Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ROBERTS FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 80-CE-66-D 80-CE-79-D 9 ALRB No. 27

DECISION AND ORDER

On August 13, 1982, Administrative Law Judge (ALJ)[1/] Thomas M. Sobel issued the attached Decision in this proceeding. Thereafter, Respondent, General Counsel, and the Charging Party each filed timely exceptions to the ALJ's Decision and a supporting brief.

Pursuant to the provisions of California Labor Code section 1146[2/] the Agricultural Labor Relations Board (Board) has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs and has decided

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[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

[2/] Unless otherwise specified, all code sections herein refer to the California Labor Code.

to affirm the ALJ's rulings,[3] findings, and conclusions,[4] as modified herein, and to adopt his recommended Order, as modified herein.[5]

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[3] We do not affirm the ALJ's ruling to admit into evidence a private agreement between Respondent and the Charging Party in settlement of various charges of interference with protected rights and discrimination because of union support. General Counsel offered the written agreement as evidence of Respondent's attempts to erode majority support for the Union. The ALJ has properly distinguished between evidence of settlement offered to prove past violations of the Act, and evidence of presettlement conduct offered to prove the motive or object of post-settlement conduct. (Compare, Brotherhood of Teamsters, Local 70 (1971) 191 NLRB 11 [77 LRRM 1336] with Northern California District Council, etc. (1965) 154 NLRB 1384 [60 LRRM 1156].) However, we do not agree that the agreement itself is admissible as evidence of presettlement conduct. Although a party is free to relitigate the facts underlying the settled charges, as background to subsequent allegations, the agreement itself is too easily perceived as an admission of liability. We therefore conclude that the prejudicial effect of the settlement agreement offered herein outweighs its probative value and it is therefore stricken from the record. (See Parker Seal Company (1972) 233 NLRB 332, 335 [97 LRRM 1301]; Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98.)

[4] The ALJ, citing McFarland Rose Production (1980) 6 ALRB No. 18, concluded that a genuine impasse must exist for an employer to raise a "business necessity" defense to an alleged violation of the duty to bargain. We clarified this rule in Joe Maggio, Inc. et al. (1982) 8 ALRB No. 72 by stating that, under exigent circumstances, the employer's duty to bargain will be tailored to the urgency of the situation and impasse is not necessarily required, particularly if the union does not reasonably respond to that urgency. (See Dilene Answering Service, Inc. (1981) 257 NLRB No. 24 [107 LRRM 1490].)

[5] We adopt the ALJ's finding that Respondent and the Union each contributed to the lackadaisical pace of the negotiations up to April 2, 1980. It appears that at some point after April 2, however, Respondent determined that it would resist the Union's efforts to conclude an agreement. Since it is difficult to identify with exactitude the date on which Respondent's bad faith began, we find that Respondent first demonstrated its bad faith on May 16, 1980, when it declared a premature impasse. (See O. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63, review den. 1st Dist. Ct. App., Div. 4 (11/10/80), hg.den. (12/10/80).) Our remedial Order will therefore begin the makewhole period on May 16, 1980.

We agree with the ALJ that the totality of Respondent's bargaining conduct, particularly between April 2 and May 23, 1980, demonstrates that Respondent lacked a good faith desire to reach agreement. This lack of good faith was demonstrated by Respondent's failure to invest authority to reach agreement in its negotiator, leading to the substantial withdrawal of tentative agreements; Respondent's readiness to declare impasse after April 2, despite its stated intention to reopen many agreed-upon bargaining issues; and Respondent's disingenuous claim that the Union no longer enjoyed the support of a majority of the employees. Respondent's lack of good faith precludes a finding that the parties were at a bona fide impasse either on May 16 or May 23, 1980. (See Montebello Rose Co., Inc. (1979) 5 ALRB No. 64 at 22, enforced (1982) 119 Cal.App.3d 1.)[6/] We therefore adopt the ALJ's conclusion that Respondent violated section 1153 (e) and (a) by failing or refusing to bargain over the wage increase granted on May 16 and by terminating contract negotiations on May 23, 1980.

Respondent urges us to reverse our Decision in Nish Noroian Farms (1982) 8 ALRB No. 25, where we held that, under the Agricultural Labor Relations Act (Act), a union remains certified until decertified through the election process, and an employer may not, absent an election, raise loss of majority support as a defense to the duty to bargain in good faith. For the reasons

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[6/] We also affirm the ALJ's finding that the parties still had room to negotiate as of May 23, even absent Respondent's bad faith.

stated in F & P Growers Association (1983) 9 ALRB No. 22, we decline to overrule Nish Noroian. Further, since Respondent's bargaining conduct demonstrates an overall lack of good faith, we need not consider whether Respondent's asserted good faith doubt as to the Union's continued majority status should toll Respondent's makewhole liability. (See F & P Growers Association, supra, 9 ALRB No. 22.)[7/]

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Roberts Farms Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective-bargaining representative of Respondent's agricultural employees.

(b) Changing any of its agricultural employees' wages or any other term and condition of employment without first notifying and affording the UFW a reasonable opportunity to bargain with Respondent concerning such change.

(c) In any like or related manner interfering

[7/] We note, in any event, that the record is devoid of any reasonable basis for Respondent's claimed good faith doubt. Even under National Labor Relations Board precedent, changes in the work force, alone, cannot support a good faith belief that the union has lost majority support. (See Dalewood-Rehabilitation Hospital, Inc. (1976) 224 NLRB 1618 [92 LRRM 1371].)

with, restraining or coercing agricultural employees in the exercise of the rights guaranteed by Labor Code section 1151.

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

(a) Make whole its present and former agricultural employees for all losses of pay and other economic losses sustained by them as a result of Respondent's refusal to bargain with the UFW on and after May 16, 1980, plus interest computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55. The period of such obligation shall extend from May 16, 1980, to April 27, 1982, and from April 28, 1982, until such time as Respondent commences good faith bargaining with the UFW which leads to either a contract or a bona fide impasse.

(b) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees regarding a collective bargaining agreement and/or any proposed changes in its agricultural employees' working conditions and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Upon request, meet and bargain collectively with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, concerning the unilateral changes heretofore made in its employees' wage rates and other terms and conditions of their employment.

(d) 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.

(e) Post copies of the attached Notice in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any notice which has been altered, defaced, covered, or removed.

(f) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order, to all Respondent's agricultural employees employed at any time between May 16, 1980, and the date on which the Notice is mailed.

(g) Provide a copy of the attached Notice to each agricultural employee hired during the 12-month period following the date of issuance of this Order.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled agricultural employees of Respondent on company time. The reading or readings shall be at such time and places as are specified by the Regional Director. Following the reading(s), the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for work-time lost during the reading and the question-and-answer

period.

(i) Notify the Regional Director in writing within 30 days after the date of issuance of this Order of the steps Respondent has taken to comply with it. If the Regional Director determines that Respondent has not fully complied with the Order within reasonable time after issuance, then upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

IT IS FURTHER ORDERED that the certification of the UFW, as the exclusive collective bargaining representative of all of Respondent's agricultural employees, be extended for a period of one year from the date, following the issuance of this Order, on which Respondent commences to bargain in good faith with the UFW.

Dated: May 19, 1983

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office by the United Farm Workers of America AFL-CIO (UFW), the certified bargaining agent of our employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing at which each side had a chance to present evidence, the Board has found that we failed and refused to bargain in good faith with the UFW in violation of the law. The Board has told us to post and mail this Notice. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives you and all 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 try to get a contract or to help or protect one another; and
6. To decide not to do any of the above things.

Because it is true that you have these rights, 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.

WE WILL NOT make any change in your wages or working conditions without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed changes.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement. In addition, we will reimburse all workers who were employed at any time during the period from May 16, 1980, to the date we began to bargain in good faith for a contract for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW.

Dated: ROBERTS FARMS, 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 627 Main Street, Delano, California, 93215. The telephone number is (805) 725-5770.

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

Roberts Farms, Inc. (UFW)

9 ALRB No. 27
Case Nos. 80-CE-66-D
80-CE-79-D

ALJ DECISION

The ALJ found that Respondent bargained in bad faith with the United Farm Workers of America, AFL-CIO (UFW) as evidenced by the failure to give authority to its negotiator, the withdrawal of numerous tentative agreements, the premature declaration of impasse, and the disingenous claim that the UFW had lost majority support of Respondent's employees. The ALJ also concluded that, absent a bona fide impasse or other defense, Respondent violated Labor Code section 1153(e) by unilaterally raising wages on May 16, 1980.

BOARD DECISION

The Board adopted the ALJ's Decision with only minor changes.

* * *

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Agricultural Labor Relations Board
AUG 13 1982
RECEIVED
Exec. Secretary

In the Matter of: ROBERTS FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 80-CE-66-D 80-CE-79-D

Appearances:

Scott H. Dunham, Esq.
O'Melveny & Myers
611 West Sixth Street
Los Angeles, California 90017
for Respondent

Clare M. McGinnis
United Farm Workers
P.O. Box 30
Keene, California 93531
for Charging Party

John Moore
Agricultural Labor Relations Board
1685 "E" Street
Fresno, California 93706
for General Counsel

DECISION OF THE ADMINISTRATIVE LAW OFFICER

THOMAS SOBEL, Administrative Law Officer:

This case was heard by me on April 26 and 27, 1982, in Delano, California. Pursuant to charges filed by the United Farm Workers of America, AFL-CIO, a complaint issued on February 11, 1982, alleging that Respondent violated Sections 1153(e) and (a) by unilaterally instituting a wage increase on May 16, 1980; by "engaging in . . . bargaining designed to create a false impasse between May 16 through May 23, 1980";[1/] and by refusing to bargain at all after May 23, 1980. On February 24, 1982, the UFW filed a motion to intervene, which was granted.

At the hearing all parties were given a full opportunity to present evidence, to call and examine witnesses, and to argue their positions. After the close of the hearing, General Counsel and Respondent filed briefs in support of their positions.

Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

I. FINDINGS OF FACT

A. Introduction and Background

Respondent, Roberts Farms, Inc. is an agricultural employer, (Answer to Complaint, Paragraph 2, Admitted); the United Farm Workers of America is a labor organization (Answer to Complaint, Paragraph 2, Admitted), duly certified as the collective bargaining representative of Respondent's agricultural employees on

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1. At the hearing, General Counsel moved to dismiss the charge underlying this allegation in its original form -- without dismissing the allegation itself -- for the purpose of eliminating bad faith as the element of his case. I granted his motion. I will discuss the effect of General Counsel's motion below, see pp. 23-26.

June 17, 1978 (see GC 3, Order of Dismissal of Objections and Issuance of Certification, Attached Certification of Representative.)

During the period in question, Roberts Farms grew a variety of crops, including grapes, tree fruits (plums and apples) and nuts (almonds and walnuts). (See generally, Testimony of Newhouse, II:58, 64-67.) Formerly, an apparently enormous operation (consisting of as much as 122,000 acres less than a decade ago, II:56), by the time of the certification election, Respondent's operations had contracted to 15,000 acres (II:58), and continued to contract until, by 1980, they consisted of approximately 4,500 acres. This decline in scale corresponded to a decline in the company's fortunes. Although no details about what might have occasioned it appear in the record, in late 1977, Respondent had filed for reorganization under Chapter XI of the Bankruptcy Act. (I:50.) The pendency of the bankruptcy proceedings helped to determine the character of the negotiations and now figure in Respondent's defense of their denouement.

B. The Negotiations[2/]

The United Farm Workers of America was certified as the collective bargaining representative of Respondent's employees in June, 1978. William Quinlan testified that he began to represent Respondent in negotiations with the UFW around August 2, 1978. The

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2. Although General Counsel ignored the history of the parties' negotiations between September 1975 and spring 1980 in order to concentrate on the events which led to Respondent's breaking off negotiations, an understanding of that history contributes to an adequate understanding of this case.

initial meeting took place in September 1978. (I:49.) Little of a substantive nature was discussed. Some information was supplied, arrangements were made to supply more, the union withdrew a proposal the company did not regard as serious, and Quinlan advised the union that the company was undergoing reorganization in bankruptcy:

> Mr. Maddock asked me what it meant that they were in bankruptcy. . . . And I explained to him that as a debtor in possession, [Respondent] was actually a different entity than Roberts Farms, Inc. that had formerly owned and operated the company, but that as a debtor in possession he would be, in a sense, a successor. We were not raising any issues of the fact that the company was not obligated to bargain . . . but that there were a lot of problems . . . .
>
> There were a number of procedural problems, and agreeing to anything, a contract would have to be agreed to by Mr. Roberts, it would have to be agreed to by the creditors committee, it would probably [have to be agreed to by the representative of the creditor's committee]. . . by his attorney, and ultimately by the court.
>
> I:50-51

Apparently, no bargaining took place between September 1978 and spring 1979, when Paul Chavez took over negotiations after which the parties had two sessions principally devoted to establishing the guidelines for negotiating. Quinlan testified about a meeting in May, 1979 in which he once again explained that the company was under the jurisdiction of the bankruptcy court, -- in fact, by that time had been adjudicated a bankrupt, -- and that a trustee, Douglas Wallace, had been appointed. Because of the substitution of a trustee for the debtor-in-possession, Quinlan sought appointment as special labor counsel to the trustee, I:53, which he received on April 19, 1979. (I:64.) Around the same time, Mr. Roberts had one of his lungs removed and was unavailable. (I:53.) Quinlan emphasized to Chavez that under the circumstances all agreements would have to be tentative: "[Chavez] asked me if that meant that I

was reserving the right to withdraw tentative agreements and I told him that it did. He told me that that was a two-way street and I acknowledged that it was a two-way street." (I:53.) Quinlan also testified that after his appointment as special counsel to the trustee he did not need either Wallace's "instructions or approval", to act on behalf of the bankrupt. (I:63.)

Meanwhile, in March, 1979, pursuant to charges being filed and served by the union, the Regional Director had issued a complaint alleging that Respondent violated Labor Code Sections 1153(a) and (c), in a number of ways: (1) by interfering with the union's right of access for collective bargaining purposes; (2) by discriminatorily laying off a number of employees because of their support for the union; and (3) by discriminatorily refusing to assign an employee to his customary work as an irrigator because of his support for the union. (Second Amended Complaint, GC 12.) On June 21, 1979, Respondent and the union entered into a private settlement agreement under which the union undertook to withdraw all charges upon Respondent's compliance with the terms of the agreement.[3/]

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3. At the hearing, General Counsel offered the Complaint and executed agreement as background evidence of Respondent's anti-union animus and, specifically, of its attempt to erode the union's majority support. (GC 12, II:50.) I admitted the documents provisionally subject to a standing motion to strike (II:50.). I also requested briefing on the question of their admissibility. Although Respondent addressed the issue, General Counsel declined to do so.

(Footnote continued----)

(Footnote 3 continued---)

It appears that the national Board has approved the use of evidence relating to a settled case in later proceedings. See, e.g., Air Express International (1979) 245 NLRB 478, 483: "Even absent . . . express provision [providing for it], evidence involved in a settled case may properly be considered as background evidence in determining motive or object of a Respondent in activities . . . occurring either before or after the settlement. Steves Sash & Door Company v. N.L.R.B. 401 F.2d 676, 678 (5th Cir. 1968)" Although Air Express International does not distinguish between the admissibility of pre-settlement conduct depending upon the nature of the settlement, the Board's apparent reluctance to rely on evidence relating to a non-Board settlement in the earlier case of Edgewood Nursing Center Inc. (1977) 230 NLRB 1021, appears to aim at such a distinction.

Although the Board didn't say it in Edgewood, it may be that to the extent the settlement appears to have been achieved by the parties acting in their private capacities, the rules ordinarily applicable to evidence of compromise were considered controlling. In fact, in urging exclusion of GC 12, Respondent relies wholly upon such ordinary evidentiary principles. (See Respondent's Post-Hearing Brief, p. 35.) Accordingly, examination of such rules is in order.

Evidence Code Section 1152(a) provides:

> Evidence that a person has . . . furnished . . . money or any other thing or act to another who has sustained . . . claims . . . is inadmissible to prove his liability for the loss or damage. . . .

GC 12 was not proffered to prove Respondent's "liability" for the specific conduct concluded by the settlement; it's purpose in this hearing was simply to provide background evidence to consider the lawfulness of other, different conduct. As such, it does not fall within the proscription of Section 1152 which only precludes introduction of such evidence to prove liability for the conduct which gave rise to the compromise. See Witkin, Evidence (1966), p. 341; see also Wright and Graham, Federal Practice and Procedure (1980), §5308. "Evidence of offers or acceptances of compromise . . . are only inadmissible "to prove liability for or invalidity of the claim or its amount." If offered for some other purpose, the evidence is admissible. Although the use of compromise evidence for some permissible purpose is customarily talked of in terms of an "exception" to the general rule, this is strictly speaking incorrect. The evidence is admissible because it is beyond the scope of the rule of exclusion. . . ." (Emphasis added)

(Footnote continued----)

Quinlan received a proposal from Chavez in August, 1979. This proposal does not appear in the record; nor is there much other evidence of the parties' conduct during this period. Quinlan testified generally that the parties discussed by telephone certain "concepts or references", such as, "other contracts . . . that we could rely upon to sort of form the conceptual basis of our negotiations", (I:57), but exactly what those concepts or references were is not clear.[4/] Also, according to Quinlan, in August 1979, Respondent attempted to negotiate an interim wage increase with the union, but, "he couldn't get any response." (I:58.) On August 18, 1979, Respondent unilaterally implemented the wage increase.[5/]

(Footnote 3 continued----)

Thus, I conclude that GC 12 is not per se inadmissible. However, the settlement is so modest it is difficult to know whether it points to the actual occurrence of unlawful conduct or the path of least resistance. Accordingly, I will not assign it very great weight in assessing Respondent's conduct but treat it as a minor element in my consideration of the circumstances of this case.

4. Apparently "the terms and references" entailed agreement on some items since, when Roberts rejected the draft contract, he did so partly on the grounds that Quinlan had no authority to agree to some of its terms.

5. Respondent informed the union of the increase by mailgram, dated August 16, 1979:

> On June 18 June 20 and June 27 I discussed with you the necessity of making an interim wage increase. On August 13 I offered to Mr. Maddock our proposed interim increase. On August 15 I offered to you our proposed interim increase. We now feel that it is necessary to implement that increase. As set forth in my discussion with you yesterday, my letter to you yesterday and my conversation with you today it will be implemented as of 8-19-79.
> William A. Quinlan

(Resp. A)

(Footnote continued----)

Apparently little of note happened between spring and winter of 1979 when the parties next met except that both parties changed their negotiators: Emilio Huerta took over for the union in October, 1979, and the law firm of O'Melveny and Meyers replaced Quinlan sometime prior to the meeting on December 18, 1979.[6/] The December 18th meeting principally involved the union's concern over the effects of the sale of 2,100 acres of vineyards to Tenneco West.[7/] (See GC 2A.)

(Footnote 5 continued----)

Chavez replied by letter, dated August 31, 1979. (GC 8.) He did not dispute that Quinlan had raised the issue of the need for a wage increase; however, he asserted that he had been waiting on Quinlan's giving him some idea of the proposed rates before responding to him. It is hard to characterize the nature of Chavez' response: disagreeing with Quinlan's charge that the union failed to communicate with him, he proposes the increase be made retroactive, but never actually objects to it.

Quinlan testified that Respondent neither sought nor received the trustee's approval for the wage increase (I:66), because, by the time it was implemented, Roberts had once again become debtor-in-possession (I:81, see also I:66) with full authority to conduct the affairs of the business.

6. Quinlan testified that December 20 was "the change-over date from my representation . . . to the law firm of O'Melveny and Meyers . . . ." (I:61.) Gordon Krischer (of O'Melveny and Meyers) testified his firm began to represent respondent sometime in late November or early December 1979. (I:85.) The negotiation notes introduced into evidence indicate that Krischer was negotiator for Respondent by December 18, 1979. (GC 2A, see also I:86 (Testimony of Krischer).

7. This sale was to produce two problems during negotiations: one adverted to above, was the union's concern over the company's obligations to employees who might be affected by it; the second related to the company's position on subcontracting, which was that it was necessary to subcontract the harvest of its remaining grapes since it had sold all its gondolas and harvesting equipment to Tenneco. (See I:104, GC 2E.)

The next meeting -- and Quinlan's last -- took place on December 20, 1979, in Quinlan's office. There was more discussion of the effects of the Tenneco West sale and the company responded to the union's August, 1979 proposal by tentatively agreeing to well over half of the contract items identified in GC 2B.[8/] Additionally, there were varying degrees of "agreement" on many other articles. For example, the parties disagreed only on the Letter of Understanding accompanying the Grievance and Arbitration article; on Part 6 of Section B of the Leave of Absence article. (GC 2B.) There was outright disagreement on other issues, such as whether the contract would run with the property, and whether there would be a full-time union representative. With respect to other items, such as the length of the contract, or the cost package, the union agreed to consider the company's offer. In general, the union wanted to treat the cost package as a whole and agreed to submit an economic counterproposal.

The next meeting on January 9, 1980, produced tentative agreement on a few more items, such as dues reporting, seniority and rest periods. Other items remained open, such as leaves of absence for training, the furnishing of tools for employees, and subcontracting and successorship. The union accepted part of the

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8. These include: Recognition; Union Security; Hiring; No-Strike Clause; Right of Access to Company Property; Discipline and Discharge; Discrimination; Mechanization (if crops to be mechanically harvested were listed); New or Changed Classification; Records and Pay Periods; Income Tax Withholding; Credit Union Withholding; Bulletin Boards; Subcontracting; Location of Company Operations; Management Rights; Union Label; Modification; Savings Clause; Worker Security; Maintenance of Standards; Hours of Work and Overtime; Bereavement Pay; Jury and Witness Pay.

company's benefit offer, counterproposed on another part, but still did not tender a complete counteroffer on wages. It put off replying to the company's offer for a three-year contract until it tendered its economic package. (See GC 2C.)

On January 30, 1980, the union sent a preliminary wage proposal for one year which was considered at the next meeting on February 22, 1980. At the February 22nd meeting, the company proposed its own, generally lower, wage schedule and expressed its preference for a three-year agreement. (I:94, See generally GC 2D.) After some discussion, the parties agreed to the wages for the first year only. Krischer testified he had specific authority from Roberts to bind the company on wages. (I:95.) There was some additional discussion leading to renewed agreement on a number of articles, such as Grievance and Arbitration, Leaves of Absence, and Housing, while other elements of the economic package began to fall into place: the parties agreed on the holiday schedule and the contribution rates to the various funds for one year only. Other economic items remained open, such as the qualification schedule for vacation, and the pruning and harvesting rates. Discussion was renewed on the effect of the sale of the company's property to Tenneco West: the union demanded compensatory payments to Respondent's employees affected by the sale; the company refused to accede to the demand, although it did offer to rehire without loss of seniority, from the list of regulars whenever new openings occurred in its work force.

On February 27, 1980, the union sent a complete economic proposal including wages for a second and third year of the

contract. The proposal included different pruning rates for each kind of vine; picking, turning and rolling rates for Thompson grapes (picked as raisins); per ton rates for harvesting the company's Petit Sirah and Burger varieties; hourly rates plus a bin bonus for plums and a per bin rate for apples. A detailed appendix was devoted to the method of payment and the procedure for computing the various grape harvesting rates. (R 6.)

The parties next met on March 4, 1980. Krischer began the meeting with intimations that, because of Roberts poor health, the company might go out of business; under the circumstances, he suggested "it might be to the Union's advantage to consider a one year contract rather than three years." (GC 2E.) (It was the company which had been proposing a three-year agreement.) Although tentative agreement had originally been reached on the Subcontracting clause, see GC 2B, Meeting of 12/20/79, the parties had continued to discuss the issue during subsequent negotiations, see e.g., GC 2C, Meeting of 1/9/80, and there was now further, futile discussion about subcontracting grapes. As noted earlier, the company had sold a great deal of its grape acreage, along with the equipment required to harvest it, to Tenneco. It now took the position that the remaining grapes, which had always been subcontracted in any event, would have to continue to be subcontracted because there was no longer any harvesting equipment. Wages were also discussed, with the company offering 19¢/vine for pruning all varieties, an hourly rate with a per bin bonus for plums, and a flat bin rate for apples. The union agreed to consider these items. The company again offered to rehire according to its

need, and without loss of seniority, any former employee laid off by Tenneco West. Huerta agreed to respond in writing to this proposal. The issue of whether the contract would run with the land was also discussed. According to Krischer, Robert's continued ill-health, and the concomitant prospect of future divestment of more, or even all, of the company's land, made it important from the point of view of attracting future buyers, that the contract not bind successors. (I:107.)

The next meeting was April 2, 1980. The union continued to insist the company harvest the remaining grapes; the company rejected the union's proposed modification of its successor clause; the union indicated it would agree to the company's vine rate for pruning Burgers and Petit Sirahs, but it wanted an hourly rate plus a per vine bonus for Thompson pruning. The union apparently agreed to the plum rate,[9/] but proposed a higher rate for apples. It wanted 22¢/tray for raisins and a guaranteed minimum of 9 hours daily for piece rate work. The company proposed a "zipper" clause for the first time; and, also, for the first time, the union proposed that wage rates be made retroactive.[10/] (I:109.) Huerta advised the company the union was offering all agreements as a

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9. A comparison between GC 2E and GC 2F indicates that there is a difference between the per bin bonus for plums proposed by each party; however, since GC 2F appears to treat the company's plum rate as agreeable to the union, I believe the difference (which is a hundredfold and out of proportion to the parties' usual differences) is a typographical error and that the parties agreed on the plum rate.

10. Krischer ambiguously testified that the issue of retroactivity might have been raised earlier. (I:109.)

package and it "would not accept further negotiations on the points discussed." Krischer acknowledged the union had made concessions, but stated the company was not prepared to accept the package immediately. He asked how long the package remained open. Huerta replied that the union wanted immediate agreement, but that the package would be open until they reached agreement. Krischer agreed to make a written reply to the union.[11/] The union accused the company of bad faith. Maddock stated that he thought the company had been playing games for the last two months and that the union might have to go to war.

Krischer replied that the parties might be at impasse and each side would have to do what "it had to do." Krischer testified that he took the union's comment to portend a strike and that he took this threat very seriously:

> . . . [W]hat I understood him to mean by that is that there would be a strike. And indeed, subsequent to the negotiation session and the meeting, as we were going out to our car, there was no -- there was a clear understanding that unless the parties reached agreement pretty quickly, that the union would very well go on strike. That's what I understood him to mean by "war" and that's what I think he meant to mean by "war," because that's what he said. He said, "We'll either get an agreement here, you're goofing around, you're not negotiating seriously, and if that's your position, we'll go to war." And I told him, "Well, lookit, it seems to me that we're at impasse here. You know, here's our position and you're telling me you're ready to go to strike over your position; you do what you have to do and we'll do what we have to do." (I:112.)

As Krischer's observation that the parties might be at impasse reveals, the union's threat, which was designed to prod the

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11. There was also some discussion about different rates paid to Respondent's Porterville and McFarland mechanics, but this issue was to be resolved easily at the next meeting.

company towards agreement, had the opposite effect of pushing him to try to clarify their differences. In general, Krischer described his efforts during the remaining meetings before negotiations were to cease, as aiming, in large part, towards preparation of the company's defense:

> And I was very concerned that if we're unable to reach agreement and the union is not going to accept the proposals, we have clearly in mind what the company's last offer would be so there's no mistake about it. (I:114.)
>
> * * *
>
> A. Because if the company is going to have a strike over its final proposal, it ought to make sure it's its final proposal.
>
> Q. Why do you say if it's going to have a strike, why do you refer to that?
>
> A. Well, because I think the parties were at impasse. We had already been threatened with a strike and I viewed us as on borrowed time ever since the meeting we had with Maddock when he said we were going to go to war. We could have had a strike at any day. (I:120.)

Before the next meeting, the parties had some telephone discussions. Respondent introduced into evidence a letter from Krischer to Huerta summarizing the contents of that discussion. Krischer rejected the union's modification of the company's successor clause on the grounds that it was unnecessary since it proposed to bind the company by contract to the same degree it was already bound by law. The company stood firm on its 19¢/vine offer for pruning all varieties and its apple harvesting and raisin tray rate; it also rejected the union's proposal on subcontracting. The company continued to insist that "the effective date of any agreement and the effective date of any wage increase" be the same; in short, that there be no retroactivity. Krischer repeated the

company's position on the need for a zipper clause and asked Huerta, who, in opposition to it, had apparently claimed that the union anticipated a need to re-open negotiations, to name any items he thought might have to be negotiated so that the parties could deal with them now. (R H.)

Huerta opened the next meeting on May 3, 1980, by listing the items he considered unresolved:

1. Successor Clause
2. Raisin Harvest Rate
3. Thompson Pruning Rate[12/]
4. Subcontracting Grape Operations
5. Effective Date of Wage Increase
6. Piece Rate for Apple Harvest
7. Zipper Clause
8. Rate Differential Between Rates Paid Mechanics in MacFarland and Cotton Center areas.
9. The Problem of Rehiring Steady Employees Who Were Working on Properties Purchased by Tenneco.[13/] (GC 26.)

After some discussion, the union accepted the company's offer on the apple harvest rates; the company agreed to equalize the mechanic rates; and the union agreed to the last proposed text of the successor clause. However, it rejected the zipper clause and

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12. From now on both parties treat only the Thompson rate as open, even though the union was to counter offer on the company's pruning rate for Thompsons by adjusting the rates for other varieties.

13. GC 2F contains a list of items the company considered open as of the previous meeting. With the exception of the rate differential and the rehiring of Tenneco employees the lists in 2F and 2G conform.

refused to bargain further over it. It continued to reject the 19¢/vine pruning rate for all varieties, but instead of agreeing to it for Burgers and Sirahs, it proposed different rates for all three varieties. It accepted the company's raisin harvesting rate and proposed $40/thousand for turning and rolling. It agreed to permit subcontracting of the Sirah and Burger, but not of the Thompson harvests, and it proposed April 1, 1980, as the effective date of the wage increase. Finally, it proposed that, to the extent positions were available, the company would rehire all steady employees on the ranches purchased by Tenneco.

The company responded by standing firm on subcontracting grape harvesting; insisting on no retroactive wage increase; expressing its "preference" for a zipper clause; insisting on its proposed 19¢/vine for pruning all varieties, and offering $35/thousand for turning and rolling raisins. If further proposed offering jobs to Tenneco employees as they became available, but only through December 31, 1980.

The union agreed to the Thompson turning and rolling rate and indicated it would "agree" to subcontracting the Thompson harvest with the condition that, if the subcontractor provided labor only, those employees would be treated as part of the unit. The company rejected the idea, as well as the union's proposed Thompson rates. After a break, the union agreed to the company's proposal regarding the steadies on the Tenneco property. By this time, only four items remained open:

1. Subcontracting the raisins;

2. The Thompson pruning rates;

3. Effective date of the wage raise; and

4. Zipper clause[14/]

The union rejected the zipper clause; proposed that the effective date of the contract be 5/4/80 and that it run through 5/3/81. It maintained its position on raisin subcontracting and its proposed pruning rate for Thompson.

At a break, Krischer spoke to Roberts, after which he proposed the effective date be set as of the date of payroll nearest the agreement. He declared the raisin subcontracting issue and pruning rates open. The union took its own break and, following it, agreed to permit raisin subcontracting and again indicated it would agree to adjust its proposed Burger and Sirah rates down in exchange for the higher Thompson rate it was proposing.

Despite the failure to reach agreement on the pruning rates, inclusion of the zipper clause, and the effective date of the contract,[15/] the parties agreed to take the other tentatively agreed-upon items to their principals for ratifiaction. (GC 2G, p. 4; Huerta, I:13.) Huerta testified that, besides seeking final approval from Roberts as to the agreed upon items, Krischer said he needed more authority to move on those which remained. (I:14.) According to Newhouse's notes, Krischer said he "would compose a

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14. See Testimony of Huerta, I:13, see also GC 2G, p. 3.

15. In his testimony, Huerta identified four remaining open issues. (I:13, 25.) I am relying on the notes as more reliable.

draft of the contract as agreed to to date and would make an effort to deliver it to the Union for their appraisal by Wednesday, May 7, 1980, but under no conditions would he deliver them a copy before his client had a chance to review it."

Considerable testimony was devoted to the question of whether Krischer breached an agreement to provide Huerta with a draft on May 7; to my mind, the matter is unimportant in view of the undisputed fact that Krischer never provided him with a draft at all.[16/] Krischer and Huerta had a series of telephone calls after the May 3rd meeting in which Huerta kept asking for the draft and Krischer kept telling him it was not yet available, because not yet approved by Roberts. (See, e.g., I:14.)

There is no disagreement that on May 16 Krischer told Huerta that Roberts would not approve the "tentatively agreed on items" (I:16, I:116), although there is some disagreement about what else he told him. Huerta testified that Krischer couldn't tell him what Roberts had rejected even though he claimed the parties were at impasse (I:17), a claim which Huerta rejected and which, according to Huerta, prompted him to tell Krischer he would accede to the company's positions on the remaining items. (I:17.) Huerta specifically recalled agreeing to one paragraph of the zipper clause and to the Thompson rate. (I:17.) According to Huerta, no wage increase was discussed.

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16. Huerta's original understanding that Krischer was to provide him with a draft by May 7 is consistent with Krischer's testimony that he had hoped to have the draft approved by Roberts before the 7th. (I:115.) On the other hand, Krischer's testimony that he was to obtain Robert's agreement before sending Huerta the draft is consistent with Huerta's testimony (I:14), and the notes.

Krischer recalled telling Huerta that Roberts had difficulty with "some provisions in the document" (I:116). and that he specifically identified the union funds, the issue of good standing, the duration of the agreement, some wage items, and retroactivity as problems. (I:117.) According to Krischer, he also told Huerta the parties appeared to be at impasse and that the company was going to implement the agreed upon wage rates, effective May 19, thereby "eliminating retroactivity" as a stumbling block to agreement.

The difference in their versions obviously bears on Repsondent's claim that the parties were at impasse before the wage rate was implemented: If Huerta had moved on items on May 16, Respondent could not plausibly claim impasse. General Counsel argues that I credit Huerta because Krischer could not produce notes of their conversation and because the notes for the May 23rd meeting are consistent with Huerta's version that he had not been told of Roberts rejection of the tentative agreements. I do not consider either or both of these grounds sufficient to discredit Krischer when the documentary evidence submitted by the parties otherwise appears to corroborate his account.

Thus, from examination of the parties' correspondence and memoranda, it appears likely that Huerta did not make specific concessions on May 16. In his letter to Krischer of May 19 (GC 5), Huerta characterizes his May 16th response to the claim of impasse as limited to a denial that the parties were at impasse and a statement of the union's willingness "to bargain <u>further</u> on remaining items". The letter also summarizes concessions the union

made as of May 19th, rather than as of May 16th. Moreover, the letter does not deny the assertion in Krischer's mailgram of May 16 that they discussed a wage increase.

On May 19, after Huerta received Krischer's mailgram, he called Krischer to reject impasse and to move on the remaining items. (I:19.) Krischer replied that there were other problems besides the open items, such as the health plans. (I:23, GC 11.) Huerta sent GC 5 memorializing his version of the conversation. In it, he opposes the claim of impasse, objects to the wage increase, accepts the pruning rate for Thompsons, part of the zipper clause, and "the company's offer to make such agreement effective May 19, 1980." Krischer's notes of their conversation confirm the union's movement. (GC 11.)

The parties next met on May 23 at which time Krischer announced that Roberts had rejected all the union plans, the union security clause and the definition of "good standing", and further, that the company wanted to challenge the union's majority status. The company offered to implement the Western Growers pension and medical plan but apparently the union rejected the offer. (I:119.) Krischer said the company would no longer bargain. (I:21, GC 2H, p. 4; I:127.) According to Huerta, Krischer also admitted that "Roberts did not want to enter into a contract with the union against his advice . . . that he had advised Mr. Roberts he may be acting contrary to the law, that this move could be deemed an unfair labor practice . . . ." (I:21-22.) Krischer did not expressly deny this and the notes indicate that Krischer admitted his client's rejection of the document could be "construed as bad faith."

These proceedings followed.

CONCLUSIONS OF LAW

Introduction

General Counsel argues that the only issue in this case is whether Respondent refused to bargain after May 23, which it evidently did. However, that finding does not settle the issues in the case for Respondent justifies its May 23rd refusal, as well as its earlier wage increase, by resort to a number of traditional defenses, all of which make the answer to General Counsel's inquiry but the start of ours.

However, a number of Respondent's defenses need not detain us long. First, I reject Respondent's argument that its refusal to bargain after May 23rd was excused by reasonable good faith doubt of the union's majority support. Our Board's recent decision in Nish Noroian (1982) 8 ALRB No. 25 makes it unnecessary for me to consider the validity of the grounds upon which Respondent claims to base its good faith doubt, since the Board has indicated that the defense is not available under the ALRA:

> An employer under the ALRA does not have the same statutory rights regarding employee representation and election as employed under the NLRA. Under the ALRA, employers cannot petition for an election, nor can they decide to or voluntarily recognize or bargain with an uncertified union. By these important differences the California legislature has indicated that agricultural employers are to exercise no discretion regarding whether to recognize a union, that is left exclusively to the election procedures of the Board. Likewise whether or not recognition should be withdrawn or terminated must be left to the election process. (Nish Noroian, supra, at pp. 13-14 (Emphasis added).)

Although expressed in dictum, this interpretation of the Act is a strong statement of the Board's view of the law and I am bound to follow it. (See e.g., United Farm Workers v. Superior Court (1977)

72 Cal.App.3d 268, 276.

Second, I also reject Respondent's argument that the May 16th wage increase was justified by "extenuating circumstances" or "business necessity." Respondent cites Member McCarthy's concurrence in Martori Bros. (1982) 8 ALRB No. 23 as representing Board recognition of the business necessity defense. However, I cannot regard a single Board member's expression of opinion as controlling; the Board's general policy regarding the defense appears in McFarland Rose (1981) 6 ALRB No. 18 which indicates that it will only be available in cases of genuine impasse.[17/] Since, as will be discussed below, I do not find the parties were at impasse, Respondent's defense is seriously undercut.

More important than the legal question, however, is whether Respondent presented any evidence justifying its necessity defense. The only evidence relied on is Krischer's conclusory testimony that Respondent's wages had fallen below area standards and that it needed to raise them to attract workers. However, it was at least partly due to Respondent's position against retroactivity that agreement was being held up in the first place; in effect, Respondent is simply pointing to circumstances created by its own bargaining position as justifying its sidestepping the bargaining obligation. I do not believe the "business necessity" defense can be utilized in such a case.

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17. The Board's authority for limiting use of the business necessity defense is Gorman's 1976 Labor Law treatise, Basic Text on Labor Law. Since publication of the text, however, NLRB cases appear to have given the "business necessity" defense greater vitality than he (or our Board) attributes to it. (See Winn-Dixie Stores (1979) 243 NLRB 972, 974.)

Finally, I must reject Respondent's additional claim that it was justified in instituting the wage increase because it was in line with its past practice. Respondent misconstrues the exception: the fact that Respondent had once before unilaterally raised wages does not necessarily permit it to invoke the past practice doctrine. It is only when the increase "[involves] virtually no independent action by the employer" that the doctrine is applicable. (N.A. Pricola Produce (1981) 7 ALRB No. 49, p. 3.) Since the record indicates that the 1979 increase was in August and the 1980 increase was in May, Respondent can hardly claim the matter of timing was "automatic." The fact that Respondent instituted the agreed upon wage is proof that the amount of the wage was not automatic. Accordingly, this defense, too, is unavailing.

RESPONDENT VIOLATED THE ACT

1. The Effect of General Counsel's Motion

Respondent otherwise defends its refusal to bargain on May 23rd as well as its May 19th wage increase, on the grounds of impasse. Before considering this claim, one preliminary procedural question, occasioned by General Counsel's motion to dismiss Charge No. 80-CE-66-D, must be addressed.

At the commencement of the hearing General Counsel moved to dismiss the charge that Repsondent "had negotiated in bad faith and intentionally delayed the reaching of an agreement." (Charge No. 80-CE-66-D) No allegation of the complaint was dismissed; the sole basis of General Counsel's motion was his theory -- outlined in his opening statement and pressed in his post-hearing brief -- that each violation alleged in the complaint was a per se violation of

the Act, which required no proof of bad faith. I granted the motion.[18]

This was apparently error since our Board has said that charges are not subject to dismissal by an administrative law officer. (Sam Andrews (1980) 6 ALRB No. 55, at p. 5.) In this respect, our Board's procedures differ from those of the NLRB, which give the national Board's administrative law officers the discretion to dismiss charges. (29 CFR 102.9.) The national Board has even held it error for an ALO to refuse to exercise his discretion to dismiss a charge. (Local 638, United Association of Plumbers (1966) 158 NLRB 1747, 1750.) Under national Board regulations, however, if the charge were properly dismissed, the allegations in the complaint should have been as well. (29 CFR 102.9) Thus, under our Board's procedures, I went too far and, under national Board procedures, not far enough. In either event, the question remains: what is the effect of General Counsel's motion on the issues in this case? For its part, Respondent claims that General Counsel has essentially conceded its good faith in bargaining "at least up to May 16, 1980, [since the] charge of bad faith was withdrawn and dismissed at the hearing."

I disagree. General Counsel's theory, only made proof of Respondent's state of mind irrelevant to his case without in any way either conceding or implying that Respondent was actuated by good

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18. I granted the motion since it seemed to me it was within General Counsel's discretion to dismiss a charge and it was within the presence of the Charging Party on whose behalf (and in furtherance of the public interest), General Counsel conducts the litigation. (See e.g. N.L.R.B. v. Laborers Intern. U. of North America (8th Cir. 1977) 567 F.2d 833, 836.)

faith at any time:

> The "duty to bargain collectively" enjoined by Section 8(a)(5) [the analog to Labor Code Section 1153(e)] is defined . . . as the duty to "meet . . . and confer in good faith with respect to wages, hours and other terms and conditions of employment." [Compare Labor Code Section 1155.2] Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party had refused even to negotiate in fact -- "to meet . . . and confer" -- about any of the mandatory subjects. (N.L.R.B. v. Katz (1962) 369 U.S. 736, 742-43, 50 LRRM 2177. Emphasis added. See also, N.A. Pricola Produce (1981) 7 ALRB No. 49.)

As to the May 16 wage increase and the post-May 23 refusal to bargain, General Counsel need only prove they occurred to make out a prima facie case of a violation since they are "refusals in fact." Respondent's defense of impasse then necessarily raises the issue of its prior good faith since the claim of impasse turns upon whether the "deadlock [was] based upon irreconcilable positions conscientiously held or [whether it was] a contrived breakdown of negotiations resulting from one party's manipulation of the bargaining process". (McFarland Rose Production (1981) 6 ALRB No. 18, at 16.)

For the same reason, however, General Counsel's attempt to prove the remaining allegation, that Respondent created a false impasse, without proving bad faith, is incoherent. We have the peculiar situation, then, of General Counsel ignoring an essential element in one part of his case, only to have evidence as to that element supplied by Respondent's defense. Since uncharged or even unpleaded allegations may be the subject of a finding, see Prohoroff Poultry Farms (1977) 3 ALRB No. 87, and since the issue of Respondent's good faith was raised and litigated through its impasse

defense, were it not for other considerations which I find persuasive, I believe I could make a finding concerning the allegation of false impasse. In this case, however, General Counsel has chosen to treat all of Respondent's violations as per se violations, thus relegating to my consideration as background, conduct which might otherwise constitute an independent violation of the Act. He tried the case this way; he has briefed the case this way and I believe it fair to hold him to it. (See e.g., Pleasant Valley Vegetable Coop (1978) 4 ALRB No. 11, p. 5.)

2. The Question of Impasse

The history of these negotiations appears to be divided into two distinct phases. The first, lasting from the date of certification through the April 2, 1980 meeting, is characterized by a lackadaisacal, even torpid approach, to bargaining by both sides; the second, after the union made its accusation of bad faith, by an abrupt acceleration of the pace of bargaining, apparently fueled, on the one hand, by the union's concern that it had been gulled, and on the other, by the company's desire to protect itself. Certainly, the union bears a great deal of responsibility for the initial pace of negotiations: it changed negotiators a number of times; it failed to submit a proposal until well over a year after its certification. As dilatory as the union was, the evidence also indicates that Respondent liked it that way.

In the first place, from the beginning and throughout negotiations, Respondent showed an excessive concern with protecting itself. Thus, at the start of negotiations, Quinlan gave Maddock the same message which he later conveyed to Chavez and Huerta when

they took over negotiations, and which Krischer felt compelled to repeat to Huerta: the company's financial troubles and, in particular, its status as an estate in bankruptcy, required that all agreements reached at the table be tentative.[19/] Analysis of the unraveling of these negotiations leads to the conclusion that Respondent used its insistence upon "tentativeness" simply as a tool to break negotiations apart.

The stated reason for Respondent's insistence that its agreements be tentative was that Respondent did not have complete authority to negotiate an agreement because the court reserved the power to reject it. (See, e.g., Joint Executive Board v. Hotel Circle (9th Cir. 1981) ____ F.2d ____, 103 LRRM 2424; Shopmen's Local U. No. 455 v. Kevin Steel Products Inc. (2nd Cir. 1975) 519 F.2d 698. However, Respondent's argument is essentially a non-sequitur: the fact that the court has the power to reject a collective bargaining agreement does not mean that Roberts needed to reserve the same power to himself. Since nothing in our Act compelled him to agree to anything at all, Labor Code section 1155.2, it is difficult to understand why his status in bankruptcy

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19. In general, Respondent breaches no duty by insisting on "tentative agreements" so long as such insistence is not designed to frustrate agreement, Fort Industry Co. (1948) 77 NLRB 1287; Tidewater Associated Oil Co. (1949) 85 NLRB 1096; Consolidated Coal Co. v. N.L.R.B. (7th Cir. 1982) 669 F.2d 482 and the union obviously acquiesced to Respondent's ground rules.

required the agreements he did make be tentative.[20/] Certainly, Respondent was able to safeguard the concerns of its estate through the bargaining process, as its bargaining on the successor issue reveals. And when Roberts did exercise the power to reject agreements, at least some of the agreements he rejected, such as union secuirty and "good standing", do not appear to have anything to do with his status in bankruptcy. Taken together, Robert's arbitrary insistence on the power to reject agreement and his arbitrary exercise of that power provide strong evidence from which to infer that his original motive in seeking it was a desire not to reach agreement.

Second, Krischer's readiness to see impasse developing in the April 2nd meeting, also indicates an eagerness to suspend bargaining. In the first place, the union's strike threat, which

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20. Under the labor act, Respondent was under a duty to bargain, and under the Bankruptcy Act he was free to bargain with due regard, of course, to his obligation to protect his estate.

> In operating the business although subject to the control of the court, the debtor must in general operate in accordance with applicable non-bankruptcy laws. For example, although there may be the power to reject an executory contract with the permission of the court, including collective bargaining agreements, the debtor may have to bargain with the union in the operation of his business. (Cowans Bankruptcy Law and Practice, 2d Ed. 1978 Vol. III, p. 92-93, see also, 5 Collier on Bankruptcy, Sections 1107, et seq.)

The power Roberts reserved to reject agreements merely because they were tentative is greater than that possessed by a court which must have sound reason for rejecting a collective bargaining agreement. See Shopmen's Local U. No. 455 v. Kevin Steel Products, 519 at 706-7.

Krischer took to betoken impasse, is not related to the question of whether impasse exists: "If in the presence of a strike an employer could avoid the obligation to bargain by declaring further efforts to be useless, the Act would largely fail of its purpose." (United States Cold Storage Corporation (1951) 96 NLRB 1108, 1109, quoting N.L.R.B. v. Reed and Prince Manufacturing Company (1943) 118 F.2d 874, 885, cert. den. 313 U.S. 595.) Similarly, examination of the other events of the April 2nd meeting also indicates no impasse. Thus, Krischer acknowledged the union had made concessions, which is a strong indicator that there is no impasse. (See Crest Beverage Co., Inc. (1977) 231 NLRB 116.) And not only was the union's insistence on a "package" in that meeting couched so as not to rule out further negotiations, but also when Krischer agreed to respond, the possibility of future movement was assured.[21/] Finally, since it was at the April 2nd meeting that two entirely new issues were brought up on which there had been no previous bargaining, a declaration of impasse is premature. (See Atlas Tack Corporation (1976) 226 NLRB 222, 227.)

It is against this background that Respondent's claims of impasse as of May 16 and May 23rd must be examined. On May 16, Krischer told Huerta Respondent had rejected the tentative agreements, thus, essentially throwing open the entire negotiating process. Respondent's introduction of new differences after negotiations had progressively reduced the number of old differences is inconsistent with bargaining deadlock since the union was never

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21. Indeed, at the next meeting the union made significant concessions.

on notice that the items Roberts rejected were at issue.[22/] Roberts cannot have it both ways: he cannot throw open the whole negotiating process at the same time as he claims there is no room for movement.

Equally important, as of the end of the May 3 meeting, the parties had narrowed the areas of their disagreement considerably; the union had even capitulated on the subcontracting issue, one of the major kernels of disagreement between them. All that remained was the zipper clause,[23/] the Thompson rates and the effective date of the contract. When the company itself granted the wage increase, it essentially gave in on the issue of retroactivity.[24/] Thus, the defense of impasse is unavailing as soon as Respondent moved from its insistence that there be no retroactivity.

> An impasse is a fragile state of affairs and may be broken by a change in circumstances which suggests that attempts to adjust differences may no longer be futile. . . . Just as there is no litmus-paper test to determine when an impasse has been created, there is none which determined

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22. Roberts summary rejection of some items as beyond Quinlan's authority is interesting for another reason. As the facts show, Quinlan was not always negotiating for Roberts as principal; for part of the time the trustee was his principal. After Roberts once again became debor-in-possession, his failure to renounce anything Quinlan lawfully, and with full authority, agreed to should estop him from doing so later.

23. Despite its insistence on the zipper clause, at one point, Respondent expressed doubt that it was a mandatory subject. The only authority on the question which I can find holds that it is. (N.L.R.B. v. Tomco Communications Inc. (9th Cir. 1978) 567 F.2d 871, 879.)

24. This is the short answer to Respondent's claim that the union acquiesced to the wage increase. It did, but it properly treated it as a concession and made further movement of its own.

> when it has been broken. . . . Most obviously, an impasse will be broken when one party announces a retreat from some of its negotiating demands. (Gorman, Basic Text on Labor Law, (1976) p. 449.)

For the same reason, Respondent's claim of continuing impasse after May 23rd must also fail since by that time the union conceded on at least two other major issues.

Accordingly, I find Respondent violated Labor Code section 1153(e) and (a).

RECOMMENDED REMEDY

Pursuant to Labor Code Section 1160.3, Respondent Roberts Farms, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a) with the UFW, as the certified exclusive collective bargaining representative of Respondent's agricultural employees;

(b) Changing any of its agricultural employee's wages or any other term and condition of employment without first notifying and affording the United Farm Workers of America, AFL-CIO (UFW), a reasonable opportunity to bargain with Respondent concerning such change;

(c) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code section 1152.

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

(a) Make whole its agricultural employees for all losses of pay and other economic losses sustained by them as the result of

Respondent's refusal to bargain as such losses have been defined in Adam Dairy (1978) 4 ALRB No. 24 and modified in Hickam (1978) 4 ALRB No. 73; the period of such obligation shall extend from May 23, 1980, until such time as Respondent commences to bargain in good faith and thereafter bargains to contract or bona fide impasse;

(b) Upon request, meet and bargain collectively with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, concerning the unilateral changes heretofore made in the employees' wage rates and other terms and conditions of their employment.

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

(c) Post copies of the attached Notice in conspicuous places on its property for a 60-day period, the time and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(d) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of the Order to all Respondent's agricultural employees employed at any time during the payroll period immediately preceding October 10, 1979.

(e) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled agricultural employees of Respondent on company time. The reading or readings shall be at such times and

places as are specified by the Regional Director. Following the reading(s), the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(f) Notify the Regional Director in writing within 30 days after the date of issuance of this Order of the steps taken to comply with it. If the Regional Director determines that Respondent has not fully complied with the Order within a reasonable time after issuance, then upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

DATED: August 13, 1982.

THOMAS M. SOBEL
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help any union;

3. To bargain as a group and to choose anyone they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect each other; and

5. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT change your wage rates or other working conditions without first meeting and bargaining with the UFW about such matters because it is the representative chosen by our employees.

DATED: ROBERTS FARMS, INC.

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.