products, Inc.* considered the effect of section 8(d) of the NLRA,[137] stating:

> The power to accord some meaningful make-whole relief is not necessarily undercut by the provision in Section 8(d) of the Act that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession". . . . The Board cannot be faulted on the grounds that it is imposing contract terms . . . when it is engaged only in a determination of a means of calculating a remedy to com-

130. NLRB v. American Ins. Co., 343 U.S. 395, 404 (1952).

131. *See* text accompanying notes 119-28 *supra*.

132. *See* text accompanying notes 148-73 *infra*.

133. *See* text accompanying notes 167-73 *infra*.

134. The court in *Tiidee Products, Inc.* recognized that make-whole is a form of damages to compensate an employee for injuries suffered from an unlawful refusal to bargain. *See* text accompanying note 137 *infra*.

135. *See* note 129 *supra*.

136. To begin with, this argument entails a reading of the ALRA as if the legislature had concluded that these two sections could not co-exist. However, it is manifest that the legislature has struck the balance in favor of the remedy by providing the ALRB with the express authority to award it and the discretion to determine its appropriateness. *See* text accompanying notes 30-33 *supra*.

137. *See* note 129 *supra*.

pensate for injuries sustained from an unfair (an unlawful) labor practice.[138]

Section 1155.2(a) of the ALRA prohibits the ALRB from interfering directly in the collective bargaining process. It is clear that the ALRB could not bring the parties before it and suggest compromises, or require that they engage in a trade-off of negotiating items, or threaten them with reprisals in the event that an agreement was not reached. Such conduct would be within the purview of section 1155.2(a). However, the effect of a make-whole award upon the bargaining process is altogether different. Properly viewed as a form of compensatory damages, make-whole does not result in a direct interference in the bargaining process. At most, its impact upon bargaining is indirect.[139] However, it is impossible to imagine a remedy that would have no effect upon the bargaining process.[140]

D. Legislative History and Intent of Section 1160.3

Virtually no record of a legislative history of the ALRA in general, and section 1160.3 in particular, exists.[141] The only published material consists of testimony at a public hearing held on May 21, 1975.[142] The testimony concerning section 1160.3 is comprised solely of statements then Secretary of Agriculture Rose Bird[143] made in

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138. 426 F.2d at 1252.

139. As previously noted, it was argued also that the award of make-whole has an indirect impact upon bargaining that is likewise proscribed by § 1155.2(a). It was claimed that indirectly a substantive contract is forced upon the employer. That is, upon resumption of bargaining, due to the expectations that the award creates in the union and employees, the union will base its bargaining position on the terms contained in the award. However, the strength of this argument is diluted by its own reliance upon § 1155.2(a). For even if the union's bargaining position is predicated upon the terms of the make-whole award, the employer is under no compulsion to reach an agreement or make a concession. Irrespective of the union's bargaining position or strategy, the only thing required of the employer is to bargain in "good faith."

140. In *Adam Dairy*, the ALRB recognized that any award of make-whole would have some impact on the bargaining process. In its consideration of the parallel statutory directives of § 1155.2(a) and § 1160.3, the ALRB observed, "we also read these 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." 4 A.L.R.B. No. 24 at 11. See text accompanying notes 148-73 *infra* for a discussion of method of calculation of the make-whole award adopted by the ALRB.

141. Until recently, hearings on proposed legislation were neither recorded nor transcribed. As a consequence, in evaluating the ALRB's test for appropriateness of make-whole, courts will be forced to rely almost exclusively on the language of § 1160.3 and the policies of the ALRA as set forth in § 1140.2 and §§ 1, 1.5 of Stats. 1975, 3d Ex. Sess., c.1, §2.

142. *See* note 32 *supra*.

143. Rose Bird, now Chief Justice of the California Supreme Court, was testifying in her

response to objections interposed by a growers' representative. The growers' representative contended that an award of make-whole would result in the writing of a contract for the parties in violation of section 1155.2(a).[144]

In response to this objection, Secretary Bird stated: "May I suggest that the Board is not bargaining for the employer. . . . What it [*i.e.*, the legislature] 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."[145] Relying on the above statement, the employer in *J.R. Norton Co.* argued that it was the intent of the legislature, in authorizing make-whole, that the appropriateness of the remedy be determined case-by-case and, further, that make-whole be awarded only in instances of "bad faith." By definition, then, make-whole would be inappropriate in the context of a technical refusal to bargain.

The obvious problem with this conclusion is the scintilla of evidence, purporting to represent the intent of the legislature, offered in support.[146] The context of Secretary Bird's comments is significant on this point. The above-quoted statement of Secretary Bird was made in response to the objection that in ordering make-whole, the ALRB would be writing a contract for the parties. When viewed in context, Secretary Bird's comments suggest that the ALRB was not to interject itself into the bargaining process but, instead, was to take affirmative action only after the bargaining process had been thwarted. However, technical refusals to bargain thwart the bargaining process, and so thwart the objectives of the ALRA, in the same manner as "bad faith" bargaining or refusals for any other reason. Furthermore, it is arguable that Secretary Bird's reference to "bad faith" refers not to the motivation behind the refusal to bargain, but to the fact of refusal, independent of the reason. From this testimony it is apparent also that the question of whether the legislature was going to include the make-whole remedy

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capacity as Secretary of the Agriculture and Services Agency. Her testimony on this issue is found at Hearing on S.B. 1, *supra* note 33, at 63-69.

144. *Id.* at 63. See text accompanying notes 129-40 *supra* for a discussion of § 1155.2(a) and the objection that make-whole results in the ALRB writing a contract for the parties.

145. *Id.* at 65.

146. The fact that the secretary of an administrative agency advanced a certain interpretation of proposed legislation at a public hearing is several qualitative steps removed from the conclusion that the legislature embraced this interpretation or, alternatively, that the intent of the legislature can be gleaned from such remarks.

is itself not evidence of an intent to limit the discretion of the ALRB to determine when make-whole would be appropriate.[147]

IV. CALCULATION AND DURATION OF MAKE-WHOLE LIABILITY

Having determined that make-whole was appropriate in every case in which an employer's refusal to bargain resulted in financial loss to employees, the ALRB in *Adam Dairy* proceeded to determine what elements would be included in the award and in what manner the award would be implemented.[148] In ordering make-whole, the ALRB was careful to bear in mind that the implementation of any make-whole award was to be guided by the principles of collective bargaining, on the one hand, and the scope of its remedial powers, on the other. "The concurrent purposes of compensating employees and encouraging the practice of collective bargaining form the framework for application of the make-whole remedy."[149] As a practical matter, the task before the ALRB in *Adam Dairy* was to further the concurrent purposes of compensation and collective bargaining without intertwining itself in the details of bargaining to the point where "the dictates of the State are substituted for agreement of the parties."[150]

The ALRB first decided that the award would be calculated at the time of its decision on the unfair labor practices charge. The suggestion that the award be computed at a post-hearing compliance proceeding was rejected on the grounds that it would consume too much time and contained too great a potential for dispute over detailed components of the award.[151] The ALRB next considered the

147. Whereas § 1160.3 mandates that, upon a finding that a party has engaged in an unfair labor practice, the ALRB *shall* take "affirmative action," it is to order an employer to make-whole its employees only when *it* deems such relief to be appropriate.

148. 4 A.L.R.B. No. 24 at 6-29.

149. *Id.* at 9. These concurrent purposes are, in reality, interdependent. In order to compensate an employee for the deprivation of his or her rights under the ALRA, the actual monetary loss must be ascertained. However, the deprivation of collective bargaining rights, by an unlawful refusal to bargain, also embraces certain noneconomic benefits, for example, grievance procedures, that an award of make-whole cannot restore to the employee. Such benefits can only be restored through collective bargaining. *See* note 40 *supra*. "Hence, our concern is that our authority to compensate for loss of wages should be applied so as to seek to spur the resumption of bargaining and that it not become a new means to delay the bargaining process through lengthy compliance proceedings." *Id.* at 10.

150. *Id.*

151. *Id.* at 13. Providing an additional forum would prolong the litigation and, as a result, the period of injury to employees and the period of liability of the employer. "It is

issue of the method of computation of the award. It rejected a "costing-out" approach wherein each particular provision of a hypothetical contract, and its alternatives, would be considered separately. Instead, the ALRB adopted a more generalized estimate of the cost of a contract because such an approach did not require the ALRB to assess alternatives.[152] The ALRB adopted the approach to the problem of calculation set forth in proposed amendments to the NLRA contained in H.R. 8410:[153]

> The measure of such damages is an objective one. It consists of the difference between the wages and other benefits received by the employees during the period of delay and the wages and other benefits they were receiving at the time of the unfair practice multiplied by a factor which represents the change in such wages and benefits elsewhere in the same industry as determined by the Bureau of Labor Statistics.[154]

The ALRB recognized that it did not have statistics on wages and benefits or collective bargaining agreements comparable to those relied upon in the proposed formula under the NLRA. However, the ALRB felt that the data it did have provided a reasonable basis for calculating a basic wage rate which employees could have expected to receive under a United Farm Workers' contract.[155]

The average basic wage of all thirty-seven contracts submitted to the ALRB for comparison was $3.13 per hour for the first year and $3.26 per hour for the second.[156] On the basis of this evidence, the

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entirely appropriate and consistent with the purpose of this section [*i.e.*, § 1160.3] to balance the need for reasonable certainty in the amount of damages with the need to minimize delays in bargaining which result directly from the use of the Board's processes." *Id.* at 12.

152. *Id.* at 16.

153. H.R. REP. No. 637, 95th Cong., 1st Sess. (1977).

154. *Id.* at 17-18; 4 A.L.R.B. No. 24 at 14. The ALRB's reasons for adopting this approach to the calculation of the make-whole award were: (1) it achieved a reasonable estimate of actual loss while avoiding argument over the relevance of conflicting data presented by the parties in a post-hearing setting; and (2) it bypassed litigation of the issue whether a particular employee would have reached a contract with the employer or agreed to a particular provision. *Id.*

155. *Id.* at 17-18. The aforementioned data consisted of 37 United Farm Workers' contracts negotiated pursuant to ALRB certification, all of which were concluded within a 12 month period following certification of the union. These contracts were negotiated during roughly the same period as the employer's unlawful refusal to bargain in *Adam Dairy*. From this the ALRB concluded that "based on this evidence it was reasonable to assume for purposes of calculating the make whole amount that Respondent's conduct deprived employees of the benefits of a similar contract concluded during the same period." *Id.*

156. *Id.* at 19-20. From this evidence the ALRB concluded also that the predictable result of the UFW's bargaining efforts during this period was the establishment of a roughly

ALRB ordered the employer in *Adam Dairy* to make its employees whole for the difference between its basic wage rate and the average negotiated wage rate of $3.13 per hour.[157] However, the ALRB had also concluded that the term "pay" in section 1160.3 encompassed both wages paid directly to an employee and all other benefits, capable of monetary calculation, which flowed to the employee by virtue of the employment relationship.[158] As a result, it had to calculate the monetary value of those fringe benefits capable of such calculation.[159] Again, the ALRB adopted a generalized approach to the issue of calculation of fringe benefits. Relying on United States Department of Labor materials[160] relating to the percentages of total compensation represented by basic wages and fringe benefits, the ALRB determined that the make-whole wage rate of $3.13 per hour represented seventy-eight percent of the total compensation package.[161] Thus, the formula for calculating make-whole, including both

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uniform basic wage rate statewide, irrespective of the pre-contract wage rates of particular employers. *Id.* at 19. This evidence further showed that there was an average increase of pre-contract wage rates of approximately 11.73% for all 37 contracts. However, this percentage increase was not adopted as the method for calculating make-whole on the grounds that it would prove to be inequitable. For example, if an employer paid a pre-contract wage rate in the vicinity of $3.10 per hour, the negotiated increase would be significantly more than the average of $3.13. To use this figure would then be inequitable to the employer. On the other hand, where the employer's pre-contract wage rate is substantially lower than $3.10 per hour, the use of the 11.73% figure would obviously be inequitable to the employees.

157. *Id.* at 20. The ALRB took notice of the fact that the figure of $3.13 per hour represented the lowest wage rate negotiated in the UFW contracts. To account for the higher wage rate paid to skilled employees, the ALRB ordered that each employee, who received during the make-whole period a differential above the employer's basic wage rate, was to be credited with a proportional increment above the make-whole base rate of $3.13 per hour. *Id.* at 22. For example, the make-whole rate for an employee earning 10% above the employer's make-whole base rate would be $3.13 per hour (make-whole base rate) plus 10% ($.31), or $3.44 per hour.

158. *Id.* at 6. In Ware v. Merrill, Lynch, Pierce, Fenner & Smith, 24 Cal. App.3d 35, 100 Cal. Rptr. 791 (1972), the court of appeal held that the scope of the term "wages," in California Labor Code § 200, encompassed all benefits to which an employee was entitled as a part of his or her compensation, for example, bonuses, payments to health and welfare funds, and employer payments of insurance premiums. Similarly, the NLRB, as "backpay" under § 10(c), has awarded vacation benefits, bonuses, and pension, health, and medical benefits. The ALRB concluded that the term "pay" in § 1160.3 was to be given the same breadth of definition as "wages" under § 200 and "backpay" under NLRA § 10(c).

159. Although fringe benefits are typically paid in a variety of forms, the ALRB decided to calculate their worth on a dollar-per-hour basis. It then ordered that this value be paid to the employee as part of the make-whole award. 4 A.L.R.B. No. 24 at 24.

160. *Id.*

161. *Id.* at 28. The figure of 78% was taken from a Bureau of Labor Statistics study and represents the percentage of straight-time pay of nonmanufacturing employees. The ALRB concluded that the nonmanufacturing category most closely resembled the agricultural indus-

the basic wage rate and fringe benefits, was:

> $3.13 (basic make-whole wage rate) = .78X (where X equals the total compensation)
>
> $$\frac{\$3.13}{.78} = X$$
>
> X = $4.01 per hour (the make-whole rate).[162]

Anticipating objections to this method of calculation, the ALRB defended its position, stating: "Even in private litigation, the courts will not impose an unattainable standard of accuracy. Certainty in the fact of damages is essential. Certainty as to the amount goes no further than to require a basis for a reasonable conclusion."[163] The period of the employer's make-whole liability was held to run from the date of first refusal to bargain following certification of the union until the date the employer commenced to bargain in good faith. The application of the remedy to this entire period was designed by the ALRB to "directly deprive Respondent of the immediate economic benefits to be gained by continuing its misconduct, and . . . to forestall those effects of delay so destructive of the union's ability to bargain."[164] The same approach to the calculation of the make-whole basic wage rate and the dollar value of fringe benefits has been followed by the ALRB in subsequent decisions.[165]

As previously noted, the ALRB's application of make-whole has come under attack as imposing contract terms on the parties.[166] A closely related challenge has been made on the grounds that the amount of the award is impermissibly speculative. In *J.R. Norton Co.* it was argued that the make-whole award, as calculated by the ALRB, violated the well-established rule that damages may be

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try; that is, it is relatively lower paying and tends to be labor intensive as opposed to capital intensive. *Id.* n.9.

162. As a result, each employee covered by the award was to receive the net difference per hour between the figure of $4.01 per hour and the actual total hourly value of all monetary benefits received by the employee during the period covered by the award.

163. *Id.* at 29. *See* Bigelow v. RKO Pictures, 327 U.S. 251 (1951); F.W. Woolworth Co. v. NLRB, 121 F.2d 658 (2d Cir. 1941).

164. 4 A.L.R.B. No. 24 at 16.

165. *See, e.g.*, Superior Farming Co., 4 A.L.R.B. No. 44 (1978) (the ALRB directed the Regional Director to utilize more recent UFW contracts for comparison, but to follow the same method of computation); Robert H. Hickham, 4 A.L.R.B. No. 73 (1978) (upon request by the UFW, the ALRB directed the Regional Director to determine whether employees paid under a "piece-rate" system, the most common method of payment, would be adequately compensated under the formula adopted in *Adam Dairy*).

166. *See* text accompanying notes 129-40 *supra*.

awarded in a civil action only to compensate for actual losses.[167] More specifically, it was maintained that the ALRB disregarded the above rule when, in *Perry Farms*, it held that "for the purpose of analysis at this juncture, the fact of loss to the employees [when an employer has refused to bargain] may be presumed."[168] It was claimed that such a presumption of loss was unwarranted. In lieu of such an unwarranted presumption, the employer contended that the ALRB was required to consider, in each case, evidence bearing on the related questions of whether there would have been a contract between the parties and, if so, what the terms of that contract would have been.[169]

However, a refusal to bargain is itself a wrong under the ALRA[170] and, as such, the fact of damage occurs there. As a result, the rule against speculative damages is satisfied insofar as certainty is only required as to the "nature, existence or cause of damage."[171] Instead, the question of what the parties would have agreed to goes only to the amount of damages, not the fact of damage. On this point, the court in *Tiidee Products, Inc.* stated:

> Similarly, the make-whole remedy—which could be measured not by a sentiment as to what the parties *should* have agreed to, but only by a determination, on the basis of all the evidence available, of what it is likely the parties *would* have agreed to—provides money compensation as a remedy for past wrongs.[172]

The method of computation of the make-whole award adopted by the ALRB provides for a reasonable degree of certainty as to the amount of damages suffered by an employee. The circumstances giving rise to an order of make-whole make difficult a more precise measure of damages. In view of the fact that it is the actions of the

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167. *See* Mozetti v. City of Brisbane, 67 Cal. App.3d 565, 575, 136 Cal. Rptr. 751, 756 (1977).

168. 4 A.L.R.B. No. 25 at 9.

169. It was suggested that the ALRB receive evidence bearing on the relative economic strengths of the parties, thereby providing it with some evidentiary basis for concluding whether a contract would have been reached. See note 154 *supra* for the ALRB's reasons for rejecting this suggestion. Alternatively, it was proposed that the ALRB award make-whole as a *conditional* remedy, that is, if the parties eventually did reach an agreement, then its terms would be applied retroactively to cover the period of liability.

170. *See* CAL. LAB. CODE § 1153(e) (West Supp. 1978).

171. *See* Griffith v. San Diego College for Women, 45 Cal. 2d 501, 516, 289 P.2d 476, 484 (1955).

172. 426 F.2d at 1252 (emphasis in original).

employer, that is, his or her unlawful refusal to bargain, that make greater certitude impossible, the objection that the ALRB's method of calculation results in an award of speculative damages is without merit. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncetainty which his [or her] own wrong has created."[173]

Conclusion

In enacting the ALRA, California has taken a bold step towards correcting the inequities and injustices existing in its agricultural labor sector. The stated purposes of the ALRA are to "ensure peace in the agricultural fields,"[174] to guarantee "justice for all agricultural workers and stability in labor relations,"[175] and to "bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state."[176] To effectuate these policies, the legislature included section 1160.3, providing the ALRB with the express authority to award make-whole and vesting it with the discretion to determine in what instances make-whole is appropriate.

The ALRB's test for the appropriateness of the remedy[177] is not an abuse of the ALRB's discretion. There are no applicable NLRA precedents[178] and the legislative history and intent of section 1160.3 is inconclusive.[179] In arriving at its determination of the appropriateness of the remedy, the ALRB exercised the judicial power proplerly delegated to it by the legislature.[180] While the ALRA does differentiate between employers and unions, imposing make-whole only upon the former, such a legislative classification does not violate the equal protection clauses of either the United States or California Constitutions. In view of the economic incentive to delay bargaining on part of the employer, section 1160.3 evidences the requisite rational relationship between the objectives of the ALRA and the means adopted by the legislature to realize those objectives.[181] Further, an award of make-whole, even in the context of a

173. Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264-65 (1945); California v. Day, 76 Cal. App. 2d 536, 552, 173 P.2d 399, 408 (1946).

174. *See* text accompanying note 2 *supra.*

175. *Id.*

176. *See* note 2 *supra.*

177. *See* text accompanying note 8 *supra.*

178. *See* text accompanying notes 119-29 *supra.*

179. *See* text accompanying notes 141-51 *supra.*

180. *See* text accompanying notes 74-85 *supra.*

181. *See* text accompanying notes 86-103 *supra.*

technical refusal, does not curtail the employer's right to seek judicial review of its objections to certification. Either the employer bargains in good faith or faces make-whole—nothing more is required.[182] Make-whole is a means of compensating employees for injuries suffered as a result of the refusal to bargain. In arriving at the amount of the award, the ALRB has adopted a method of calculation which provides reasonable certainty as to the amount of the damages[183] and which does not so involve the ALRB in the bargaining process that it imposes contract terms on the parties.[184]

Moreover, as ordered by the ALRB, make-whole is in furtherance of the policies of of the ALRA. The ALRA was enacted to provide protection to agricultural employees through the creation of a duty to bargain and the provision of a remedy for an employer's violation of that duty. When the duty to bargain is breached, both employees and the union suffer considerable economic and noneconomic injury.[185] This injurious effect is the same regardless of the employer's reasons for refusing to bargain. As a consequence, the ALRB's test for the appropriateness of the remedy is necessary to compensate employees and provide a deterrent to employers who, in view of the economic incentive to delay, might otherwise be tempted to refuse to bargain.

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182. *See* text accompanying notes 104-18 *supra*.
183. *See* text accompanying notes 166-73 *supra*.
184. *See* text accompanying notes 148-50 *supra*.
185. *See* text accompanying notes 40 and 154 *supra*.