

Indio, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RICHARD A. GLASS COMPANY, INC. ,)	Case Nos . 79-CE-36-SD
DMB PACKING CORP. dba)	79-CE-37-SD
R . A . GLASS COMPANY, RANCHO)	79-CE-38-SD
MARCA DE ORO, RANCHO ORO VERDE,)	79-CE-40-SD
RANCHO DE DIAMANTES,)	80-CE-75-SD
)	80-CE-99-SD
Respondents,)	
and)	
)	14 ALRB No . 11
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Charging Party.)	
)	

DECISION AND ORDER

On May 28 , 1985 , Administrative Law Judge (ALJ) Robert L. Burkett issued the attached Decision in this matter. Thereafter, Respondent Richard A. Glass Company, Inc. (Respondent or Company) timely filed exceptions to the ALJ's Decision with a supporting brief, and General Counsel filed a brief in response to Respondent's exceptions.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings, and conclusions of the ALJ, to the extent they are consistent herewith, and to issue the attached Order.

Background

At all times pertinent herein, Respondent operated a business in Indio, California, whereby it provided packing, shipping and marketing services for independent citrus growers.

Respondent made additional services available to its grower-customers upon request, such as providing them with harvest crews and equipment and supervising the actual harvest and transport of crops from their fields to Respondent's packing shed.

On January 14, 1977, the United Farm Workers of America, AFL-CIO (UFW or Union), served Respondent with a Petition for Certification pursuant to Labor Code section 1156.3(a).^{1/} In its Response to the Petition, Respondent submitted a pre-petition payroll roster listing 86 harvest and general labor employees eligible to vote in the election. The UFW received a majority of the valid votes cast in the election and, on April 25, 1977, was certified by the Board as the exclusive collective bargaining representative of all agricultural employees of Richard A. Glass Company, Inc. in the State of California.^{2/}

Thereafter, on December 19, 1977, the Union and Respondent entered into a comprehensive collective bargaining agreement to run through December 1, 1980. A second collective bargaining agreement was consummated on February 28, 1982, to run through February 27, 1983. Attorney David E. Smith, Respondent's counsel at the time of the representation election and in all subsequent matters relevant herein, served as Respondent's

^{1/} All section references are to the California Labor Code unless otherwise specified.

^{2/} Both the National Labor Relations Board (NLRB) and the ALRB are required to define agriculture in conformity with the Fair Labor Standards Act (FLSA) of 1933, section 3(f), 29 U.S.C. section 203(f) (Bodine Produce Co. (1964) 147 NLRB 832 [56 LRRM 1276]; Labor Code Sections 1140.4(a) and (b).) There is no question that all field and harvest employees whose names appeared on Respondent's

(fn . 2 cont. on p. 3)

negotiator and was a signatory to the aforescribed documents. Smith stipulated that the two agreements were essentially the same and that the negotiations which culminated in the 1982 agreement commenced prior to the expiration of the initial contract.

Pertinent provisions of the contract provided, inter alia, that two weeks prior to the start of any of the Company's operations, Respondent would provide the Union with a current roster of seniority workers in the certified unit; those workers would be recalled jointly by Respondent and the Union on no less than two weeks notice; Respondent would afford the Union seven days written notice of impending layoffs; and, all new hirings would be effectuated through the Union's hiring hall. Respondent also agreed to keep the Union apprised as to all locations where workers covered by the agreement were or would be working. In January 1978, Respondent advised the UFW that Labor Contractor Oscar Ortega and Respondent's counsel would henceforth represent the Richard A. Glass Company in all matters relative to the agreement.

(fn. 2 cont.)

pre-petition payroll roster are engaged in primary farming activities and thus are agricultural employees within the meaning of the FLSA and section 1140.4(b) of the Agricultural Labor Relations Act (ALRA or Act). (Farmer's Reservoir & Irrigation Co. v. McComb (1949) 337 U.S. 755. Although the status of the packing shed employees is not before us in this proceeding, Respondent agreed to language in the contract which provides that should either the NLRB or the ALRB rule that certain shed-related duties are agricultural, employees in those categories shall be subject to the provisions of the contract with the UFW which governs the terms and conditions of employment of Respondent's agricultural employees. We assume, therefore, that the status of the packing shed employees has not been adjudicated by the NLRB. Accordingly, Respondent's contention that those employees are not subject to ALRB jurisdiction is a conclusion of law not binding on the Board.

At the time of the election and consummation of the initial bargaining agreement in December 1977, Respondent normally required three seasonal harvest crews comprised of about 20 employees each, as well as an indeterminate number of employees responsible for general year-round maintenance and irrigation. Respondent hired and supervised one of the crews, the so-called "company crew," and engaged two labor contractors, one of whom was Ortega, to assemble and supervise the remaining crews.

Respondent stipulated at hearing that citrus workers traditionally work on a piece rate basis and agreed that it is common practice for a new wage rate to be set by the employer each time employees change groves, predicated, on the condition and productivity of the trees. With respect to the members of the certified unit, however, Respondent could no longer unilaterally set the rate. The contract with the UFW provided for a basic rate plus, when warranted, an upward-adjusted surcharge subject to on-the-spot negotiations between Respondent and the steward for each crew and/or the Union. Disputes were subject to arbitration.^{3/}

During the 1977-1978 season, the parties often failed to agree on the surcharge. Members of the union crews testified that

^{3/} The arbitrator is contractually bound to accept either Respondent's or the Union's proposed rate and is precluded from independently setting a different rate. The parties resorted to arbitration at least once, as reflected in the Arbitrator's Report of June 18, 1979. The UFW proposed increases for two crops ranging from 6.77 to 11.76 percent whereas Respondent proposed increases for the same crops ranging from 5.88 to 6.77 percent. The arbitrator adopted the company's proposals. As to two other crops, the UFW proposed increases ranging from 10 to 11.11 percent but Respondent proposed no increase. The Union's proposal was adopted by the arbitrator.

Ortega sometimes merely declared "that's the rate, take it or leave it." The ALJ found numerous work stoppages during the 1973 and 1979 harvests resulting from Respondent's failure to negotiate rates in conformity with contract provisions. During those times, according to the ALJ, other nonunion crews were called in to finish the tasks initially assigned to union crews. The ALJ also found that the early layoff of two crews on or about May 15, 1979, was directly attributable to the failure of Respondent and the Union to agree to the piece rate proposed by Respondent, and that union crews were advised that unless they accepted Respondent's rate, they should not expect any more work that season.^{4/}

^{4/} Reynaldo Zepeda described several instances in which employees and the Company both agreed and disagreed on the rate of pay. He testified that when the parties could not agree, the crew did not work, for up to two weeks at a time, but kept returning to the field to attempt to negotiate further. During those times, the crew was replaced with nonunion crews. Jesus Garcia was the negotiator for the Ganoa crew, apparently the same crew in which Zepeda worked. He testified that the crew would be out of work for two or three days at a time during the wage disputes. Zepeda, Garcia and Raul Galvaz credibly described the last day they worked, in May or June of 1979. Zepeda said the crew objected to the rate specified by the Company and were advised by Ortega, "Well, if you're not going to go in [to start work], that's it for the rest of the season. And if anybody wants to go in without a union, they can go in." Galvaz corroborated Zepeda's account, adding that the crew had waited from 6 a.m. that morning until noon without working in anticipation of a favorable response "from the Company. Finally, Ortega told them they could continue working, but not under the Union contract. The entire crew left and did not work for Respondent the remainder of that season. Respondent does not contend that the failure of crew members to complete the season invalidated their seniority preference for recall in a subsequent season. As the layoffs were not the subject of an unfair labor practice charge, and since the ALJ indicated that the evidence was admissible for purposes of background only, the Board declines to find that Respondent's conduct in that regard constitutes a violation of the Act subject to remedy.

The citrus harvest season in the Coachella Valley runs generally from October to June. Union crews were recalled in October 1978 in accordance with the contract. However, no unit employees were recalled for the start of the 1979-1980 season.^{5/} On April 25, 1980, as the end of the 1979-1980 season approached, and after the UFW had filed grievances and unfair labor practice charges alleging, inter alia, unilateral changes in employees' terms and conditions of employment, Respondent recalled one crew.

Alleged Diversion of Bargaining Unit Work

On December 24, 1979, the UFW timely filed an unfair labor practice charge in which it alleged that since on or about November 10, 1979, Respondent eliminated a substantial amount of bargaining unit work for discriminatory reasons by effectuating a change in its business practices. The UFW also alleged that Respondent failed to timely notify the Union and afford it an opportunity to bargain over the change before it was implemented or to bargain over the effects of the change. The conduct was alleged to have violated sections 1153(c) (discrimination in employment), 1153(e) (unilateral changes in contravention of the duty to bargain in good faith) and 1153(a) (interference with employees' section

^{5/} The only exceptions were four grove tenders, about the same number as were drawn from the unit in the immediately preceding season. Union members recalled, but outside the contract, included Maria and Leonel Lua who had worked under contract through May 1979. Although both were recalled for the start of the 1979-80 season, they were not sent the customary joint notice from the union. Rather Manual Ortega, Oscar's father, came to their house and instructed them where to report for work the next day. Maria testified that while there were only three ranches under union contract in the 1979-1980 season, "We used to work all the ranches under contract [in prior seasons]."

1152 rights).^{6/}

Following an investigation by the Board's Regional Office, a complaint issued based on the charge described above, as well as other charges, and ultimately was the subject of a full evidentiary hearing before an ALJ in which all parties participated. In its answer to the complaint, Respondent denied all allegations therein but asserted no affirmative defenses save the general statement that it engaged in no conduct violative of the Act. During the course of the hearing, Respondent engaged in limited cross examination of General Counsel's witnesses but called no witnesses of its own. Although Respondent concedes a change, which admittedly resulted in a diminution of the amount of work previously available to employees in the unit covered by the Board's certification order, Respondent contends that the change was not motivated by reasons proscribed by the Act but was the result of actions beyond its control. Respondent's defense, as expressed in a statement of position set forth in its brief in support of exceptions to the ALJ's Decision, is that unnamed and unspecified numbers of its grower-customers, although continuing to utilize Respondent's harvest equipment and packing and shipping facilities, voluntarily decided to assume direct responsibility for their own harvest labor requirements and therefore were no

6/ The UFW also alleged that Respondent interrogated employees because of their activities on behalf of the Union. As General Counsel failed to present any evidence in support of the allegation, it is hereby dismissed.

longer dependent upon Respondent for that purpose.^{7/}

Thus, the only question before the Board on this issue is whether General Counsel has established a prima facie case of unlawful conduct and, if so, whether Respondent's reliance on a mere statement of position is sufficient to overcome General Counsel's case. For reasons which follow, we conclude that the evidence does in fact preponderate in support of General Counsel's showing of violations of sections 1153(c), (e) and (a) of the Act and that Respondent's asserted defense is a pretext.

In October and November of 1979, not having received their anticipated recall notices, a number of unit employees expressed concern to the UFW since other Coachella Valley citrus operations had commenced harvesting for the 1979-1980 season. In the ensuing weeks, union representatives Leopoldo Trevino and Nancie Jarvis made several telephone calls to Ortega's office on behalf of the inquiring employees. They were assured each time by Ortega's secretary that recalls were imminent. Employee Raul Galvaz made a number of visits to Ortega's office. On each occasion, he was told that Respondent expected to begin harvesting in about two weeks.

By the time Trevino left his employ with the UFW in February 1980, no unit employees had been recalled for the

^{7/} General Counsel alleges that Respondent operated at least three citrus groves for its own account. Those parcels have been identified by General Counsel as Rancho Marca de Oro, Rancho Oro Verde and Rancho de Diamantes. Unless General Counsel's contention is disproved by Respondent during the compliance phase of this case, any individuals engaged in agricultural activity on those parcels, whether or not supplied by a labor contractor, clearly would be employees of Respondent herein and therefore could not be subject to the defense.

harvest. Prior to his departure, he made field visits to all Coachella Valley citrus groves in which union crews had worked in years past. He found the same groves being harvested by nonunion crews using equipment bearing the Richard A. Glass Company logo and working under the direction of the same supervisors and foremen. Employee Galvaz made similar inspections in November, 1979 of at least six different ranches with which he was familiar, having worked on them in the immediately preceding season. He inspected fourteen different groves in the next three months. Virtually all of the nonunion crews were supervised by Rogelio Ganoa, the foreman of the "company crew" in prior years. Eventually Galvaz, Francisco Ruiz and other unit employees became discouraged and sought work elsewhere, thereby relinquishing their seniority preference for recall in subsequent seasons.

On December 12, 1979, prior to Trevino's leaving but after the UFW had filed grievances and unfair labor practice charges based on the failure to recall, Respondent's counsel wrote to the Union as follows:

Work for the seniority workers will probably commence near the 1st of January, 1980. The reason for this is that the grapefruit does not have size at the present time on the ranches which have elected to have R. A. Glass Co. harvest their fruit. Seniority workers will, of course, receive the two weeks advance notice pursuant to the terms of the contract.

Respondent, through Ortega, ultimately did issue recall notices, but only in numbers sufficient to comprise one crew and not until April 25, 1980, a few weeks before the normal end of the harvest season. Respondent had advised the Union in writing that harvest

contracts with individual growers are on an annual basis, expiring at the end of each season. Respondent did not explain why, in this instance, it would not have had work available for unit employees at the beginning of the season. Moreover, Respondent neither tendered the two week advance notice of recall nor advised the Union that it intended to recall employees on a date certain, yet both requirements are clearly set forth in the bargaining agreement. Nancie Jarvis spoke to Ortega's secretary to suggest that notices to more unit employees be sent as she did not believe Respondent could draw enough employees to constitute even one crew. As she pointed out, employees had awaited recall for seven months and many had obtained work elsewhere and might not still be in the area. For the same reasons, Jarvis requested that Ortega call her in order to discuss Respondent's adherence under these circumstances to the contract provision specifying that failure to report for work within three days of notice would result in a loss of seniority. Ortega's secretary later advised her that the company intended to strictly enforce the three-day recall provision.

Respondent does not contest any of the evidence set forth above but asserts that although it continued to pack and ship produce from the various fields observed by Trevino and Galvaz, owners of those fields had contracted directly with Ortega in his role as a labor contractor independent of Respondent.^{8/}

^{8/} It should be noted that Ortega had been a major supplier of labor to citrus and other growers prior to the election herein and, in addition, farmed his own agricultural holdings.

Among Respondent's grower-customers who allegedly changed their labor policies in the relevant year are two Coachella Valley operations, namely, the Sherwood Ranch (20 acres dates, 12 acres citrus) and Hacienda del Gato (100 acres citrus). Sherwood is owned by the Fritz Burns Foundation (Foundation) whose president, Joseph E. Rawlinson, has offices in Los Angeles. Sherwood has been locally supervised in the Indio area since 1968 by Al Kerwin and has been a customer of Respondent's since about 1970. Hacienda del Gato, an asset in the estate of the late Fritz Burns, had been managed by Respondent for over 30 years. At all times pertinent herein, control of the Burns' estate was in the hands of three coexecutors including Rawlinson and Frances R. Thomas.

Kerwin hired Salvador Yanez to oversee the care of the date crop on the Sherwood Ranch and also to irrigate the citrus. However, he never assumed any duties with respect to the citrus harvest, having turned over total responsibility for that aspect of the operation to Respondent in 1970, an arrangement which he testified continues to date without change. As Kerwin explained, neither he nor the Foundation had anything at all to do with the citrus crop except to await receipt of a year-end check from Respondent for any proceeds remaining after Respondent had deducted all costs. Kerwin recalled having once received what appeared to be a statement for harvest labor costs from one Oscar Ortega in 1980. Since Kerwin had never heard of Ortega, he immediately called Respondent to complain that the billing " . . . wasn't according to our agreement . . . we never paid any bills [for labor or any other costs]." Kerwin returned the invoice to

Respondent and heard nothing further about the matter.

Rawlinson confirmed Kerwin's recollection of the incident, adding that the Foundation did not pay the Ortega bill and had never before or since received such a billing. Moreover, according to Rawlinson, he had a preference for the established method of doing business with Respondent as it was more convenient to receive a yearly statement with a single check representing profits. In a letter to the ALRB's San Diego Regional Office on November 6, 1980, Rawlinson further explained as follows:

This year, Mr. Ben Vallett, Jr. representative of the Richard A. Glass Company suggested to Mr. Kerwin that we pay the pickers. Mr. Kerwin told Mr. Vallett that we would rather he paid the pickers as we know nothing about that particular phase of the operation and that we would just like to deal with the Richard A. Glass Company alone. Mr. Kerwin stated that Mr. Vallett agreed to that.

As one of the executors of the Burns' estate, and thus overseer of Hacienda del Gato, Frances Thomas testified that the only labor she hired consisted of three year-round maintenance employees since Respondent handled everything else. She testified further that Respondent had been hired specifically to pick, pack, haul, ship and market the grapefruit and tangerine crops produced on Hacienda del Gato and that harvest labor in particular had always been handled by Respondent and "they still do." It was customary for Respondent to send the Burns' executors a single statement once a year, an end-of-season breakdown of all costs, including labor, and a check for whatever profits remained. Thomas testified that in 1980, for the first time, she received a bill directly from Ortega for labor as well as an advance against that season's harvest from Respondent, or at least "[that's] what they

say. It's an advance on the crop." Thomas estimated that she now receives as many as three or four advances per season from Respondent, drawn on Respondent's account, as well as an invoice from Ortega for labor. She testified that the Ortega invoice and the Glass advance arrive in the same envelope and the amount of the advance usually approximates or is slightly in excess of the bill for labor. Thomas routinely deposits the check from Respondent and within a few days issues her own check to Ortega.^{9/} However, she testified that no one associated with the management of the Burns' estate initiated the new billing procedure, or sought out Ortega, or hired him to provide labor. Moreover, she had no idea who was responsible for the change in practice but did know with certainty that it could not have been one of her coexecutors "because I handled this type of thing."

Respondent asserts that while it did not recall union employees, it failed to do so for legitimate business reasons. But, in that regard, Respondent has made only oblique references to a "business justification," contending that the admitted change in hiring practices was initiated by customers who looked to sources other than Respondent for their harvest requirements.^{10/}

^{9/} According to Rawlinson, the first set of invoices/advances for labor for the Hacienda del Gato were issued on March 26, 1980 and May 20, 1980. Rawlinson added that he was surprised to learn that checks had been issued to Ortega by the Burns' estate since "it was my understanding that this matter was all taken care of by the Richard A. Glass Company. . . . It is our contention that the labor was always hired by the Richard A. Glass Company."

^{10/} The Board does not in any manner imply that Respondent's grower-customers were not free to make such arrangements on their own initiative; we merely find that they did not do so.

However, since its assertion in that regard was directly rebutted by two customers, we find that the alleged business justification is not consistent with the facts on record and therefore is not a legally adequate justification for Respondent's actions.

Notwithstanding our reliance on a failed defense, there is ample independent evidence in the record to demonstrate a discriminatory motive for Respondent's conduct. Respondent ignored the Union's status and repudiated its own bargained-for provisions of the collective bargaining agreement in the following ways: by failing to provide clearly relevant information, upon request (as developed and discussed below); by failing to timely notify the Union of the change in business practices, which it subsequently conceded; by falsely promising employees imminent recall and thereby misleading them and conveying the impression that the Union had little or no power to protect their contractual rights; and, by Ortega's response to employees who attempted to enforce the rate-setting provisions of the contract in the Spring of 1979.

We find that Respondent has not established that the failure to recall, a departure from its past policy, was tied to economic considerations, and conclude that the failure to recall was the product of an impermissible motive in violation of the Act.

The state of the record is such that Respondent's pretext has been directly demonstrated as to two of its grower-customers. As Respondent failed to prove its sole defense, we believe that the Board is free to infer that the pretext

applies to all customers whom Respondent contends voluntarily and independently discharged Respondent's labor services for the 1979-1980 harvest. Lending further authority to the Board's position is the adverse inference rule which presumes that a party will introduce all relevant evidence which is favorable to its case. (International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB (Gyrodyne Co.) (B.C. Cir. 1972) 459 F.2d 1329 [79 LRRM 2332].)

Of course, the inference may not be drawn where the evidence clearly falls within the ambit of confidentiality or some other validly recognized privilege. Such is not the case here. During the course of its investigation of the UFW's unfair labor practice charges, General Counsel sought, by subpoenas ad testificandum and subpoenas duces tecum, to question Respondent's employees and to obtain certain information. Respondent resisted production on the grounds that the information sought was confidential as it would necessitate revealing details of contractual arrangements with customers. Respondent successfully asserted that defense in a subsequent subpoena enforcement action initiated by the Board in the Superior Court of Riverside County, California. General Counsel proceeded to attempt to prove his case by secondary evidence during the pendency of the Board's appeal of the ruling of the lower court. After the unfair labor practice hearing had ended, the California Court of Appeal for the Fourth Appellate District held that since Respondent did not contest the relevancy of the information which General Counsel sought in the subpoenas duces tecums, but merely asserted a "trade

secret" privilege, Respondent had the burden of proving the existence of a "trade secret" as well as the burden of demonstrating how disclosure would injure its business. The court concluded that Respondent had not succeeded in meeting its burdens. (Agricultural Labor Relations Board v. Richard A. Glass Co., Inc. (1985) 175 Cal.App.3d 703.)^{11/}

Neither may the inference be drawn where relevant evidence or witnesses are available to both parties but are not introduced by either party. That also is not the case here. Respondent stipulated that the 21 individuals named in the complaint and whom General Counsel sought to examine as alleged officers, supervisors or agents of Respondent, would refuse to testify on any matter or subject relevant to issues in the complaint except their names, addresses and telephone numbers.

Thus, we find there is no impediment to drawing an unfavorable inference from Respondent's failure to call any witnesses or to put on any evidence to support its contention that its grower-customers cancelled their prior arrangements for Respondent's harvest services. Therefore, we draw an adverse inference from Respondent's failure to produce its own principals who had the best knowledge as to why unit work had been eroded. We further draw the inference from Respondent's failure to permit Ortega to testify about his independent contracts with

^{11/}This Board acknowledges the validity of the "trade secret" privilege in appropriate cases and when timely asserted in accordance with federal labor law precedents and the analysis of the California Court of Appeal as set forth in Agricultural Labor Relations Board v. Richard A. Glass Co. Inc. (1985) 175 Cal.App. 3d 703. See discussion, infra.

Respondent's customers. Where the General Counsel has produced strong evidence, Respondent's production of weak evidence or, as here, no evidence, warrants the inference that the production of strong evidence would have been adverse to Respondent. (The Goodyear Tire & Rubber Company (1984) 271 NLRB 343 [117 LRRM 10861].)

Accordingly, we infer that Respondent's conduct was motivated, by some consideration that Respondent purposely failed to reveal and that the only motive apparent from this record is union animus. As has been observed by the courts:

Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact -- here the trial examiner -- required to be any more naive than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal -- an unlawful motive -- at least where ... the surrounding facts tend to reinforce that inference.
(Shattuck Denn Mining Corporation (Iron King Branch) v. NLRB (9th Cir. 1966) 362 F.2d 466, 470 [62 LRRM 2401].)

Scrutinizing the reasons put forth by Respondent for failing to recall the discriminatees, we are persuaded, and find, as did the ALJ, that they are not only implausible on their face but were clearly refuted by the evidence, specifically, testimony by two of Respondent's own customers. Accordingly, we find that Respondent discriminatorily failed to recall unit employees for the start of the 1979-1980 harvest season in violation of sections

1153 (c) and (a) and instituted unilateral changes in business practices in violation of sections 1153 (e) and (a) .

Alleged Failure to Provide Information

On December 10, 1980, the UFW filed an unfair labor practice charge in which it alleged that Respondent violated section 1153(e) and (a) by failing to provide information.

The ALJ summarily disposed of the allegation on the grounds that (1) he was estopped from finding Respondent in violation of the duty to provide information by a California Court of Appeal ruling upholding Respondent's contention that the information sought by the Union was protected by a "trade secret" privilege, and (2) Respondent supplied some of the information requested and/or the Union had not exhausted its efforts to obtain the information. We believe that the ALJ has relied in part on a Superior Court ruling which was subsequently vacated^{12/} and that his further analysis finds no basis in established principles of labor-management relations.

As a threshold matter, we observe that the record reveals only one request by the Union for information within six months of

^{12/}As the relevant Decision of the Court of Appeals, Agricultural Labor Relations Board v. Richard A. Glass Co. , Inc. (1985) 175 Cal.App.3d 703, did not issue until approximately seven months after the ALJ rendered his Decision herein, we find that his reference to the ruling on appeal is inadvertent error. In any event, the "trade secret" privilege was asserted by the Respondent only in response to information sought by General Counsel in preparation of his case relative to the allegation that bargaining unit work had been subcontracted in violation of the Act. The privilege was never asserted to the Union prior to the filing of the unfair labor practice charge which alleges a failure to provide information. (See, e.g., Oil, Chemical & Atomic Workers' Union v. NLRB (D.C. Cir. 1983) 711 F.2d 348 [113 LRRM 3163]; Detroit Edison Co. v. NLRB (1979) 440 U.S. 301 [100 LRRM 2728] and discussion, infra.)

the filing of the relevant charge and thus all prior requests for information would be subject to the statute of limitations defense of section 1160.2.^{13/} However, Respondent neither asserted a limitations defense on this question nor objected to a full exposition, including the admission of pertinent exhibits, pertaining to allegedly unfulfilled requests for information over a two-year period preceding the filing of the charge. Moreover, even though the initial request for information was made outside the statutory period, the Board may examine such prior conduct in order to explain or clarify conduct which occurred within six months of the filing of the charge. (Local Lodge No. 1424 v. NLRB (1960) 362 U.S. 411 [45 LRRM 3212].)

Thus, the Board is not precluded from examining and, where warranted, finding violations of the duty to provide information outside the limitations period. (See, Ruline Nursery Co. v. Agricultural Labor Relations Board (1985) 159 Cal.3d 247, 265 [216 Cal.Rptr. 162]; AS-H-NE Farms (1980) 6 ALRB No. 9.) Based on the evidence which follows, in light of prevailing authority, we will find that Respondent failed to timely respond to the Union's requests for clearly relevant information beginning

^{13/} By letter dated June 24, 1980 and hand delivered to Oscar Ortega, Respondent's labor contractor and designated representative for matters arising under the bargaining agreement, UFW representative Nancie Jarvis advised that she had just learned that the crew of Lalo Magana had been working under the contract since sometime in May of 1980, yet the union had not been so advised, as required by the contract. She specifically called Ortega's attention to the provisions of Articles 3 (hiring) and 4 (seniority) of the bargaining agreement and asked that he comply by submitting to the Union a list of all employees working under the contract including their date of hire and job classification. There is no evidence that the request was satisfied.

in January 1978.

The essential facts were fully litigated and are not in dispute. For more than two years following implementation of the initial collective bargaining agreement, the Union attempted, without success, to obtain specific information from Respondent. Although the Union made repeated requests for a variety of information, we confine our discussion to only that information which falls within two general categories -- information which Respondent expressly agreed in the contract to provide (e . g . , locations of Company operations) and information relative to grievances in which the Union alleged that Respondent had breached the collective bargaining agreement by performing bargaining unit work with nonbargaining unit personnel (i . e . , subcontracting).

On January 30, 1973, the Union submitted a written request for information including the sites of citrus harvest activity as contemplated by the collective bargaining agreement between the parties.^{14/} Respondent agreed that same day to supply all of the information requested by a date certain. Later, after not having received the promised data, particularly that concerning locations, the Union renewed its request. In its written reply, Respondent explained only that it never had any operations in the Westmoreland area nor any agricultural employees

^{14/} Article 20 of the agreement provides as follows: "The Company will provide the Union with the exact locations including total acreage and crops of all present agricultural operations (and any acquired or lost during the life of this Agreement) immediately after the execution of this agreement, for use by the Union representatives pursuant to the Right of Access Article." Article 13, section C, states: "Company will provide description of Company work locations."

in any areas outside the Coachella Valley. Although there is uncontroverted evidence that the Union continued to press for information, particularly work locations, Respondent did not at any time apprise the Union as to the sites of the various groves where harvest employees actually were working. As discussed previously, the Union ultimately attempted to determine which groves Respondent was harvesting that season by personally inspecting all Coachella Valley citrus groves which it knew Respondent to have harvested in previous seasons.

On April 23, 1979, the UFW filed the first of the grievances in which it alleged that Respondent was performing bargaining unit work with nonunit employees. In its reply, dated April 24, 1979, Respondent stated that it employed two crews (the Zamora and Gaona crews) in accordance with the Union contract and that it assumed that the grievances pertained to crews working for citrus growers who only utilized Respondent's shipping services, as those growers had independently contracted directly with Ortega for their harvest crews. In a meeting between the parties on May 17, 1979, the Union asked Respondent to substantiate its claim in that regard. Respondent promised a full response and, in a subsequent letter dated June 19, 1979, pledged to supply additional information "as soon as it can be secured." After several more phone requests by the Union, the parties met again, on July 5, 1979, to discuss the grievances and Respondent's as yet unfulfilled assurance that it would demonstrate that growers were themselves hiring and paying Ortega. The Union advised Respondent that it had tentatively decided to take matters

to arbitration and again requested information for the declared purpose of assessing whether it would .in fact be advisable to pursue arbitration. On July 25, 1979, Respondent submitted an invoice from Ortega for labor supplied to one ranch as well as a copy of a cancelled check showing payment. Respondent also stated that since the Union had apparently decided that the matter would be submitted to arbitration, "I see no reason to supply any additional information."^{15/}

It is well settled that section 1153(a) of the Act imposes upon an employer the duty to furnish a union, upon request, information relevant and necessary to enable the union to intelligently carry out its duties as the employees' exclusive bargaining representative. (Holyoke Water Power Co. (1985) 273 NLRB 1369 [118 LRRM 1179], enforced (1st Cir. 1985) 778 F.2d 49 [120 LRRM 3487]; NLRB v. Acme Industrial Co. (1967) 385 U.S. 432 [65 LRRM 2069].) That duty does not terminate upon the consummation of a collective bargaining agreement but continues unabated during the term of the agreement in order to permit the union to police and administer the contract. (NLRB v. Acme Industrial Co., supra; K. Kroger Co. (1976) 226 NLRB 512 [93 LRRM 1315].) Since the duty to supply information relevant to the union's obligations to administer the bargaining agreement is a statutory one, it is immaterial whether a contract is silent as to information the employer must submit; the duty to supply

^{15/} Although the Union continued to request information and Respondent indicated a willingness to submit information through December 12, 1979, we do not find Respondent's attempts at compliance to be either complete or in good faith.

information exists independent of any agreement between the parties. (American Standard, Inc. (1973) 203 NLRB 1132 [83 LRRM 1245].) So long as the information sought is relevant to the union's responsibility to administer the contract, an employer's failure to provide the information requested may constitute a failure of the duty to meet and bargain in good faith. (Curtiss-Wright Corp. (1963) 145 NLRB 152 [54 LRRM 1320], enforced (3d Cir. 1965) 347 F.2d 61 [59 LRRM 2433].)

With particular reference to grievances and arbitration, it is equally well settled that an employer has a duty to provide information which would allow the union to determine at the outset whether there has been a breach of the bargaining agreement. Thus, the duty to bargain in good faith within the meaning of section 1155.2 requires an employer to make available information which would enable the union to make an informed decision about whether to process a grievance and, in particular, to provide information which would assist the union in preparing for arbitration. (NLRB v. Pfizer Co. (7th Cir. 1985) 763 F.2d 890 [119 LRRM 2947]; Montgomery Ward & Co. (1973) 234 NLRB 588 [98 LRRM 1022].)

At no time throughout the long course of the Union's attempt to secure information with regard to work locations did Respondent assert that the Union was not specific or that it was ambiguous in its requests. Nor did Respondent ever contend that the information sought was not contemplated by the contract, otherwise presumptively irrelevant, overbroad or too burdensome to produce. Indeed, Respondent repeatedly acknowledged the validity of the information by promising production, but belatedly advised

only where its employees were not working. Thus, Respondent breached its collective bargaining obligation by not supplying the information in a timely manner or in a manner useful to the Union. (LaGuardia Hospital (1982) 260 NLRB 1455 [109 LRRM 1371] (employer responded in inadequate and untimely manner); Peyton Packing Co. (1961) 129 NLRB 1358 [47 LRRM 1211] (employer expressly promised to provide information but waited three months to do so); J. I. Case Co. v. NLRB (7th Cir. 1958) 253 F.2d 149 [41 LRRM 2679] (cannot produce information in form not suitable for informed consideration).)

We reach a similar result with respect to information sought for the express purpose of facilitating the grievance/arbitration process. Respondent's refusal to submit requested information was a failure of its bargaining obligation inasmuch as the material sought was "potentially relevant and useful to the representative in processing grievances under the contractually established grievance procedure." (NLRB v. Acme Industrial Co. (-967) 385 U.S. 432 [64 LRRM 2069].) On facts similar to those in the present case, the NLRB recently affirmed an ALJ's ruling that information sought by the union concerning work done by nonunit employees was relevant to the union's function as the employees' bargaining representative and, therefore, the employer's refusal to provide that information constituted a violation of the duty to bargain. (Crittenden Construction Company, Inc. (1987) 287 NLRB No. 17 [127 LRRM 1344].) In Crittenden, supra the ALJ reasoned that while there is no presumption that information regarding the "generic description of

work being performed" by an employer is relevant, it was so deemed in that case because of the union's reasonable suspicions that unit work was being diverted. As he explained, "[T]he information sought is relevant to whether or not any work performed on the LaFarge job is of a type that the contract between respondent and [the union] requires [that it be] assigned to employees represented by the [union]." He found a strong probability that the information would be useful to the union in evaluating whether the contract may have been violated and would also enable the union to make an informed decision as to whether to go forward to grievance and arbitration. We find Crittenden, supra, controlling. The information sought in the instant case was necessary to the Union's intelligent processing of its grievance concerning Respondent's alleged violation of contract provisions and possible erosion of unit work through assignment of jobs to unrepresented employees. As such information was clearly relevant to a material issue in the grievance, it had potential relevance to the Union's statutory obligation to represent employees within its certified unit. (Washington Gas Light Co. (1984) 273 NLRB 1.16 [118 LRRM 1001].)

Independent of the decision of the California Court of Appeal, ruling invalid Respondent's assertion of a "trade secret" privilege in the instant case, the NLRB and various federal courts have established similar as well as additional grounds for rejecting an employer's claim of confidentiality such as the one here. Respondent's failure to assert the defense until after General Counsel had sought essentially the same information as had

the union may, by analogy, be sufficient to invalidate the defense outright. (Oil, Chemical & Atomic Workers Union v. NLRB (D.C. Cir. 1983) 711 F.2d 348, fn. 6 [113 LRRM 3163].)^{16/} Moreover, a mere claim of privilege will not support an employer's categorical refusal to supply information. (Oil, Chemical & Atomic Workers Union, supra.) There must be "a more specific demonstration of a confidential interest in the particular information requested." (Washington Gas Light Co. (1984) 273 NLRB 116, 117 [118 LRRM 1001].) As the Supreme Court indicated in Detroit Edison Co. v. NLRB (1979) 440 U.S. 301 [100 LRRM 2728], the NLRB must be permitted to balance the union's need for information against the legitimate and substantial confidentiality interests of the employer. Here, however, as in NLRB v. Pfizer Co. (7th Cir. 1985) 753 F.2d 890 [119 LRRM 2947], Respondent appears to have argued that since contractual arrangements with its grower-customers are per se confidential, it need not be required to explain the need for confidentiality. The court held that an employer's bare assertion that the information sought is confidential does not entitle it to resist production with impunity.

The facts in O & G Industries, Inc. (1984) 269 NLRB 986 [116 LRRM 1046] are particularly instructive as the employer-respondent in that case also asserted confidentiality of

^{16/} The court quoted from German, Basic Text on Labor Law (1976) page 417 as follows: "If the company does wish to assert that a request for information is too burdensome, this must be done at the time the information is requested and not for the first time during the unfair labor practice proceeding."

contracts as grounds for resisting information sought by the union. After respondent, a general contractor, had been awarded a road construction project within the union's territorial jurisdiction, it contracted with a nonunion supplier to provide various material for the project. Thus, as respondent advised the union, it would not need to employ any union members. The union filed a grievance in which it alleged that respondent had violated the collective bargaining agreement by contracting out unit work. In reply, respondent contended that under its contract with the supplier, it had no title in or control of the materials until delivered to the job site. The NLRB affirmed the ALJ's finding that the union asked for a copy of the contract in order to verify respondent's contention "and also to determine whether respondent, under the contract, has retained substantial control of the work being done by employees on [the supplier's] payroll who were delivering the [construction materials]." The NLRB specifically rejected respondent's refusal to deliver the contract on the grounds that it was a "business arrangement" between respondent and the supplier, a claim characterized by the NLRB as "rest[ing] on some general claim of privilege."

Conclusion

Having found that Respondent has engaged in certain unfair labor practices, we shall order Respondent to cease and desist from failing to recall employees, or instituting unilateral changes in its employees' terms and conditions of employment without first affording the Union notice and an opportunity to bargain about such changes, and to cease and desist from failing

to provide the Union, upon request, relevant information necessary to its ability to police and administer the contract in an informed manner.

In order to remedy the discriminatory diversion of bargaining unit work, we shall order Respondent to offer all affected employees^{17/} full and immediate reinstatement to their former positions, dismissing, if necessary, new employees to make room for the discriminatees, without prejudice to their seniority or other rights and privileges and to make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, by payment of a sum of money equal to the amount that they normally would have earned as wages from the date of the discriminatory failure of recall to the date of a bona fide offer of reinstatement, less net earnings, and with interest thereon, in accordance with established Board precedent.

Finally, Respondent's disregard for, and violation of, its collectively bargained-for agreement evidences bad faith. Respondent's conduct was in contravention of the basic policy of the Act which encourages the practice and procedure of the collective bargaining agreement. Therefore, we will direct Respondent to bargain in good faith within the meaning of section 1155.2 of the Act.

^{17/}Our order will cover the named discriminatees listed in paragraph 24 of the Third Amended Complaint in this matter as well as the Does 1 through 50, if any, referenced in that same paragraph. The latter represents alleged discriminatees whose names were not known to nor obtainable by the General Counsel. (See also General Counsel's Exhibit No. 25 which the parties agree is the relevant seniority list for purposes of recall in the 1979-1980 harvest season.)

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) orders that Respondents, Richard A. Glass Company, Inc., DMB Packing Corporation, doing business as R. A. Glass Company, Rancho Marca de Oro, Rancho Oro Verde, Rancho de Diamantes, and their owners, officers, agents, representatives, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to rehire or otherwise discriminating against agricultural employees because of their participation in union or other protected concerted activities.

(b) Instituting or implementing any changes in any of its agricultural employee's terms or conditions of employment, including the diverting or subcontracting of unit work and the failure to hire or recall employees pursuant to the seniority and recall provisions of the collective bargaining agreement, without first notifying and affording the United Farm Workers Union, AFL-CIO (UFW or Union), an opportunity to bargain with the Respondents concerning such changes.

(c) Failing or refusing to supply the Union, upon request, with information contemplated by the collective bargaining agreement or with any other information relevant to the Union's obligations to administer the contract.

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

2. Take the following affirmative actions which are deemed necessary to effectuate the purposes of the Act.

(a) Immediately offer to employees who were not recalled for the start of the 1979-1980 harvest season full reinstatement to their former jobs or substantially equivalent employment without prejudice to their seniority or other employment rights and privileges, and reimburse them for all losses of pay and other economic losses they may have suffered as a result of Respondents' unlawful conduct, reimbursement to be made according to Board precedent, plus interest thereon computed in the manner prescribed by the Board in E. W. Merritt Farms (1983) 14 ALRB No. 5.

(b) Should the Union so request, rescind the unilateral changes heretofore made in employees' terms and conditions of employment.

(c) Upon request, make available to the Union all information relevant and necessary to its obligations to administer the collective bargaining agreement or to otherwise represent unit employees in an informed manner.

(d) Upon request, meet and bargain in good faith with the UFW as the exclusive bargaining representative of its agricultural employees and embody any understanding reached in a signed agreement.

(e) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all personnel records, social security payment records, timecards, and other records relevant and necessary to a determination by the Board of the backpay period and amounts of backpay and interest due to the Respondents' employees under the terms of the Board's order.

(f) Sign the Notice to Agricultural Employees attached hereto, and after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(g) Post copies of the Notice in all appropriate languages at conspicuous places on Respondents' property, including places where notices to employees are usually posted, for sixty (60) days, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copies of the Notice which may be altered, defaced, covered or removed.

(h) Mail copies of the Notice in all appropriate languages within 30 days after the issuance of this order to all employees employed by Respondents at any time during the 1978-1979 and 1979-1980 citrus harvest seasons.

(i) Arrange for a Board agent or representative of Respondents to distribute and read the attached Notice, in all appropriate languages, to its employees assembled on Respondents' time and property, at the times and places to be determined by the Regional Director. Following the reading, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employee rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly employees to compensate them for lost work time during the reading and the question-and-answer period.

(j) Notify the Regional Director in writing within thirty (30) days after the date of the issuance of this order of the steps Respondent has taken to comply with its terms and to continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: October 21, 1988

BEN DAVIDIAN, Chairman^{18/}

JOHN P. McCARTHY, Member

IVONNE RAMOS-RICHARDSON, Member

^{18/}The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority. Members Smith and Gonot did not participate in the consideration of this matter.

NOTICE TO AGRICULTURAL EMPLOYEES

After a trial at which each side had a chance to present facts, the Agricultural Labor Relations Board found that we violated the law by refusing to rehire agricultural employees because of their participation in union or other protected concerted activities; by instituting changes in employees' terms and conditions of employment without first notifying and affording the UFW an opportunity to bargain with the company concerning such changes; and by failing or refusing to provide the Union with relevant information which it requested.

The Agricultural Labor Relations Board has told us to send out and post this notice. We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing any of the things listed above. Especially:

WE WILL NOT fail or refuse to rehire or reinstate, and will not in any other manner discriminate against any employee in regard to his or her employment, because he or she has joined or supported the UFW or any other labor organization.

WE WILL notify and bargain with the UFW before making any changes in the wages, hours and working conditions of our agricultural employees.

WE WILL, if the Union so requests, rescind the unilateral changes we made in your terms and conditions of employment.

WE WILL, upon request, provide the UFW with information that is relevant and necessary for the union to represent our employees as their exclusive collective bargaining representative.

WE WILL offer to reinstate all employees who were laid off or who were not rehired to their former jobs in the 1979-1980 harvest season without prejudice to their seniority rights or any other employment rights and privileges and reimburse them for all losses of pay and other economic losses they may have suffered as a result of our unlawful conduct, plus interest thereon.

DATED:

RICHARD A. GLASS COMPANY, INC.

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Richard A. Glass Company, Inc. ,
DMB Packing Corp. dba
R. A. Glass Company, Rancho
Marca de Oro, Rancho Oro Verde,
Rancho de Diamantes

14 ALRB No. 11
Case Nos. 79-C2-36-SD
79-CE-37-3D
79-CE-38-SD
79-CE-40-SD
80-CE-75-SD
80-CE-99-SD

Background

Respondent engages in the packing and shipping of citrus commodities and for that purpose maintains a packing facility in Indio, California. Respondent also provides complete harvesting services for independent growers including the hiring and supervision of field and harvest crews who comprise Respondent's agricultural employees. In 1978, those employees elected the United Farm Workers of America, AFL-CIO, as their exclusive representative for purposes of collective bargaining. In 1978 and again in 1982, Respondent entered into a comprehensive collective bargaining agreement with the UFW covering Respondent's employees' wages and other terms and conditions of employment. The agreement also provided that Respondent and the Union would jointly recall employees according to seniority at the beginning of the harvest season and that Respondent would keep the Union apprised as to the various sites where its employees were working. At the start of the 1979-1980 citrus harvest season, Respondent did not recall any members of the certified bargaining unit, prompting the UFW to file unfair labor practice charges in December, 1979, alleging that Respondent had discriminatorily failed to recall employees because of their union activities and had diverted the work normally assigned to them to nonunion crews. The Union also alleged that Respondent had thereby implemented unlawful unilateral changes in its employees' terms and conditions of employment and had failed to provide the Union with relevant information upon request in violation of the duty to bargain in good faith.

Administrative Law Judge Decision

Pursuant to an investigation of the unfair labor practice charges, a complaint issued based on allegations which were the subject of an evidentiary proceeding in which all parties participated. The ALJ found that, from October 1979 through May 1980, Respondent subcontracted out bargaining unit work on ranches historically picked by Union members and concluded that Respondent failed to recall seniority employees in the 1979 season because of their Union membership. The ALJ rejected Respondent's contention that the change from Union to nonunion employees was the result of its customers having independently hired their own labor contractors. Based on his perception of the evidence, he concluded that

Respondent had engaged in a series of transactions in order "to escape responsibility and liability under the [Act]." He also found that Respondent's failure to recall employees, without having first notified and bargained with the Union, constituted an unlawful unilateral change in employees' terms and conditions of employment. The ALJ dismissed the alleged refusal to provide information on the basis of a judicial ruling which he interpreted to mean that the information sought was protected by a "trade secret" privilege which Respondent had asserted.

Board Decision

In evaluating the alleged diversion of bargaining unit work, and Respondent's failure to recall Union employees for the pertinent harvest season, the Board found that General Counsel had presented a prima facie case of unlawful discrimination and that Respondent's sole defense was a mere pretext. Although Respondent conceded a change in hiring practices, it contended that the change was beyond its control - that it was the result of its customers independently and voluntarily choosing to cease contracting with Respondent for harvesting services and to make private arrangements with Respondent's labor contractor. Respondent neither called any witnesses or introduced any documentary evidence in support of the defense, relying instead on a mere statement of position. However, two of Respondent's customers who ostensibly severed their harvest contracts with Respondent were called by General Counsel. According to their testimony, neither initiated any changes as to labor and insisted that Respondent continued to harvest, haul, pack and ship their produce just as in prior seasons. They did, however, describe what appears to have been a change in billing procedure by which the customer simultaneously receives an invoice for labor, payable directly to the labor contractor, as well as an advance against year-end profits from Respondent. One customer testified that both the invoice and the advance arrive in the same envelope and that the advance usually equals or slightly exceeds the bill for labor. Based on their uncontroverted testimony, the Board concluded that, as to them, Respondent's defense clearly was non-existent. The next question was whether the Board could draw an adverse inference from Respondent's failure to call witnesses or to put on evidence and thus whether the inference could be extended to all remaining customers whom Respondent apparently claimed had cancelled their harvest contracts. The Board ultimately answered that question in the affirmative and ordered Respondent to offer immediate reinstatement to all employees who should have been recalled and to reimburse them for all economic losses resulting from Respondent's discrimination.

With regard to the requests for information, the Board found that the Union, over a period of two years, had requested without success information which was statutorily relevant to its obligation to represent employees as well as specific information

(e . g . , work locations) which Respondent had expressly promised to provide by virtue of the collective bargaining agreement. The Board also found that the ALJ, in ruling otherwise, has inadvertently relied on a Superior Court decision which had held that Respondent withheld information on the basis of a valid trade secret privilege. However, that ruling was reversed by a California Court of Appeal prior to issuance of the ALJ's Decision. Accordingly, Respondent was ordered to cease and desist from failing or refusing to provide the UFW, upon request, with information necessary and relevant to carry on its bargaining agent responsibilities in an informed manner.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:)
)
RICHARD A. GLASS COMPANY, INC.,)
DMB PACKING CORP. dba R. A.)
GLASS COMPANY, RANCHO MARCA DE)
ORO, RANCHO ORO VERDE, RANCHO)
DE DIAMANTES,)
)
Respondents,)
)
and)
)
UNITED FARM WORKERS)
OF AMERICA, AFL-CIO,)
)
Charging Party.)
_____)

Case Nos 79-CE-36-SD
79-CE-37-SD
79-CE-38-SD
79-CE-40-SD
80-CE-75-SD
80- E-99-SD

Appearances:

Lupe Martinez
for General Counsel

David E. Smith
Smith & Hall of
Indio, California
for Respondent

Ira Gottlieb of
Keene, California
for Charging Party

Before: Robert L. Burkett
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

ROBERT L. BURKETT, Administrative Law Judge:

The hearing in this matter began on September 21, 1982, and spanned two years during which time there were numerous motions, continuances, and two separate Superior Court actions. The matter was concluded on September 11, 1984. Proceedings were held at various locations in Coachella Valley and Los Angeles.

The General Counsel, the Respondent, and the United Farm Workers of America, AFL-CIO, the Charging Party (hereafter the UFW) were represented throughout the proceedings (however, the UFW was not always present). Briefs were filed by the Charging Party and the Respondent. Various memoranda and subpoenas duces tecum were also filed and served by the parties before and during the course of the hearing.

The UFW filed six unfair labor practice charges against Respondents which served as the basis of the complaint. The charges had the following file dates: 79-CE-36-SD dated 12/24/79; 79-CE-37-SD dated 12/27/79; 79-CE-38-SD dated 12/27/79; 79-CE-40-SD dated 12/27/79; 80-CE-75-SD dated 10/24/80; 80-CE-99-SD dated 12/10/80. They were all timely served on Respondents.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments, memoranda, and briefs of the parties, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Neither the Respondent nor the UFW challenged the Board's jurisdiction. Accordingly, I find the Respondent is an agricultural

employer within the meaning of Labor Code section 1140.4 (c) , and that the UFW is a labor organization within the meaning of Labor Code section 1140.4(f) .

II. BACKGROUND

At the heart of this case are allegations by the Charging Party and the General Counsel that Respondents unilaterally determined to subcontract out bargaining unit work previously performed in its groves, and did so by a series of corporate transfers whose intent was to in part disguise the true identity of Richard A. Glass and its successors. The underlying unfair labor practice charges as set forth in Paragraphs 27, 28, 29, 30 and 31 of General Counsel's Third Amended Consolidated Complaint rely in large measure on substantiating its subcontracting and successorship allegations.

III. STATEMENT OF FACTS

A. History

On January 13, 1977, a representation petition was filed by the UFW in case number 77-RC-1-C. An election was held January 19, 1977, and the UFW received the majority of the votes cast. On April 25, 1977, the Board certified the UFW as the collective bargaining representative for all agricultural employees of the Richard A. Glass Company, Inc. (also referred to as the R.A. Glass Company, Inc.).

Uncontradicted evidence established that at the time of the election there were three crews harvesting citrus for R.A. Glass Company, Inc. These crews were: The Joseph R. Sanchez labor contractor crew in Blythe, California, the Oscar Ortega labor

contractor crew in the Coachella area, and a crew hired directly by Richard A. Glass, also in the Coachella area.

The testimony establishes that shortly after the UFW and R.A. Glass signed their first collective bargaining agreement in December 1977, the Glass crew was transferred to labor contractor Oscar Ortega who thereafter paid the crew directly.

After the UFW's certification, there were numerous negotiation sessions covering the period from April 27, 1977 through December 16, 1977 (twelve such sessions as stipulated to by counsel), which led to the signing of a collective bargaining agreement on December 19, 1977. The agreement expired December 1, 1980.

A second collective bargaining agreement was entered into by R.A. Glass Company and the UFW on February 28, 1982 and expired on February 27, 1983. It is the Respondent's position that the Richard A. Glass Company which signed the second agreement differs in its entirety from the R.A. Glass which signed the original contract in 1977.

B. The Complaint

1. I find, as a result of uncontroverted evidence presented by General Counsel, that Respondent, Richard A. Glass Company, Inc., was a California corporation engaged in growing, harvesting, and handling of citrus crops in Riverside County until its dissolution sometime in 1980.

2. I find, as a result of uncontroverted evidence presented by General Counsel, that Respondent, Richard A. Glass Company, Inc., was at all times relevant herein an agricultural

employer within the meaning of Labor Code section 1140.4 (c) .

3. I find, as a result of uncontroverted evidence presented by General Counsel, that Respondents Rancho Marca de Oro, Rancho Oro Verde, and Ranch de Diamantes were California corporations engaged in citrus farming operations in Riverside County until their dissolution sometime in 1978.

4. The evidence presented does not demonstrate that the assets of Rancho Marca de Oro, Rancho Oro Verde, and Rancho de Diamantes, were owned or controlled by Richard A. Glass Company, Inc., or by the officers, directors or shareholders of Richard A. Glass Company, Inc., during the relevant period of time. Despite the huge amount of documentary evidence presented by General Counsel, proof of ownership of the above-named properties by Richard A. Glass was never substantiated.

5. While proof of ownership of the above properties was not established by the evidence, the testimony of the workers, of the UFW representatives, and the evidence contained in the documents submitted in evidence during the course of this hearing, do clearly establish a strong circumstantial case that Rancho Marca de Oro, Rancho Oro Verde, and Rancho de Diamantes were at the very least joint employers with Richard Glass Company and formed an integrated agricultural business operation with Richard A. Glass Company, Inc.

Counsel for Respondent would have us believe that, coincidentally, during a very short period following the UFW's certification for the Richard A. Glass workers, a number of conveyances occurred which dramatically changed the work makeup of

Richard A. Glass Company, Inc. I am convinced, based on the evidence presented and my assessment of the credibility of the witnesses, that the Respondents engaged in a deceptive and well thought out scheme the sole purpose of which was to subvert the collective bargaining agreement R.A. Glass had signed with the UFW, and to create the fiction that Glass was merely a commercial packing shed, no longer involved in agricultural employment within the purview of our Act.

While counsel for Respondent argues that the testimony presented by General Counsel regarding the Sherwood Ranch has no relevance in this hearing because it does not refer to an act charged by the UFW, I find the conduct of Respondent with regards to both the Sherwood Ranch and the F. Patrick Burns Estate to be most relevant in that it provides insight into Respondent's state of mind and its plan of divesting itself of agricultural operations subject to the Act; there is an attempt to change its established business practices to create the illusion that it was the grower/producer who was paying and hiring Oscar Ortega rather than to Richard A. Glass, as it had in the past.

6. I find, based on uncontroverted evidence presented by General Counsel, that Vaquero Farms Inc. is a California corporation doing business in Stanislaus and Riverside counties.

7. I find, based on uncontroverted evidence presented by General Counsel, that Vaquero Farms is an agricultural employer within the meaning of Labor Code section 1140.4 (c) .

8. General Counsel's Exhibits 18b, c, d, e, f, g, and h demonstrate that Richard A. Glass Company, Inc. , conveyed various

parcels of property in Coachella and Riverside counties to Vaquero Farms, Inc.'s directors and officers. General Counsel's Exhibit 19c is the Notice of Issuance of Securities filed October 20, 1977, whereby Vaquero Farms, Inc. purchased the entire stock of Richard A. Glass Company, Inc. General Counsel Exhibit 19-j is a business card of Louis P. Sousa indicating that he is president of Richard A. Glass Company, Inc. "a wholly owned subsidiary of Vaquero Farms, Inc. "

On October 4, 1977, the assets of Richard A. Glass Inc. were sold to the officers and directors of the principals of Vaquero Farms, Inc. On October 20, 1977, all the stock of Richard A. Glass Company, Inc. was sold to Vaquero Farms, Inc. Richard A. Glass Company, Inc., however, was not dissolved but became a subsidiary of Vaquero Farms, Inc. The takeover of Richard A. Glass Company, Inc. by Vaquero Farms, Inc. was preceded by Louis B. Sousa forming a corporation called "Louis B. Sousa, Inc." and filing articles of incorporation for this new corporation on September 15, 1977. On October 17, 1977, three days after the assets of Richard A. Glass Company, Inc. were transferred to the directors and officers of Vaquero Farms, Inc., Louis B. Sousa filed an amendment to the articles of incorporation of this corporation changing its name to Richard A. Glass Company, Inc.

Based on the evidence presented, I find that some time in 1977, Vaquero Farms, Inc., its officers, directors or shareholders, purchased the assets of Richard A. Glass Company, Inc. resulting in Richard A. Glass Company, Inc. becoming a wholly owned subsidiary of Vaquero Farms, Inc.

9. Based on the uncontroverted evidence presented by General Counsel, specifically, General Counsel's Exhibits 18k, q and w, I find that, in 1977, Vaquero Farms, Inc., or its officers, directors or shareholders, purchased the assets including real properties of, Rancho Marca de Oro, Rancho Oro Verde, and Rancho de Diamantes.

10. I find, based on the uncontroverted evidence presented by General Counsel, specifically, General Counsel Exhibit 19-i, and General Counsel's 18-i, j, k, l, m, o, p, q, r, s, t, u, v, w, x, y, and z, that Rancho Marca de Oro, Rancho Oro Verde and Rancho de Diamantes constituted, at all times material herein, an integrated agricultural business enterprise with Vaquero Farms, Inc.

11. I find that DMB Packing Corporation is a Delaware corporation doing business in Riverside County as admitted by counsel for Respondents.

12. It is the position of the Respondents that DMB Packing Corporation which was stipulated to have obtained a fictitious business license as "Richard A. Glass Company, Inc.", purchased assets that bore little or no relationship to the original Richard A. Glass Company, Inc. In General Counsel's Exhibit 22-bb, David Smith, counsel for Respondents, wrote to Nancy Jarvis stating that the assets of Richard A. Glass Company, Inc. had been purchased by DMB Packing Corporation. Once again I find that this assertion strains credulity. General Counsel properly points out that a number of parcels of real property are traceable from the original Richard A. Glass Company, Inc. to the officers and directors of Vaquero Farms, Inc., and finally to DMB. While it is true that

there is a gap in succession or in ownership resulting in part on General Counsel's unsuccessful attempt to subpoena documents which have been protected by the Court of Appeals under claim of trade secret privilege, the information contained in General Counsel's Exhibits 20-a, 18-b, 18-c, 18-d, 18-h, 18-w, 18-q, 18-dd, 19-o and 19-b presents an overwhelming amount of circumstantial evidence indicating that DMB Packing is successor to the original Richard A. Glass Company through Vaquero Farms and through further unknown ownership. On that basis, I find that DMB Packing Corporation continued the original agricultural operations of Richard A. Glass Company, Inc.

I therefore find that DMB Packing is an agricultural employer within the meaning of Labor Code section 1140.4(c) of the Act.

I find that in 1979, DMB Packing Corporation or its officers, directors or shareholders purchased the assets of Richard A. Glass, Inc. from Vaquero Farms, Inc. or the officers, directors or shareholders of Vaquero Farms, Inc., or the successors of Vaquero Farms, Inc.

I find that in 1979, DMB Packing or its officers, directors or shareholders, purchased real properties known as Rancho Marca de Oro, Ranch Oro Verde, and Rancho de Diamantes from Vaquero Farms, Inc., its officers, directors or shareholders, or its successors.

I find that Rancho Marca de Oro, Rancho Oro Verde, and Rancho de Diamantes were, at all times relevant herein, alter egos of or joint employers with DMB Packing or formed an integrated agricultural business operations enterprise with DMB Packing

Corporation.

I find that subsequent to the transactions described in Paragraphs 14 and 15 in the complaint, DMB Packing filed an application for a fictitious business license to do business as Richard A. Glass Company, Inc.

13. I find, as admitted, that the UFW is now and at all times material herein has been a labor organization within the meaning of Labor Code section 1140.4(f) doing business in Riverside County.

14. I find that on December 19, 1977, Richard A. Glass Company, Inc. and the UFW entered into a collective bargaining agreement covering the agricultural employees of Richard A. Glass Company, Inc.

15. I find, based on uncontroverted evidence presented by General Counsel that on February 23, 1982, the UFW and DMB Packing doing business as Richard A. Glass Company, entered into a collective bargaining agreement covering the agricultural employees of DMB Packing doing business as Richard A. Glass Company, and that this agreement expired February 27, 1983.

16. I find that the collective bargaining agreements mentioned in Paragraphs 20 and 21 of the complaint were negotiated on behalf of Richard A. Glass Company and DMB Packing doing business as Richard A. Glass Company by David E. Smith who is representing Richard A. Glass Company and DMB Packing Corp. in the present proceedings. I base this finding upon the uncontroverted evidence presented by General Counsel.

17. I find, based on the uncontroverted evidence oresented

by General Counsel and on the findings above, that at all times material herein DMB Packing Corporation is a successor to Richard A. Glass Company, Inc. under the Act.

18. At all times material, the persons listed under Paragraph 24 of the Complaint were and are agricultural employees within the meaning of section 1140.4(b) of the ALRA as stipulated to by counsel at the hearing.

19. I find that as stipulated to by counsel, the persons named in Paragraph 25 of the Complaint have at all times material herein been supervisors and agents of Respondents within the meaning of section 1140.4(j) of the Act except for Manuel Ortega and those persons listed beginning with Ann P. Costa and running through John Fedele. I note that Lalo Magana should have been listed as Euralio Magana and that it was stipulated that Oscar Ortega is a labor contractor and supervisor rather than a general supervisor.

Based on the uncontroverted evidence presented, in particular General Counsel's Exhibit 19-h, 19-mm, 19-11, 20-a and 20-b, I find that Ann P. Costa, Larry J. Enos, Tony Costa, Dominic De Mare and Anthony J. Di Mare are all supervisors within the meaning of section 1140.4(j) of the Act.

20. Based on the uncontroverted testimony presented by General Counsel, I find that Fritz B. Burns Foundation, the Sherwood Ranch, and the Patrick F. Burns Estate are agents of Respondent within the meaning of 1140.4(b) of the Act. No other evidence was presented as to any of the persons and entities named in Paragraph 26 of the complaint.

C. Discussion of the Unfair Labor Practices Charged

It should be noted that counsel for Respondent rested without presenting evidence in this matter. I therefore base my findings of fact solely on the evidence presented by General Counsel, both documentary and by testimony and by my judgment of the demeanor and credibility of General Counsel's witnesses. It should also be noted that I make my findings of fact based on the above finding that DMB Packing is the successor of Richard A. Glass Company, Inc. and that Rancho Marca de Oro, Rancho Oro Verde and Rancho de Diamantes have at all times herein formed an integrated agricultural business enterprise with R. A. Glass and its successors.

As part of the first contract, a supplemental agreement was signed on the same date that the contract was executed, December 19, 1977. The supplemental agreement and Appendix A of the contract established the "basic rate" or piece rate for the citrus harvest. It also gave bargaining unit employees the absolute right to refuse to work if agreement on rates could not be reached. Such refusal was specifically unaffected by and would not be construed as a violation of the no-strike provision of Article 25a. It also provided for arbitration of any dispute at a particular block or grove. The supplemental agreement was in effect from December 19, 1977 through December 19, 1978. At the expiration of the supplemental agreement, the base rates could be negotiated. This, in fact, occurred on June 18, 1979, when arbitrator William H. Pivar issued an award changing the base rates. The customary practice with negotiating the harvest piece rate in the fields was stipulated

to by General Counsel and Respondent's attorney, David E. Smith. Evidence presented by General Counsel established that during the 1978 and 1979 citrus harvest seasons there were numerous work stoppages resulting from the failure of the employer to negotiate the piece rate. Reynaldo Hernandez Zapata testified that during the 1978-79 season there were numerous occasions when Salvador Yanez or Oscar Ortega refused to negotiate the piece rate. He testified that on several occasions during the 1978-79 season the piece rate "negotiations" consisted of Oscar Ortega offering to flip a coin to decide the piece rate which workers were going to be paid. Raul Galvez, a worker in the crew of Ramon Zamora, testified that Oscar Ortega and Salvador Yanez failed to negotiate the piece rate during the 1978-79 season. He further testified that during one occasion Oscar Ortega stated, "Well, as far as the union is concerned, I can clean my balls with it."

Oscar Ortega is a central character in these proceedings. In the first year of the collective bargaining agreement, General Counsel's Exhibits 22-c, d, e, k, n, q, and w establish that he was designated by Respondents as the representative responsible for representing them in contract administration. The General Counsel presented uncontroverted evidence that in the 1979-80 season, Oscar Ortega, in his new role as labor contractor, and his foremen Rogelio Gaona, Manuel Ortega, Ramon Zamora, and Felipe Montero supplied the harvest workers. The evidence demonstrates that the subcontracting work was carried out in the identical groves where bargaining unit workers had worked the previous 1979 season. At the same time Oscar Ortega was playing the role of labor contractor, he was also acting

as Richard A. Glass' representative in discussions of grievances filed by the United Farm Workers of America.

Raul Garcia, a worker in Rogelio Gaona's crew, testified that he was the union representative who, under the contract, was authorized to negotiate piece rates on behalf of the workers. He testified that in the 1978-79 season there was great difficulty in reaching agreement because the employer representatives would not negotiate piece rate.

Witnesses presented by the General Counsel testified that the bargaining unit crews of Rogelio Gaona and Ramon Zamora were often stopped for days or even weeks as a result of the failure of Respondents to negotiate the piece rate. They also testified that, during this time, other crews were called in to do the work of the Gaona and Zamora crews; Reynaldo Hernandez Zapata testified that he saw crews performing bargaining unit work and followed the trucks full of fruit to the Richard A. Glass Company, Inc. packing shed. He testified that the crews used Glass equipment, tools and other implements and that Glass trucks took the citrus to the packing shed. He stated that he saw these crews a number of times during the 1978-79 season and on several occasions followed the trucks to the shed. One of the foremen he said he saw working in the groves in charge of such a crew was Felipe Montero.

Hernando Perez testified that he obtained work in Mr. Montero's crew and that he worked until the end of the 1978-79 season.

Leopoldo Trevino, the UFW contract administrator during the

1978-79 season, testified that he located crews doing bargaining unit work "outside of the contract". One of the crews he located was that of foreman Felipe Montero.

Several workers in Rogelio Gaona's and Ramon Zamora's crews testified concerning the early lay off of the crews in May 1979, because they would not agree to the piece rate being imposed by the employer. Their testimony was that both crews were told that if they would not agree to the rate proposed, they would have no more work that season.

Reynaldo Hernandez Zapata testified that the last day of work of the 1978-79 season took place on Highway 86 in May or June of 1979. He stated that the crew arrived at the grove to begin work at 6:00 a.m. when he noticed that the grove was in terrible shape. He testified that the crew would not agree to work at the piece rate being offered by Oscar Ortega and Salvador Yanez. He stated that from 6:00 a.m. to about 10:00 a.m. the crew was stopped outside the grove during which time Oscar Ortega and Salvador Yanez would periodically come and go. Finally, the crew representative told Oscar Ortega that the price offered was too low; to which Mr. Ortega responded, "Well, if you're not going to go in, that's it for the rest of the season. And if anybody wants to go in without a union, they can go in.", he stated. He testified that no agreement was reached and the crew went home. That was the last day of work for the Ramon Zamora crew in the 1978-79 season. His testimony was corroborated generally by Raul Galvez who was also present at that time.

Jesus Garcia testified that on or about the same date he

was the piece rate negotiator and crew representative in Rogelio Gaona's crew. He stated that the crew arrived for work on Highway 86 and Avenue 73 and that the piece rate could not be agreed upon. He testified that foreman Rogelio Gaona and Manuel Ortega were present and that, when no agreement could be reached, Mr. Gaona said that if the crew did not want to work that would be all for the crew because there were a lot of people without a contract that wanted to work.

General Counsel's Exhibits 21-a, b, and c, which are the UFW's monthly payroll reports prepared by the employers under the UFW contract substantiate that the last time Rogelio Gaona and Ramon Zamora's crew worked was in May 1979.

I find, based on the evidence presented by General Counsel, the testimony of General Counsel's witnesses, and the failure of Respondent to rebut that evidence or testimony, that the layoff of the crews in May 1979 resulted from bargaining unit employees engaging in activity that was concerted and protected under 1152 of the Act and was further in violation of the supplemental agreement executed on December 19, 1977.

Reynaldo Hernandez Zapata testified that he and several coworkers went to the Oscar Ortega office in Coachella in October 1979 a number of times to ask when work was to begin. He testified that he and the others were told by Mr. Ortega's secretary, that the work would begin "soon", but they were never called. He stated that he also went to the union almost daily to inquire about the beginning of work. Raul Galvez testified similarly. Leopoldo Trevino testified that, as the UFW contract administrator, he made

several calls to Oscar Ortega's office to inquire about the start of work in the 1979-80 season and that he was told by Mr. Ortega's secretary that the workers would be called soon, but no one was ever called. Nancy Jarvis testified that Mr. Trevino contacted Mr. Ortega's office at her request to determine when work was going to begin. She stated that she and several workers carried out an investigation and learned that non-union crews were doing the bargaining unit work.

General Counsel Exhibits 21-a, 21-b and 21-c which were prepared by the employer corroborate this testimony and demonstrate that, with the exception of growth tenders, the bargaining unit has been severely reduced since the 1979-80 citrus season.

General Counsel presented uncontroverted evidence that, from October 1979 through May 1980, Respondent subcontracted bargaining unit work on ranches historically picked by bargaining unit employees. The evidence established that during this period that work was being performed by Oscar Ortega, Manuel Ortega, and crews headed by foremen Gaona and Zamora and others who had previously supervised union crews. Reynaldo Hernandez Zapata, Leopoldo Trevino, Raul Galvez, Nancy Jarvis and several others testified that they went out to the groves and saw the Richard A. Glass Company, Inc. foremen/supervisors working with non-union crews and using Richard A. Glass Company, Inc. bins, ladders, trucks, and other equipment.

Maria Lua testified that at the start of the 1979 season Manuel Ortega came to her house and told her that the season was about to start but not to let anyone else know. She has since

worked for Richard A. Glass Company under the supervision of foreman Rogelio Gaona and supervisors Yanez, Oscar Ortega and Manual Ortega. She testified the ranches she has worked since the 1979-80 season are the same ranches where she previously worked "under the contract" including Rancho Marca de Oro, Rancho Oro Verde, and Rancho de Diamantes.

Francisco Ruiz testified that he worked for Richard A. Glass Company, Inc. prior to the 1979-80 season under the supervision of Ramon Zamora but that he was not called back at the start of the 1979-80 season. He testified that it was not until January 1981 that he found work with Oscar Ortega harvesting citrus and has worked with him ever since. He stated his foreman is Arturo Avila and that the supervisors are Oscar Ortega and Manuel Garcia. He testified that some of the ranches at which he has worked included Marca de Oro and Diamantes.

I find, based on the uncontroverted testimony of General Counsel's witnesses, their demeanor and credibility, and the failure of Respondent to offer any evidence in rebuttal, that Respondent has failed to recall seniority bargaining unit employees in the 1979-80 citrus season.

The issue of whether or not the Respondent has failed to provide information to the UFW in connection with the grievance and arbitration proceedings in 79 RHE No. 3 and 79 RHE No. 4 is clouded by the Court of Appeals' subsequent ruling that much of the information requested is covered by the trade secret privilege. I am bound by the Court of Appeals' ruling and therefore can make no finding that there has been a failure to provide information under the Act regardless of whether or not Respondents previously raised

the trade secret privilege. I further find, based on the evidence presented by General Counsel, that counsel for Respondent did at times supply much of the information requested by the UFW and that, in any case, the UFW did not exhaust its efforts to continue to request information from Mr. Smith.

D. Findings of Fact and Conclusions of Law

The assertion by Respondent that the changes that took place merely represented independent decisions by independent companies to use independent labor contractors and not Richard Glass agricultural employees at the same time a series of highly unusual conveyances of Richard Glass were taking place strains the bounds of credulity, particularly since the divestitures took place a very short period of time after the initial certification and contract.

Based on the testimony of General Counsel's witnesses, their demeanor and my judgment of their credibility, cross-examination by Respondent's attorney, the documentary evidence presented by General Counsel, and the total lack of rebuttal testimony and evidence presented by Respondent, I make the following findings of fact and conclusions of law.

1. Since on or about April 1979 and continuing to the present, Respondents have unlawfully instituted unilateral changes in employment practices, including but not limited to, the following acts and conduct:

a. Hired workers in the crew of Rogelio Gaona in violation of the provisions of the collective bargaining agreement, including, but not limited to, the seniority and recall provisions.

b. Failed to hire and recall workers into the crew of

Rogelio Gaona in violation of the seniority and recall provisions of the collective bargaining agreement.

c. Subcontracted and/or diverted bargaining unit work previously performed by the crew of Rogelio Gaona.

d. Hired workers in the crew of Aurelio Magana in violation of the provisions of the collective bargaining agreement including, but not limited to, the seniority and recall provisions.

e. Failed to hire and recall workers into the crew of Aurelio Magana in violation of the seniority and recall provisions of the collective bargaining agreement.

f. Contracted and/or diverted bargaining unit work previously performed by the crew of Aurelio Magana.

g. Hired workers in the crew of Felipe Montero in violation of the provisions of the collective bargaining agreement, including, but not limited to, the seniority and recall provisions.

h. Failed to hire and recall workers into the crew of Felipe Montero in violation of the seniority and recall provisions of the collective bargaining agreement.

i. Subcontracted and/or diverted bargaining unit work previously performed by the crew of Felipe Montero.

2. Since or or about April 1979 and continuing to the present, Respondents have failed and refused to bargain with the UFW concerning the unilateral changes set forth in Paragraphs 17, parts a through i, of the complaint.

3. On or about May 15, 1979, Respondents laid off workers in the crews of Ramon Zamora and Rogelio Gaona because of their participation in protected union and concerted activities.

4. Since or or about April 1979 and continuing to the present, Respondents have refused to rehire the persons named in Paragraph 24 of the complaint because of their participation in protected union and concerted activities.

5. By the acts described in Paragraphs 1, 2, 3, and 4 herein, Respondents have violated and continue to violate section 1153(a) of the Act.

6. By the acts described in Paragraphs 1 and 2 herein, Respondents have violated and continue to violate section 1153(e) of the Act.

7. By the acts described in Paragraphs 3 and 4 herein, Respondents have violated and continue to violate section 1153(c) of the Act.

IV. CONCLUSION

I am in agreement with General Counsel's assertion in his brief that once the corporate land transactions are pierced and the intent of Respondent is demonstrated, the entire case falls into place and the law is not at all complicated.

The facts in the present case are analogous to those in Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85 where the Board stated:

Where a term or condition of employment is established by past practice and/or contractual provision, the unilateral change constitutes "a renunciation of the most basic of collective bargaining principles, the acceptance and implication of the bargain reached during contract negotiations. (Citation.) Even after expiration of the contract, an employer's unilateral change of any existing working conditions without notifying and bargaining with the certified bargaining representative constitutes a per se violation of section 1153(e) and (a) of the Act. (Citations.) Where the unilateral change relates to a mandatory subject of bargaining, such as subcontracting and

hiring, a prima facie violation of sections 1153(e) and (a) is established. (Citations.)

In Tex-Cal, there were two collective bargaining agreements which contain almost identical limitations on subcontracting as those found in the two Richard Glass Company contracts.

In Footnote 6 of the decision, page 7, the Board held that even when the collective bargaining agreement expires, the hiring practices and work assignment procedures established by the contract remain in effect as terms and conditions of employment which cannot be unilaterally changed without notifying and bargaining with the union, at its request, about those changes. In the present case the UFW was not notified nor did Richard A. Glass Company, Inc. bargain about the changes resulting in the elimination of the bargaining unit brought about as a result of subcontract of bargaining unit work.

General Counsel argues that Pepsi-Cola Bottling Co. and Brewery and Beverage Drivers (1983) 266 NLRB No. 27 [112 LRRM 1303] and N.L.R.B. v. Acme Industrial Company (1967) 385 U.S. 432 demonstrate that the UFW was entitled to the information it requested and claims not to have properly received. It is the position of the hearing officer that I am bound by Court of Appeals ruling and am therefore estopped from finding Respondents in violation of their duty to provide information to aid the arbitral process.

As previously stated, this is a case that hinges not so much on interpretation of law but rather on the findings of fact and the determination that the series of transactions involving Glass and related companies was done in part to escape responsibility and

liability under the Agricultural Labor Relations Act.

ORDER

The Respondents, R. A. Glass Company, Inc. , DMB Packing Corporation, doing business as R. A. Glass Company, Rancho Marca de Oro, Rancho Oro Verde, Rancho de Diamantes, and their owners, officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Laying off, or refusing to rehire, or otherwise discriminating against agricultural employees because of their participation in protected union or concerted activities;

b. Instituting or implementing any change in any of its agricultural employees' wages, work hours, or any other terms or conditions of employment, including the diverting or subcontracting of unit work and the failure to hire or recall employees pursuant to the seniority and recall provisions of the collective bargaining agreement, without first notifying and affording the UFW an opportunity to bargain with the Respondents concerning such changes.

c. Failing or refusing to bargain with the UFW concerning any change in its agricultural employee wages, work hours, and any other conditions of employment, including the diverting or subcontracting of unit work and the failure to hire or recall employees pursuant to the seniority and recall provisions of the collective bargaining agreement, in accordance with requirements of good faith specified in sections 1155.2 and 1155.3 of the Act.

d. In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed in section 1152 of the Act.

2. Offer full and immediate reinstatement to employees who were laid off or were not rehired to their former or substantially equivalent jobs without prejudice to their seniority rights or any other employment rights and privileges, and reimburse them for all losses of pay and other economic losses they may have suffered as a result of Respondents' unlawful conduct, reimbursement to be made according to Board precedent, plus interest thereon computed in the manner prescribed by the Board in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

3. Makewhole its employees for all economic losses they have suffered as a result of the unilateral changes in the terms and conditions of employment which losses resulted from Respondents' refusal to bargain in good faith and Respondent's unlawful contracting and/or diversion of bargaining unit work.

4. Upon request, meet and bargain collectively with the UFW as the certified exclusive bargaining representative of Respondents' agricultural employees concerning the unilateral changes heretofore made in employees' terms and conditions of employment.

5. Rescind the unilateral changes heretofore made in its employees' terms and conditions of employment, if the UFW so requests.

6. Preserve and upon request make available to this Board and its agents, for examination, photocopying, and otherwise copying, all personnel records, social security payment records, timecards, and other records relevant and necessary to determination

by the Board of the backpay period and amounts of backpay due to the Respondents' employees under the terms of the Board's order.

7. Sign the Notice to Agricultural Employees attached hereto, and after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

8. Post copies of the Notice in all appropriate languages in conspicuous places on Respondents' property, including places where notices to employees are usually posted, for a ninety (90) day period, the period and place of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copies of the Notice which may be altered, defaced, covered or removed.

9. Mail copies of the Notice in all appropriate languages within 30 days after the issuance of this order to all employees employed by Respondents at any time during the 1979 to 1980 season in question.

10. Arrange for a Board agent or representative of Respondents to distribute the Notice in all appropriate languages to its employees assembled on Respondents' time and property, at the times and places to be determined by the Regional Director. Following the reading, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employee rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly employees to compensate them for lost of this reading and

the question-and-answer period.

11. Notify the Regional Director in writing within thirty (30) days after the date of the issuance of this order of the steps Respondents have taken to comply with its terms and to continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: May 28, 1985

ROBERT L. BURKETT
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After a trial at which each side had a chance to present their facts, the Agricultural Labor Relations Board found that we violated the law by discharging, laying off, and refusing to rehire agricultural employees because of their participation in protected union or concerted activities; by failing or refusing to bargain with the UFW; and by instituting changes in its employees' wages work hours without first notifying and affording the UFW and opportunity to bargain with the company concerning such changes.

The Agricultural Labor Relations Board has told us to send out. and post this notice. We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above. Especially:

WE WILL NOT fail or refuse to rehire or reinstate or otherwise discriminate against any employee in regard to his or her employment because he or she has joined or supported the UFW or any other labor organization .

WE WILL notify and bargain with the UFW before making any changes in the wages, hours and working conditions of our agricultural employees.

WE WILL offer to reinstate all employees who were laid off or who were not rehired to their former jobs without prejudice to their seniority rights or any other employment rights and privileges and reimburse them for all losses of pay and other economical losses they may have suffered as a result of our unlawful conduct. We will further pay back all employees for their losses they may have suffered as a result of the unilateral changes in the terms and

conditions of employment resulting from our refusal to bargain in good faith.

Dated:

DMB PACKING INC. dba R . A . GLASS INC.

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is (6 1 9) 353-2130.

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

DO NOT REMOVE OR MUTILATE.