Gilroy, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PAUL W. BERTUCCIO, dba BERTUCCIO FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 81-CE-91-SAL 82-CE-29-SAL 10 ALRB No. 16

DECISION AND ORDER

On March 14, 1983, Administrative Law Judge (ALJ) Joel Gomberg issued the attached Decision in this proceeding. Thereafter Respondent timely filed exceptions to the ALJ's Decision and a brief in support thereof. The Charging Party and General Counsel each timely filed a response to Respondent's exceptions.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the ALJ's rulings, findings and conclusions as modified herein, and to adopt his recommended Order with modifications.

We affirm the ALJ's finding that Respondent failed

[1/] All section references herein are to the California Labor Code unless otherwise specified.

to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW or Union) for the reasons stated in his Decision.

We affirm the ALJ's finding that Respondent provided information on the 1980 ornamental corn wage rates. Information need not be provided in the manner requested. (See Emeryville Research Center v. NLRB (9th Cir. 1971) 441 F.2d 880 [77 LRRM 2045]; Shell Oil Co. v. NLRB (9th Cir. 1972) 457 F.2d 615 [79 LRRM 2997].) But we also recognize that the Union is not required to probe for information. (As-H-Ne Farms (1980) 6 ALRB No. 9.) Respondent told the Union's representative that its proposed wage rate for ornamental corn represented a seven percent increase over the 1980 wage rate, and the Union easily calculated the 1980 wage rate based on the information.

We find merit in Respondent's exception to the ALJ's finding that it violated section 1153(e) and (a) when it refused to provide the Union with an account of the rents owed by striking employees. Information requested must be necessary and relevant to the collective bargaining process. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24.) We find that General Counsel failed to show that this information was relevant to the bargaining process. (As-H-Ne Farms, supra, 6 ALRB No. 9.)

We affirm the ALJ's finding that Geoffrey Gega did not lack the legal authority to negotiate on behalf of Respondent, as was the situation with Respondent's previous negotiator, Jasper Hempel. We do not find that Respondent's failure to inform Gega of its operations or its position on matters relating to the negotiations rendered Gega ineffectual as a negotiator. Tina

Bertuccio was present at the negotiation meetings, as a representative of Respondent, in order to provide information about Respondent's operations. She could have supplied Gega and the UFW with the information. The positions put forth by the negotiator during bargaining are the positions of the employer the negotiator represents. Paul W. Bertuccio testified concerning instances in which he had not authorized a proposal to be made, but these were minor matters which did not reflect upon Gega's general authority to reach an agreement. It was Respondent's general bad faith that prevented an agreement from being reached between the parties, not Gega's effectiveness as a negotiator. On July 25, 1982, Respondent informed the UFW that it was willing to accept the package proposal the UFW offered on April 8, 1982.[2/] The UFW informed Respondent that the package proposal was no longer on the table for acceptance since Respondent had rejected it on April 8. The UFW treated Respondent's acceptance as a counterproposal and rejected it due to a change in circumstances. The UFW and Respondent met on August 18, 1982, and the UFW presented a package proposal, which Respondent rejected. The UFW then asked Respondent to present a proposal, but Respondent refused to make any proposals until the UFW made a more "reasonable" proposal. On September 14, 1982, the ALJ adjourned the hearing in this case.

Respondent asserts that the UFW has engaged in bad

[2/] Respondent cited the effectiveness of the UFW's strike and boycott, as well as the hearing in this matter, which began on July 26, 1982, as reasons for "accepting" the UFW's April 8, 1982 package proposal.

faith bargaining since July 26, 1982 when it rejected Respondent's counterproposal.

A finding of bad faith bargaining must be based upon the totality of the circumstances, determined from the record as a whole. (As-H-Ne Farms, supra, 6 ALRB No. 9; McFarland Rose Production (1980) 6 ALRB No. 18; Admiral Packing Company, Inc. (1981) 7 ALRB No. 43.) Respondent's July 25, 1982 counterproposal appears to have been a good faith attempt to reach an agreement. However, discrete periods within the course of negotiations will not be separated out of "the totality," simply because it is not shown that there was bad faith in every meeting between the parties or in every correspondence or action between the parties. (McFarland Rose Production, supra, 6 ALRB No. 18; Masaji Eto (1980) 6 ALRB No. 20.)

In this case the evidence is clear that, based on the totality of the circumstances, Respondent engaged in bad faith bargaining from April 2, 1981 to July 24, 1982. However, the record is inconclusive to prove that Respondent continued its bad faith conduct or engaged in good faith bargaining after July 25, 1982. The record is equally inconclusive concerning whether the UFW engaged in bad faith bargaining after July 26, 1982. We will leave to further proceedings the determination of whether, after July 24, 1982, Respondent abandoned its course of conduct which we find to be in bad faith in this case, particularly, Respondent's offer of proposals which exclude agricultural employees covered by the certification and its failure to provide information relevant to the bargaining

processes. In such further proceedings, evidence can be presented concerning the UFW's conduct subsequent to July 25, 1982.

Remedy

We shall order Respondent to make whole all agricultural employees it employed during the period from April 2, 1981 to July 24, 1982. The period prior to April 2, 1981 is covered by our Decision in 8 ALRB No. 101, in which we ordered Respondent to make whole all agricultural employees it employed between January 22, 1979, and September 8, 1980, and from September 9, 1980 to the date Respondent commences good faith bargaining with the UFW which leads to a contract or a bona fide impasse.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Paul W. Bertuccio, 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), on request, with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of its agricultural employees, or implementing any changes in its agricultural employees' wages, hours, or other working conditions without giving prior notice to the UFW, and an opportunity to bargain over such changes.

(b) Failing or refusing to furnish to the UFW, at its request, information relevant to collective bargaining.

(c) Bargaining directly with agricultural employees.

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

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

(a) 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.

(b) Upon request of the UFW, rescind the wage increases granted in January 1982 and, thereafter, meet and bargain collectively with the UFW, at its request, regarding such changes.

(c) On request, provide the UFW with information regarding which parcels of land under its control will be farmed and which will be kept dormant, and other data relevant to collective bargaining.

(d) Make whole its present and former agricultural employees, including employees who went out on strike on or about July 10, 1981 but not including employees hired after July 10, 1981, as replacements for those strikers, for all losses of pay and other economic losses sustained by them as the result of

Respondent's refusal to bargain, such losses to be computed in accordance with Board precedents, plus interest computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55. The period of said makewhole obligation shall extend from April 2, 1981 until July 24, 1982 and thereafter, until Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse. The computation of the makewhole award for an employee who went on strike on or about July 10, 1981 shall not include actual wages or benefits received for the period from July 10, 1981 or such later date as the employee went on strike to either the date such employee unconditionally returned or offered to return to work or the date Respondent commences good faith bargaining with the UFW resulting in contract or bona fide impasse, whichever date comes first. Rather the makewhole award for such an employee shall include the difference between what such employee would have earned by working for Respondent during said period and what the employee would have earned by working during the same period at rates of payment which Respondent would have been paying had he been bargaining in good faith. (See Admiral Packing Company (1981) 7 ALRB No. 43.)

(e) Preserve, and upon request, make available to the Board or its agents for examination, photocopying, and otherwise copying all records relevant and necessary to a determination of the amounts of backpay, makewhole, and interest due to the affected employees under the terms of this Order.

(f) Sign the Notice to Employees attached hereto

and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies thereof in each language for the purposes set forth hereinafter.

(g) Post copies of the attached Notice in conspicuous places on its property for sixty (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.

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

(i) Mail copies of the attached Notice in all appropriate languages, within thirty (30) days after the date of issuance of this Order, to all agricultural employees employed by Respondent between April 2, 1981, and the date the Notice is mailed.

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice and/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 time lost at this reading and

the question-and-answer period.

(k) Notify the Regional Director in writing, within thirty (30) days after the date of issuance of this Order, of the steps which have been taken to comply with it. 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: March 30, 1984

ALFRED H. SONG, Chairman

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas 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 refuse to provide the UFW with the information it needs to bargain on your behalf over your working conditions.

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 NOT bypass the UFW and bargain directly with our employees.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement.

WE WILL pay all of our agricultural employees who worked at any time from April 2, 1981 to the date we began to bargain in good faith with the UFW for a contract, for all losses of pay they have sustained as the result of our refusal to bargain.

Dated: PAUL W. BERTUCCIO

By: _____
(Representative) (Title)

If you have any quetions 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 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 44-3-3161.

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

PAUL W. BERTUCCIO, dba
BERTUCCIO FARMS

10 ALRB No. 16
Case Nos. 81-CE-91-SAL
82-CE-29-SAL

ALJ DECISION

ALJ Joel Gomberg found that Respondent violated section 1153(e) and (a) of the Act by (1) failing or refusing to bargain in good faith about the wages, hours, and working conditions of any employees supplied by labor contractor Jesus Quintero; (2) bargaining directly with the apricot harvesters in July 1981 about an increase in wages; (3) unilaterally increasing wages in January 1982 without bargaining with the UFW; and (4) engaging in surface bargaining with the UFW by (a) engaging in dilatory tactics when Respondent's negotiator was unavailable to meet with the UFW negotiator, and delaying in providing information requested by the UFW; (b) failing to provide an effective negotiator who was sufficiently informed about Respondent's operations or knowledgeable of Respondent's position on critical matters relating to the negotiations; and (c) making predictably unacceptable proposals. The ALJ concluded that the totality of Respondent's conduct was a continuation of the bad faith bargaining found by the Board in 8 ALRB No. 101 and that Respondent was determined not to reach an agreement with the UFW. The ALJ found that General Counsel failed to establish a prima facie case regarding an alleged threat made by Tina Bertuccio to cancel a negotiation session if the workers refused to call off the work stoppage/protest.

The ALJ found no merit in Respondent's affirmative defenses that the UFW engaged in bad faith bargaining by (1) walking out of negotiations on July 10, 1981 and again on April 8, 1982; (2) making a package proposal on April 8, 1982 without intending to agree to a contract on its terms; (3) since July 26, 1982 engaging in dilatory tactics, making regressive and predictably unacceptable proposals and disrupting negotiations; and (4) failing to provide information concerning the costs of the UFW's Robert F. Kennedy medical plan.

The ALJ recommended a makewhole remedy from January 22, 1979. Because the strike which began on July 10, 1981 was an unfair labor practice strike, he also recommended that the makewhole relief for the period of the strike follow the Board's approach in Admiral Packing Co. (1981) 7 ALRB No. 43, whereby (1) nonstriking workers employed prior to the strike would receive makewhole, (2) replacement workers would receive no makewhole because they would not have worked but for the strike, and (3) striking employees would receive the makewhole differential they would have received had they not gone out on strike.

BOARD DECISION

The Board affirmed the ALJ's rulings, findings and conclusions with modifications. The Board found that although the information requested concerning the 1980 ornamental corn wages rate was not provided in the form requested, Respondent did in fact provide information from which the Union could easily calculate the rate. The Board reversed the ALJ's finding that Respondent violated section 1153(e) and (a) by refusing to provide the Union with an account of rents owed by striking employees, finding that there was no showing how this information was relevant to the bargaining process. The Board did not adopt the ALJ's finding that Respondent's negotiator was ineffective, noting that a knowledgeable representative, Tina Bertuccio, was present at the negotiations to supply information.

The Board found that the record supports a finding that Respondent did not bargain in good faith until July 24, 1982. From July 25, 1982 forward, the Board found the record to be inconclusive as to whether Respondent continued its bad faith bargaining or commenced bargaining in good faith. The Board therefore left such determination to further proceedings.

* * *

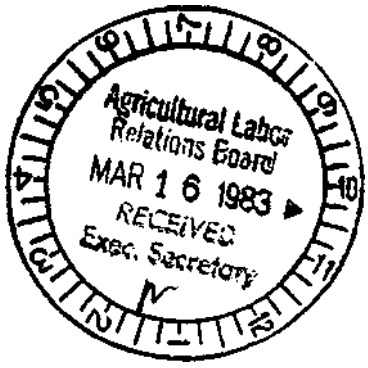
This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD



PAUL W. BERTUCCIO, dba BERTUCCIO FARMS, Respondent	)	Case Nos. 81-CE-91-SAL 82-CE-29-SAL
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	)	

APPEARANCES:

James W. Sullivan
for the General Counsel

Marcos Camacho
for the Charging Party

Lewis P. Janowsky for
the Respondent

STATEMENT OF THE CASE

Joel Gomberg, Administrative Law Judge: This case was heard by me on 13 days in July, August, and September, 1982, in Hollister and Salinas, California. The Complaint, issued on May 11, 1982, was based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter "UFW" or "the Union"). The charges were duly served on Respondent. The General Counsel issued a First Amended Complaint before

the hearing began. A Second Amended Complaint, incorporating an amendment made at the hearing pursuant to motion, was issued while the hearing was in progress. The Second Amended Complaint alleges violations of Sections 1153(a) and (e) of the Agricultural Labor Relations Act (hereafter "the Act") by Paul W. Bertuccio, doing business as Bertuccio Farms (hereafter "Respondent" or "the Company").

All parties were given a full opportunity to participate in the hearing. The UFW intervened, as a matter of right, pursuant to Section 20266 of the Board's Regulations. All parties waived oral argument, but filed timely post-hearing briefs pursuant to Section 20278 of the Regulations.

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

FINDINGS OF FACT

I. Jurisdiction.

Respondent admitted that it is an agricultural employer within the meaning of §1140.4(c) of the Act, and that the Union is a labor organization within the meaning of §1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices.

The Second Amended Complaint alleges that Respondent refused to bargain collectively in good faith with the UFW, in violation of §§1153(a) and (e) of the Act, by engaging in surface bargaining, refusing to bargain at all

concerning harvest employees supplied to it by Jesus L. Quintero, refusing to supply relevant information to the Union, or failing to supply it in a timely manner, unilaterally increasing wages, and bargaining directly with a group of apricot harvesters. The Complaint also alleges as an independent violation of §1153(a) that Respondent threatened to call off a scheduled bargaining session unless protesting employees returned to work.

The Respondent denies that it has violated the Act. With respect to many of the employees supplied by Quintero, it contends that it engaged in a "technical" refusal to bargain, in order to maintain its legal position, expressed in a Petition for Unit Clarification which it withdrew on July 9, 1982, that they were not properly included in the certified bargaining unit. The Respondent has also asserted a number of affirmative defenses[1/] alleging that the UFW was engaged in bad faith bargaining.

A. The Context Of The Collective Bargaining Between The Parties.

The UFW was certified as the exclusive bargaining representative of the Company's agricultural

1/I granted the UFW's motion to strike one of Respondent's affirmative defenses, based on alleged strike misconduct on the part of the Union. Although I ruled that the proposed affirmative defense was not a legally sufficient defense, under NLRA and Board precedent, to charges of bad faith at the bargaining table I specifically told Respondent's counsel that my ruling would not bar evidence of Union strike misconduct offered for the purpose of showing effects it may have had on events at the bargaining table. No such evidence was offered by the Company.

employees on November 17, 1978, after receiving the majority of votes cast at a representation election held on October 17, 1977. Paul W. Bertuccio & Bertuccio Farms (1978), 4 ALRB No. 91. The parties began negotiating on January 22, 1979. Respondent's bargaining conduct from that date until September 8, 1980, was the subject of an earlier Board proceeding. In Paul W. Bertuccio (1982), 8 ALRB No. 101 (hereafter "Bertuccio I") the Board held that Respondent committed many violations of its statutory duty to bargain in good faith with the Union and ordered it to make whole all its agricultural employees for all economic losses they suffered as a result, until such time as the Company "commences good-faith bargaining with the UFW which leads to a contract or a bona fide impasse. . ."

This case (hereafter "Bertuccio II") involves the bargaining conduct of the parties from March, 1981, until August, 1982. During the Bertuccio II period, the parties met nine times between April and July, 1981, when the UFW called a strike and walked out of negotiations. In 1982, there were four negotiating sessions between January and April 8, when the UFW again suspended negotiations to pursue an economic boycott against Respondent. The parties had one formal bargaining session during the hearing.

Paul Chavez and Geoffrey Gega, the principal negotiators for the Union and the Company, respectively, were present at every bargaining session. Tina Bertuccio

was also present at each meeting, but her husband, Paul, who runs the Company as a sole proprietorship, never attended. Mrs. Bertuccio's role in the bargaining was to provide Gega with information about Company operations, when needed to respond to Union requests, and to report to her husband about what transpired at the sessions. Cesar Chavez, the UFW President and Paul's father, attended three sessions each in 1981 and 1982. Gega's practice was to consult with Paul Bertuccio before and after meetings to discuss the Company's position on bargaining matters. While the parties had agreed to a number of contract proposals by April 8, 1982, they remained apart on almost all the economic issues, as well as such major items as hiring, seniority, and Union security. On the eve of the hearing, the Company offered to enter into an agreement based on the Union's April 8 proposal. The UFW rejected this offer, contending that changed circumstances over the intervening three months required it to seek greater economic benefits.

B. The Course Of Bargaining Over The Employees Supplied By Quintero.

From August, 1979, until July, 1982, the Company maintained that employees provided to it by Jesus L. Quintero, Inc., to harvest its crops were not included in the bargaining unit and/or should not be covered by the terms of a collective bargaining agreement. The Quintero employees comprise approximately 50% of the Company's work force during its peak employment period. The dispute

between the Union and the Company over the status of these employees effectively prevented them from reaching agreement on a contract during the Bertuccio II period. It affected a wide range of critical items in the proposed agreement, including hiring, seniority, wages, recognition, and union security.

1. The Relationship Between The Company And Quintero.

Quintero has been supplying employees to the Company for more than 20 years. Mr. Quintero's daughter, Hope Beltran, has worked for the firm since 1964, and has been in charge of its operations since its incorporation in 1975. According to Beltran, the pattern of the relationship between Quintero and the Company has not changed in any material respect since the representation election.

Quintero crews alone harvest the Company's onions, gourds, ornamental corn, garlic, and peas.[2/] Employees who worked in the harvest of the first four crops voted in the representation election without challenge from the Respondent. No objections relating to the inclusion of the employees working in the harvest of these crops in the certified bargaining unit were filed.

The Company uses crews composed of both its direct employees and workers provided by Quintero in the harvest of lettuce, cabbage, anise, cardoni, and bell peppers.[3/] Quintero received a commission of 10% of the

2/I shall refer to these as the "exclusive" crops,

3/I shall refer to these as the "mixed" crops.

wages paid to these employees. The employees provided by Quintero were paid at the same rate as the directly hired employees. The rate was set by the Company. They were supervised by Company foremen and were treated in the same manner as directly hired employees for seniority purposes. Quintero's role in the mixed crops was limited to providing labor.

In the five exclusive crops, the compensation for the employees was set by Bertuccio in consultation with Beltran. The Company paid Quintero a 10% commission on the payroll in each of these crops. While Beltran testified that she was paid by the ton in the onion harvest, Mr. Bertuccio stated that he paid a 10% commission. In Bertuccio I, Beltran testified that she received a commission for work performed in the onion harvest, but was paid by the ton for hauling the onions to the packing shed. In the absence of any documentary evidence on this point, I conclude that Quintero was compensated by a 10% commission, rather than by the ton, in the onion harvest. Quintero foremen supervise the crews in the garlic, onion and pea harvests, but not in the other two crops. The employees in all five harvests accrue Company seniority in the same manner as the directly hired employees.

Quintero provides various hand tools to employees working in the exclusive harvests, as well as baskets, sacks, scales, and sorting tables. In addition to

this minor equipment, Quintero uses its own forklifts in the garlic harvest, and hauls the corn, gourds, and onions to the Company packing shed in its own trucks. Quintero is paid by the ton for hauling the onions, but the record is silent as to the form and amount of any compensation for the hauling of the corn and gourds.

Quintero's services to the Company begin and end with the harvest.[4/] The Company alone is responsible for land preparation, planting, growing, cultivation, and packing and marketing. The Company alone makes all the major decisions concerning the timing of each function.[5/] The Company alone is in a position to make a profit or suffer a loss. Quintero's role is limited to providing labor for a fee, supervising some of that labor, supplying standard equipment, and transporting certain crops from the field to the Company's packing sheds.

2. The Bertuccio I Period.

The Administrative Law Officer in Bertuccio I found that the Company contended for the first time, in 1979, that the employees who worked in the harvest of onions, garlic, and peas were not properly included in the bargaining unit, because Quintero acted as a custom

4/Quintero does provide employees to perform hoeing and thinning work in certain crops. It is undisputed that Quintero acts as a labor contractor in this context.

5/Even in the onion harvest, where Quintero exercises the most control, the Company decides when Quintero should haul the onions to its packing shed.

harvester with respect to these crops. As a result, Jasper Hempel, the Company negotiator in Bertuccio I, refused to make any contract proposals with respect to these three harvest operations. In his testimony in Bertuccio I, Hempel gave four reasons for believing that Quintero was a custom harvester.[6/] He claimed that he was unaware until August, 1980, that the onion and garlic workers had voted in the election. This information raised a serious question in Hempel's mind about whether Quintero was a custom harvester. Hempel was no longer sure that his legal position was correct. The Administrative Law Officer concluded that: "Hempel's belief that Quintero was a custom harvester was not reasonably based on either fact or law and illustrates the casualness and lack of seriousness by which these negotiations were conducted. Hempel's consistent refusal to make proposals in onions, garlic or peas is further evidence of Respondent's surface bargaining." Bertuccio I, Administrative Law Officer Decision, at p. 108.[7/]

6/"...1) he [Hempel] had been told this by his predecessor, Andrade; 2) Quintero supplied knives and trucks in gourds and all the equipment in onions and garlic including digging equipment, baskets, knives and trucks to transport the product to the packing shed; 3) Paul and Tina Bertuccio had told him that trucks were supplied by Quintero and that convinced him that Quintero was a custom harvester because this fact fit squarely into an ALRB decision he had read (but could not name); and 4) Quintero was paid by the ton for the onion harvest." Bertuccio I, Administrative Law Officer Decision, at p. 104.

7/It is amazing, yet oddly typical of Respondent's erratic conduct with respect to this issue, that it did not except to the Administrative Law Officer's findings and conclusions concerning the Quintero employees, although it filed 30 other exceptions on December 1, 1981.

3. The Unit Clarification Petition.

On October 27, 1980, after the hearing in Bertuccio I had concluded, Hempel filed a Petition for Unit Clarification with the Board, alleging that Quintero functioned as a custom harvester with respect to the five exclusive crops, and that the employees in the harvests of those crops should be excluded from the certification. The Petition recites certain facts with respect to Quintero's responsibilities for each crop (not all of which are accurate) and cites two Board decisions, Kotchevar Bros. (1976), 2 ALRB No. 45, and Gourmet Harvesting and Packing (1978), 4 ALRB No. 14, as supportive of its position. The Petition did not allege that Quintero was paid by the ton in the onion harvest. It relies entirely on Quintero's provision of equipment and managerial responsibility for its position. The Petition did not seek to have the employees provided by Quintero who worked in the anise, cardoni, bell pepper, cabbage, and lettuce harvests excluded from the certification.

The Company's attorneys were not of a single mind concerning this issue. During the Bertuccio I hearing, the Company's trial counsel, Jim Johnson, stated Respondent's legal position that: "... Quintero and his members or the employees supplied by Quintero, are members of the bargaining unit" (G.C. Exh. 18).[8/] Further, Paul Bertuccio

8/It is possible that Johnson was referring only to the employees provided by Quintero to do hoeing and thinning work.

testified on numerous occasions that Quintero acted as a labor contractor in the onion and garlic harvests (G.C. Exhs. 15-17). In the present hearing, when Mr. Bertuccio was asked to explain what he meant by his testimony in Bertuccio I that Quintero's people in the pea harvest were "our" people, he stated that they would be Company employees and not part of a labor contractor or a custom harvester.[9/]

4. The 1981 Bargaining Sessions.

When bargaining resumed on April 2, 1981, it was the Company's legal opinion, according to Gega, that Quintero was the agricultural employer of the harvest employees in the five exclusive crops. As to the workers supplied by Quintero in the mixed crops, the Company proposed that they not be covered by a collective bargaining agreement. However, it was Gega's legal opinion that the Company, and not Quintero, was their agricultural employer.

The issue of the status of the employees provided by Quintero did not arise during the negotiations until May 12, when Gega proposed wage rates for employees in the onion, garlic, pea, and gourd harvests.[10/] Gega told

9/In Paul W. Bertuccio and Bertuccio Farms (1979), 5 ALRB No. 5, the Board considered a number of unfair labor practice allegations involving Quintero employees and Beltran. The Company did not contest Quintero's status as a labor contractor in this proceeding, and it was held liable for an unfair labor practice committed by Beltran.

10/Gega explained that he had been unable to propose a rate for the corn harvest, because he had been having difficulty in obtaining the most recent rate from Quintero. See Section C.I., infra.

the UFW that the Company intended to continue using Quintero employees to harvest these crops, that it had no intention of using its own employees in these harvests, but that it was proposing these rates in case it changed its practice. Paul Chavez testified that this explanation confused him, because he could not understand why the Company would be proposing wage rates for these harvests if it was contending that they were not in the bargaining unit. Gega told Chavez that the Company considered Quintero to be a custom harvester as to these harvest operations and that the proposed rates would not apply to his employees.[11/]

During the May 12 meeting, Cesar Chavez asked Gega what the employees in the garlic harvest were currently being paid. Gega said the rate varied from $.60 to $1.25 a basket, depending on field conditions. Chavez replied that the rate was in fact $2.50 a basket. Both Paul Bertuccio and Beltran testified that the garlic employees were being paid at the $2.50 rate. Tina Bertuccio, who was present at the May 12 meeting, testified that she believed at the time that the rate quoted by Gega was accurate. Testimony from Beltran and others established that, as a result of a widespread strike in the area during the 1980 garlic

11/The reasonableness of Chavez's statement that he was confused by Gega's explanation was buttressed by Paul Bertuccio's testimony. Bertuccio was asked if the wage rates for the onion, garlic, and pea harvests were meant to apply to Quintero's employees. Bertuccio replied that: "I believe they would have to be intended that way, being onions and garlic are in there. He's the one does those. I presume that's why it was in there." R.T. IV:153.

harvest, the prevailing rate was increased to $2.50 a basket for garlic which was windrowed and $3.00 a basket for garlic which was not windrowed.

On May 1, the parties came to agreement on the union security article, which was initialed on May 27, along with a side letter on the good standing clause. The applicability of the union security provisions to the Quintero employees in the mixed crops was not discussed.

The status of the Quintero employees came to the forefront during the climactic bargaining sessions of July 9 and 10, in the context of the hiring article. Until this time, the two areas of major controversy concerning hiring were the Union's insistence that hiring be conducted through its hiring hall and the Company's demand that it be permitted to continue to obtain workers through Quintero. During the June bargaining sessions, there had been some discussion indicating flexibility in the Union's position on the hiring hall. Finally, on July 9, the UFW, abandoning its insistence on use of its hiring hall, proposed that the Company be permitted to hire directly, with certain procedural protections for the Union, but that labor contractors could only be used to the extent explicitly provided for in the subcontracting article. The subcontracting article had already been signed off, and would not have permitted the use of Quintero in the exclusive harvests. However, it was understood by the Company that the Union's proposal would have allowed it to continue to hire the employees

previously provided by Quintero in those crops. Aside from the limitation on the use of labor contractors, the UFW proposal was, in general, quite similar to the Company's most recent hiring proposal of August 8, 1980.

On July 9 and 10, Gega rejected the UFW hiring proposal on a number of grounds. First, it placed too many restrictions on the Company; in essence, according to Gega, it provided for a Union hiring hall on Company premises. As far as employees obtained through labor contractors and custom harvesters were concerned, Gega told Chavez that the Company would prefer that they not be included in the bargaining unit, but that if the Union would agree to the continued use of contractors, the Company would be willing to discuss their inclusion in the bargaining unit. But Gega clearly stated that it was the Company's position that the employees in the exclusive crops would not be in the bargaining unit. On July 10, Gega proposed that the parties agree on a hiring principle based on the Company's past practice. He offered to draft language based on this principle, once the Union agreed to it. Chavez rejected Gega's proposal, which would have removed 50% of the bargaining unit from coverage of the proposed contract, because he believed that the Quintero employees were in the unit and because of earlier cases of discrimination in hiring by the Company.[12/]

12/See Paul W. Bertuccio and Bertuccio Farms (1979), 5 ALRB No. 5, and Paul W. Bertuccio (1982), 8 ALRB No. 39.

During his testimony, Paul Bertuccio was asked to read over the Union's July 9, 1981, hiring proposal. His answers indicated that he had a clear understanding of the proposal's provisions and their effect on his operations. For example, Bertuccio testified that he knew the proposal called for company hiring and no use of labor contractors, but that employees previously hired through labor contractors would still be permitted to work for the Company pursuant to the proposed contract's seniority provisions. He also indicated that he understood the provisions requiring notice to the Union in advance of hiring. At first, Bertuccio testified that the Union proposal was acceptable to him at the time and that he believed Gega had communicated his acceptance to the Union. Later, Bertuccio retracted this testimony and stated that the prohibition on the use of labor contractors was unacceptable to him in 1981. But, Bertuccio stated that the remainder of the hiring proposal was acceptable to him in July, 1981.

Gega proposed on July 10 that employees in the onion and garlic harvests be paid a variable piece rate based on yield per acre. Although Gega testified that he drafted this wage proposal after obtaining information from Paul Bertuccio, he was unable to explain in a satisfactory way how the rates for various yields were determined.[13/] Further, as to the garlic harvest, the top rate was $1.34 per basket, far below the $2.50 rate which garlic harvesters

13/See Section C.2., infra.

were then being paid, and which Paul Bertuccio knew they were being paid. Gega stated that he was interested in establishing rates in garlic and onions in the event the Board ruled that employees in those crops should have been included in the bargaining unit. He testified that he believed that the Board would order the contract to be reopened to include those employees if an agreement had been reached excluding them from its terms.

The Union accused the Company of bargaining in bad faith and stated that its position with respect to the Quintero employees was illegal. On July 11, the Union called a strike against the Respondent. The parties did not meet again until January, 1982.

5. The 1982 Bargaining Sessions.

The status of the employees provided by Quintero continued to divide the parties in 1982, despite the fact that the Company failed to except to the conclusion of the Administrative Law Officer in Bertuccio I that Quintero was not a custom harvester. There was some progress on the other outstanding issues in February and March. The parties continued to negotiate wage rates for the employees in the five exclusive crops. On April 8, the Union made concessions on most of the remaining major issues. It even proposed excluding the harvest employees in ornamental corn, gourds, and peas from the bargaining unit. There was discussion during the April 8 meeting which led Gega to believe that Cesar Chavez was willing to permit the Company to

continue to use labor contractors under certain circumstances. After a Union caucus, Paul Chavez explained that the UFW was not proposing continued use of labor contractors for those crop operations which remained in the bargaining unit.

The Company presented a proposal on April 8, which explicitly injected the Quintero issue into the union security and seniority articles. It submitted a union security supplemental agreement which would have excluded all employees hired through labor contractors and/or custom harvesters from any obligations imposed on all other employees by the union security provisions. It also proposed that employees hired through labor contractors and/or custom harvesters not accrue any seniority with the Company, even though it was contrary to Company practice, which treated Quintero workers in the same manner as directly hired employees. The Union walked out of the April 8 meeting. Cesar Chavez told the Company that the Union would organize a boycott of its products and force the Company into making greater concessions.

On July 9, after the prehearing conference in this matter, and after the Board had ordered that the hearing consider the Company's Petition for Unit Clarification, the Respondent withdrew the Petition, claiming that the Board's decision in Tony Lomanto (1982), 8 ALRB No. 44, had for the first time established that Quintero did not act as a custom harvester in relation to the five exclusive crops.

ANALYSIS AND CONCLUSIONS

Section 1153 (e) of the Act makes it an unfair labor practice for an agricultural employer "to refuse to bargain collectively in good faith" with a labor organization certified by the Board as the exclusive bargaining agent of its agricultural employees. The content of the duty to bargain is set out in Section 1155.2(a) as:

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

Both provisions are virtually identical to their NLRA counterparts and have been the subject of an enormous body of NLRB and court case law over the past 40 years. The law recognizes two main categories of bargaining violations: (1) so-called "per se" violations, which involve a failure or refusal to bargain in fact, regardless of motivation, and to which there are very limited legal defenses; and (2) bad faith bargaining, which involves a determination by the trier of fact, after consideration of the entire record, that the conduct of the party, both at the bargaining table and away from it, is, taken as a whole, inconsistent with its statutory duty to bargain with an open mind and "with a bona fide intent to reach an agreement if agreement is possible." Atlas Mills (1937), 3 NLRB 10, 21, 1 LRRM 60.

The General Counsel contends that, with respect to the employees provided by Quintero, the Respondent has committed per se violations by: 1) refusing to bargain, without any factual or legal basis, over the work performed by the Quintero employees; and 2) failing to provide information concerning its variable wage proposals for the garlic and onion harvests. The General Counsel further alleges that the two violations noted above, taken together with making contradictory and predictably unacceptable proposals relating to the Quintero employees on wages, hiring, and union security, is evidence that the Respondent was engaged in surface bargaining. The Board has already concluded, in Bertuccio I, that the Company bargained in bad faith concerning the Quintero employees. My task is to determine if the Company has abandoned its prior unlawful conduct or if it has continued on substantially the same course. McFarland Rose Production (1980), 6 ALRB No. 18, at pp. 24-25.

The Respondent's bargaining posture concerning the employees provided by Quintero demonstrates conclusively that it was engaged in bad faith bargaining, utterly inconsistent with its statutory duty to attempt to reach an agreement with the Union. For nearly three years, the Company steadfastly adhered to its completely unfounded and untenable position that the employees in the five exclusive crops should not be included in the bargaining unit. It also continued to propose, over the Union's objections, that

the employees in the mixed crops be excluded from the terms of the proposed collective bargaining agreement, although it always conceded that they were properly within the bargaining unit. It is an elementary principle of labor law that:

> [I]t is a violation of Section 8(a)(5)[14/] for one party over the opposition of the other to insist that employees included by the Board in the unit be excluded [citation omitted] or that bargaining be restricted to less than all members of the established unit. [Citation omitted.] Beyerl Chevrolet, Inc. (1975), 221 NLRB 710.

Nor is an employer's good faith a defense. N.L.R.B. v. Bardahl Oil Company (8th Cir. 1968), 399 F.2d 365. [Employer's good faith belief that salesmen were not its statutory employees held not a defense to an unfair labor practice charge under Section 8(a)(5).]

Respondent now characterizes its conduct with respect to the employees in the exclusive crops as a "technical refusal to bargain," (Employer's Post-Hearing Brief, at p. 74) in an attempt to shield itself from the Board's make-whole remedy. It also argues that Gega was always willing to bargain over the coverage of the employees in the mixed crops. In fact, Gega conditioned bargaining concerning these employees on the Union's agreement that the Company could continue to hire through labor contractors. As Beyerl Chevrolet, supra, clearly establishes, it is a per se unfair labor practice for an employer to condition

14/SectIon 8(a)(5) of the NLRA is that Act's counterpart to Section 1153 (e) of our Act.

bargaining over employees in the bargaining unit on concessions from the Union. Such conduct by itself indicates Respondent's intent to set up roadblocks to agreement.

A brief chronological review of the Company's changing stance concerning the Quintero employees will bring into sharp focus its cynical manipulation of this issue for the purpose of thwarting agreement with the Union. It will also demonstrate that Respondent's contention that it merely engaged in a "technical" refusal to bargain is without merit. Finally, although I conclude that the Respondent's refusal to bargain with the UFW with respect to the Quintero employees is a per se violation of the Act, the analysis will also show that at no time did the Company have a reasonable, good faith belief that the Quintero employees were not its agricultural employees.

The representation election at the Company was held in October, 1977. Although Respondent was represented by the same law firm which has represented it throughout all the Board proceedings and contract negotiations, none of the many Quintero employees who voted was challenged. The Company filed four objections to the certification of the election, charging Union and Board agent misconduct, but it did not object to the description of the bargaining unit or the inclusion in it of the Quintero employees. Beltran, who believed that she was acting as a labor contractor, and not as a custom harvester, as to all crops except the onions, testified at the hearing held to investigate the Company's

objections.

When the Bertuccio I bargaining began, there was no contention made by the Company that the Quintero employees were improperly included in the certification. On August 15, 1979, the parties routinely reached agreement on the recognition article, in which the Company recognized the Union as the exclusive representative of all its agricultural employees in the certified unit. There is no doubt that all the employees supplied by Quintero were included within the terms of the certification and the recognition article.

Paul Bertuccio testified candidly in Bertuccio I that he was unwilling to change his hiring procedures in order to reach a contract with the Union:

> If we had to change our hiring procedure, and not use a contractor, I would never grow onions, because it's always been done by the contractor. I would never grow garlic, because it has always been done by a contractor. I would never grow any of the commodities that is done by contract. I wouldn't grow them. I couldn't stay in business. [G.C. Exh. 15.]

Bertuccio repeatedly testified in Bertuccio I that Quintero was a labor contractor.[15/] At the same time, his negotiator, Jasper Hempel, was testifying that he believed Quintero

15/As Respondent's counsel repeatedly emphasized at the hearing, the terms "labor contractor" and "custom harvester" were not originally legal terms of art. They have been used in the agricultural industry for many years. Bertuccio has been aware of this industry usage since well before his involvement with the Board began. Yet, he consistently and repeatedly referred to Quintero as a labor contractor.

acted as a custom harvester with respect to the garlic, onions, and peas. But Hempel admitted that when he learned that the Quintero employees had voted in the election, he had serious doubts about the validity of his opinion.

Hempel testified that when he first raised the custom harvester issue in negotiations in August, 1979, he based his opinion on a Board decision that he could not remember. Despite the fact that the issue was raised in August, 1979, and that Hempel expressed serious reservations about his position at the hearing, the Unit Clarification Petition was not filed until October, 1980, after the hearing concluded.

Obviously, the Company's attorneys were trying to find a legal cloak to justify their client's adamant refusal to bargain over the working conditions of approximately half the workers in the bargaining unit. But the legal fig leaf which they fashioned is inadequate to hide the naked refusal to bargain. Incredibly, the Company maintained in its unit clarification petition that, at the time of the representation election, it "was unaware that the ALRA made a legal distinction between farm labor contractors and custom harvesters." This lack of awareness was the Company's primary reason for seeking a clarification of the unit. Aside from the fact that the Company must be presumed to know the law, and that the Board had issued its decision in Kotchevar Brothers, supra, in March, 1976, more than 18 months before

the election, I simply cannot believe that the law firm of Dressier, Stoll & Jacobs, which represented many employers in Board proceedings, was unaware of the Kotchevar case and the custom harvester-labor contractor distinction.

During the Bertuccio II period, the Respondent asserted its position about the Quintero employees at critical times, with some variations in formulation, to stymie agreement with the Union. At other times, the parties had extensive discussions concerning the Company's proposed rates for the onion and garlic harvests. Although Gega told the Union that the proposed rates would only apply to directly hired employees, and there were no plans to hire any, the mere fact that the Company was going through the motions of negotiating about these harvests led the Union to believe (incorrectly) that the Company might not be adhering rigidly to its position.

It was not until the last bargaining session before the Bertuccio II hearing that the Company for the first time proposed that the union security and seniority provisions not apply to any of the Quintero employees. These proposals were predictably unacceptable to the Union, because they would have treated two sets of bargaining unit workers differently in key areas of the collective bargaining agreement. No self-respecting union could agree that some of its members not be eligible to accrue seniority, particularly when they were currently earning seniority credit. Nor could the Union sign a contract which would

have required some employees to join the Union while others in the same crew would be exempt from this obligation.

Finally, on the eve of the hearing in Bertuccio II, the Company seized upon some language in the Board's Order remanding its Unit Clarification Petition for hearing together with this unfair labor practice case, which indicates that the Board's prior approach to deciding cases raising custom harvester issues had been unclear, as a convenient excuse to abandon its untenable position, while claiming it had previously asserted it in good faith. The Board noted that it had clarified the law in Tony Lomanto (1982), 8 ALRB No. 44, which issued after the Administrative Law Officer's Decision in Bertuccio I. "The Board therefore believes that the instant petition should be reviewed in light of our decision in Tony Lomanto and without reference to any prior proceedings." The Respondent claimed that Tony Lomanto for the first time made it clear that Quintero was not the agricultural employer of any of the employees it supplied to the Company. It therefore withdrew its petition.

The Respondent suggests that it was compelled to refuse to bargain about the Quintero employees in order to preserve its position pending Board resolution of the unit clarification petition.[16/] This argument is specious.

16/Actually, Respondent had abandoned its position on this issue on December 1, 1981, when it did not except to the Bertuccio I Administrative Law Officer's findings and conclusions with respect to the Quintero employees.

Until the Board ruled otherwise, the Quintero employees remained in the unit. The Company's duty to bargain was not suspended by the filing of the petition. If the Company had wanted to ensure that bargaining with respect to the Quintero employees not be construed as a waiver of its legal position, it could simply have proposed language in the contract providing that the employees would not be covered by its terms in the event the Board determined they were not properly included in the unit.[17/] Instead, the Company chose a course which would have required the Union to abandon nearly half the bargaining unit. The fact that, in order to try to reach agreement, the Union proposed, in April, 1982, the exclusion of the employees in the gourd, pea, and corn harvests does not suggest that the Company's position had legal merit. It simply indicates that the Union was trying to get a contract for most of the employees it represented. After more than three years of fruitless bargaining, it was willing to sacrifice coverage

17/Cf. Joe Maggio, Inc. (1979), 5 ALRB No. 26, where the parties negotiated a collective bargaining agreement along with a letter of understanding calling for the Board to clarify the unit. In Maggio, contrary to Respondent's statement in its exceptions to the Regional Director's dismissal of its unit clarification petition, questions regarding the unit were not present at the time of the certification, because Maggio did not hire another firm to top its carrots until after the representation election. But, Maggio is precedent for the proposition that a contract can be negotiated while questions concerning the composition of the bargaining unit remain unresolved.

for some of the unit employees.[18/]

I conclude that the Company's refusal to bargain about the Quintero employees in the exclusive and mixed crops constitutes a per se violation of Section 1153(a) and (e) of the Act. I further conclude that the totality of its bargaining conduct with respect to these employees was designed to thwart reaching agreement with the Union, while continuing to offer a false hope that agreement was possible. This conduct constitutes surface bargaining and is itself sufficient to establish a violation of §§1153(a) and (e) of the Act.

Assuming arguendo that the Company's litigation and bargaining posture, if it were based on a reasonable, good faith belief that the employees in the exclusive crops were improperly included in the bargaining unit, would constitute a defense to either the underlying charge of bad faith bargaining or to the imposition of the make-whole remedy[19/] I will review the status of the law relating to the custom harvester issue.

18/The Union's legal authority to negotiate a contract for less than all the employees in the bargaining unit is questionable. Signing such a contract might well have left the Union liable to charges of bad faith bargaining or failure to fairly represent the workers in the excluded crops.

19/In J. R. Norton Co. v. Agricultural Labor Relations Board (1979), 26 Cal.3d 1, the California Supreme Court held that, in order to safeguard the exercise of employee free choice in selection of a bargaining representative, make-whole relief may not be awarded in cases where an employer maintained a reasonable, good faith belief that the union would not have won the election had it been properly conducted. Here, the Company has repeatedly stated that it does not challenge the Board's certification -- [continued]

The Act's definition of "agricultural employer" specifically excludes from its terms "any person functioning in the capacity of a labor contractor," because the Legislature determined that "the bargaining process under the Act should occur between unions and growers rather than between unions and labor contractors..." Vista Verde Farms v. Agricultural Labor Relations Bd. (1981), 29 Cal.3d 307, at p. 323. However, the Board has consistently held that a person's legal status as a labor contractor will not automatically serve to bar him from being deemed an agricultural employer when he is in fact acting as something more than a mere labor contractor. In Kotchevar Brothers, supra, the Board concluded that a labor contractor who supplied specialized grape picking equipment to a wine grower, along with labor, and who transported the grapes to the winery, was acting as a custom harvester in relation to the grower, and should be considered the employer of the grape harvesters. The Board also noted that the custom harvester was compensated by the ton, that his charges were not related to labor costs, and that he provided a complete service.

19/[continued from Page 27]--of the Union as exclusive bargaining representative. This case does not call into question the free exercise of employees in choosing their bargaining representative. As the court noted in Norton: "It is clear that make-whole relief is appropriate when an employer refuses to bargain for the purpose of delaying the collective bargaining process." 26 Cal.3d 1, at p. 31.

In Napa Valley Vineyards Co. (1977), 3 ALRB No. 22, the Board explained that in cases where a labor contractor is acting as a custom harvester it would consider the "whole activity" of both possible employers in order to determine which could provide the more stable basis for a collective bargaining relationship.

Thus, it was clear, by the time of the representation election, that the Board was willing, in appropriate cases, to hold that persons holding licenses as farm labor contractors could also be the statutory employer of the workers they provided to landowners. It was equally clear that Quintero was acting, in relation to the Company, as a typical labor contractor, providing labor for a fee.[20/] The Company was in complete control of each of the harvests and was responsible for all crop operations before and after the harvest.[21/] Quintero simply provided standard equipment and supervision to its crews, services routinely provided by labor contractors.[22/] Even if one assumed that Quintero's

20/The fact that the Petition for Unit Clarification did not allege that Quintero was compensated by the ton for its work in the onion harvest supports my finding that compensation was actually paid on a commission basis.

21/In Napa Valley, supra; Gourmet Harvesting and Packing, supra; and Jack Stowells (1977), 3 ALRB No. 93, the Board had consistently looked to the entity which controlled the harvest as the statutory employer.

22/See Labor Code Section 1682(b) [definition of "farm labor contractor" includes such services], and Sutti Farms (1982), 8 ALRB No. 63.

services went beyond those usually provided by labor contractors, it is clear that the employees had strong, permanent ties to the Company, which set their wage rates and granted them seniority rights. The Company, rather than Quintero, would have provided the requisite stability for collective bargaining.

The Board's decision in Tony Lomanto is applicable only in situations in which there has been a preliminary determination that the labor contractor is acting as a custom harvester. Sutti Farms (1982), 8 ALRB No. 63. In such cases, Lomanto provides guidance in the form of a list of criteria to be considered in assessing the "whole activity" of the grower and the custom harvester, for the purpose of determining which would provide more stability as a collective bargaining partner to the Union. Lomanto is entirely irrelevant to the fact situation of this case, which establishes that Quintero was acting as a typical labor contractor, and not as a custom harvester. While the custom harvester-labor contractor distinction has presented the Board with a number of difficult cases, this is not one of them. At no time during the Company's relationship with the Union was there legal support for the proposition that Quintero was acting as a custom harvester. Whatever refinements may have occurred in Board decisions over the years, they have been without any impact on this case. The outlines of the Board's doctrine have been clear since Napa Valley Vineyards, supra, which was decided well before the

representation election. I conclude that the Company, in its bargaining conduct with respect to the Quintero employees never had a reasonable, good faith belief that it was not their statutory employer. This conclusion is further evidence of Respondent's bad faith in these negotiations.

C. The Union's Requests For Information.

The General Counsel contends that the Respondent violated §§1153(a) and (e) of the Act with respect to the following four information requests made by the Union:

1. The April 23, 1981, Request For The 1980 Wage Rates Of The Onion Loaders And The Harvesting Employees In Cabbage, Gourds, Apricots And Ornamental Corn.

At the April 23 meeting, Gega told Chavez that he believed the 1980 rates for onion loaders and the gourd harvesters were the same as they had been in 1979. Gega also told Chavez that the Union had already been provided with the cabbage rate in 1980. Gega told Chavez that he would check the onion loader and gourd rates and let him know if they were identical to the 1979 rates. Chavez testified that Gega promised to get back to him with the rates even if they were the same as the 1979 rates. I credit Gega on this matter. His testimony concerning information requests was generally more accurate than Chavez's. Chavez also testified that he asked for the 1980 harvest rate for peas and that Gega told him he believed the rate was the same as it had been in 1979. The Complaint does not allege that the Respondent failed to provide information concerning

the pea rate. I find that this issue has not been fully litigated.

Gega did not provide the Union with information on the 1980 rates in corn and apricots until July, 1981. Even then, the information was supplied almost by accident, in the context of the Company's proposal to grant interim wage increases in those crops. Gega told Chavez that the proposed interim rates were 7% above the 1980 rates. From that information, the Union could have derived the 1980 figures. Respondent's attempt to justify the delay in providing this obviously relevant information is without merit. The Company and Quintero had a longstanding relationship. Assuming that Tina Bertuccio could not have determined the rates from her payroll records, a telephone call to Beltran would have quickly resulted in receiving the information. Respondent's vague reference to difficulties in getting the information from Quintero is unsubstantiated in the record. I conclude that Respondent failed to provide this information to the Union in a timely manner, in violation of §§1153(a) and (e) of the Act.

2. The July 10, 1981, Request For The Following Information Concerning Onions And Garlic; Yield Per Acre, And The Number of Hours And Employees Required For Their Harvest.

On April 8, 1982, Chavez repeated the request and additionally asked that the information be provided by block. The Company did not provide any of the requested information until June 14, 1982. It noted that records are not kept on an individual field or block basis.

The requested information was clearly relevant and necessary for the Union to evaluate the monetary implications of the Company's variable rate wage proposals for onions and garlic. These proposals were based on yield per acre. The underlying data must have been available to the Company at the time the proposals were drafted. Gega's explanation that he simply forgot about the information requests is not credible and is, in any event, not a defense to the charge. I base this determination on Gega's testimony concerning the formulation of the variable rate wage proposals and what the data actually disclose.

As Gega explained the variable rate proposals, they were designed so that employees would generally earn piece rates in the middle of the proposed range.[23/] For

---

23/Here is the text of the Company's proposals:

ONION HARVEST

Yield Per Acre (in Tons)	Rate Per Basket (in Dollars)
25 or more	.32
20 to 24.99	.34
15 to 19.99	.36
10 to 14.99	.39
5 to 9.99	.41
0 to 4.99	.43

GARLIC HARVEST

Yield Per Acre (in Pounds)	Rate Per Basket (in Dollars)
10,000 or more	.64
8,000 to 9,999	.75
6,000 to 7,999	.85
4,000 to 5,999	1.00
2,000 to 3,999	1.20
1,999 or less	1.34

onions, for example, Gega claimed that most of the work would be performed in fields with yields between 10 and 20 tons per acre. Gega's information response establishes that the average yield per acre in 1980 was in fact 30 tons per acre. If the Union had been provided this information in a timely manner, it could have instantly seen that the Company's proposal was either in error or designed to pay the employees only at the lowest variable wage rate, because as the yield increases, according to the proposal, the piece rate declines. Because the actual yield per acre was in the highest category, the piece rate would be in the lowest. The same analysis applies to the garlic rates. The actual average yield per acre was in the highest category (10,000 pounds). Again, contrary to Gega's testimony, most of the employees' earnings would have been in the lowest category. Either the proposals were deliberately framed so as to deceive the Union into agreeing to lower piece rates, or, as seems more likely, the proposals were based on no data at all, and were simply put on the table as part of the Company's tactic of diverting attention from its refusal to bargain over the garlic and onion crops. Whichever is the real explanation, the Respondent's conduct concerning the variable rate proposals, and the Union's information request relating to them, is inconsistent with its obligation to bargain in good faith and is evidence of surface bargaining. I conclude that the failure to provide this information in a timely matter is a violation of §§1153

(a) and (e) of the Act.

3. The January-29, 1982, Request For An Accounting Of Rents Owing By Striking Employees For Housing Provided By The Company.

The Company concedes that it refused to supply this information to the Union. It argues that the housing was not a condition of employment and therefore not a mandatory subject of bargaining. It also noted that the information had already been supplied to the individual tenant-employees. These contentions are without merit. The Company and the Union had been negotiating for years about housing. The record establishes that the housing was rented to employees by the Company at below-market rates, as a condition of employment. The fact that the information had been made available to the employee-tenants did not relieve the Company of its obligation to respond to the Union's request. The Union was entitled to get the information directly from the Company, rather than attempt to locate each tenant-employee, in order that it could represent the members of the bargaining unit over a term and condition of their employment. I conclude that the Company's refusal to provide this information violated §§1153 (a) and (e) of the Act.

4. The January 29, 1982, Request For A List Of Which Acreage Would Be Planted And Which Would Remain Dormant In 1982.

Paul Chavez made this request in the context of several letters from Gega indicating substantial cutbacks by the Company in its planting of crops for 1982. On

October 27, 1981, Gega had notified Chavez that the Company had not planted 550 acres of the mixed crops. He also noted that the Company's lease on a 150-acre ranch, later identified as the Hogan Ranch, had not been renewed, and would result in a decrease in the planting of five crops. On January 14, 1982, Gega informed Chavez that 100 acres each of onions and bell peppers would not be planted, but added, inexplicably, that this action would not cause any displacement of bargaining unit work. These actions by the Company supply the relevance for the Union's request. They had a clear impact on bargaining unit work. The Union was entitled to know in greater detail the scope and extent of that impact. I conclude that in refusing to supply this information the Company violated §§1153(a) and (e) of the Act.

D. The Respondent Negotiated About Wages Directly With The Apricot Harvesters.

On July 8, 1981, the crew which picked apricots by piece rate stopped work and its members began to yell to their foreman, Robert Correa, that they wanted a raise of $.05 a bucket, from $.35 to $.40. Salvador Santoyo, a member of the crew, testified that Correa went to his truck and called the Company office by radio. Santoyo heard Correa explain that the workers wanted an extra nickel per bucket. Correa told the crew that Mr. Bertuccio had told him that he would discuss the matter with his wife and call back on the radio. Several minutes later Correa received a call and told the workers that they would be receiving the extra nickel in their next paychecks. The crew returned to work.

When called as a witness by the General Counsel, Tina Bertuccio had some difficulty remembering which events occurred on July 8, rather than July 9, when a general walkout occurred. But, she did clearly remember that Correa called her on the radio to inform her that the apricot crew had stopped working because the employees wanted a $.05 raise. However, she denied granting the request. She stated that she told Correa that the Company was not in a position to grant a raise without first talking to the Union and her lawyers. Later, when testifying for the Respondent, Tina Bertuccio denied talking to Correa about this incident over the radio. Instead, she testified that Correa came to the office to talk to her about the workers' demand for a $.05 raise. But, according to Bertuccio, Correa did not mention that the employees had stopped working. She testified that she never learned of any work stoppage by the apricot pickers. She then told Correa that, because of the Union negotiations, the Company could not grant a raise. Paul Bertuccio testified that Correa came to the office and told him the workers wanted more money. Bertuccio referred Correa to his wife and mentioned that a raise probably could not be granted without checking with the attorneys and the Union about its legality. Bertuccio testified that Correa did not mention the size of the increase the workers wanted or the fact that they had stopped picking.

Correa's testimony paralleled the version of events Tina Bertuccio testified to in the Respondent's

case-in-chief. He characterized the stoppage as a little problem. It was not a matter of concern to him and it did not enter his mind to mention to either Paul or Tina Bertuccio that the men had stopped working. He simply told Paul that the men wanted $.05 more. Paul told him to check with Tina. Tina denied the request. Then Correa returned to the field, told the men that they would not be getting a raise, and the men returned to work.

When Santoyo received his paycheck the following week, he spoke to Tina Bertuccio about the absence of the $.05 raise. According to Santoyo, Mrs. Bertuccio told her that it was his boss Chavez's fault. (Paul Chavez had refused to agree to the Company's July 9, 1981, proposal for an interim increase of $.02% for the apricot pickers, a proposal that Paul Bertuccio said was made without his authority and without any prior discussion with Gega. Santoyo was present at the July 9 meeting.) Mrs. Bertuccio testified that she simply told Santoyo that no raise had ever been promised.

Where there are conflicts in the testimony, I credit Santoyo's version over that of the Company witnesses. Mrs. Bertuccio at first testified that Correa had called her on the radio to tell her about the work stoppage. She later changed her testimony, both to deny that there had been any call on the radio and that she had ever learned of the work stoppage. Correa's testimony is inherently incredible. He stated that apricots were a perishable

crop, that he had never experienced a work stoppage before, and that he did not know if the employees would return to work without getting a raise. Yet, he testified that it did not enter his mind to tell the Bertuccios that the crew was refusing to work. Correa's testimony also conflicts with the Bertuccios' on several points. He testified that he told Paul Bertuccio that the employees were asking for a nickel raise. Bertuccio said that he was not told how much they were asking for. More significantly, Correa testified that apricots were not falling on the ground, while Mrs. Bertuccio stated that the next morning there were apricots all over the ground and she was concerned about getting the employees to go back to work. By the following week, she told Paul Chavez that the fallen apricots were like a big rug and that the Company had lost a lot of money.

I conclude that in bargaining directly with the apricot harvest employees, the Respondent violated §§1153 (a) and (e) of the Act. As-H-Ne Farms (1980), 6 ALRB No. 9.

E. The Unilateral Wage Increase Of January 18, 1982.

In July, 1981, the Company had proposed an increase of $.25 per hour for its hourly workers and some piece rate increases. At the July 9, 1981, meeting, Gega also proposed an interim increase for the apricot harvesters. Chavez told Gega that he did not think he would agree to the interim rate proposals, but that possibly something could be worked out. The Company never implemented the

interim increases in 1981.

Gega sent Chavez a letter on December 28, 1981, proposing a $.25 per hour increase "for all bargaining unit classifications." It is not clear if the proposal was meant to apply to workers compensated by piece rate. On January 7, 1982, Chavez told Gega by phone that the Union would not agree to the interim raise proposal, but suggested that the parties meet to negotiate wages and other matters. Chavez proposed that any wage increases be made retroactive. Chavez sent Gega a letter on January 11, reiterating the Union's position. The parties scheduled a negotiation meeting for January 29, after the wage increases were scheduled to go into effect, because Gega was unavailable to meet before that date.

The Company had raised hourly wages in the month of July in previous years, as follows:

1974	$.30
1975	No raise
1976	$.20
1977-1980	$.25

Analysis And Conclusions

Generally, an employer which unilaterally raises wages will be found to have committed a per se violation of its duty to bargain in good faith. N.L.R.B. v. Katz (1962), 369 U.S. 736. Here, the Respondent argues that it has not committed an unfair labor practice because its interim

increase was consistent with its past practice.[24/] The Company asserted the same defense in Bertuccio I with respect to the 1979 and 1980 unilateral increases. The Board upheld the Administrative Law Officer's findings and conclusions that the Company committed per se violations of its duty to bargain when it instituted those increases. The Administrative Law Officer specifically rejected the Company's reliance on past practice. Bertuccio I, Administrative Law Officer Decision, at pp. 172-173. The Board's decision on this issue is binding precedent. I cannot consider the 1979 and 1980 wage increases to constitute evidence of a past practice of the Company, when it has been determined that they were instituted unlawfully. I therefore conclude that the unilateral increase of January 18, 1982, constitutes a per se violation of §§1153(a) and (e) of the Act. I also find, for the reasons stated by the Administrative Law Officer in Bertuccio I, that the increases are evidence of Respondent's overall bad faith.

F. Surface Bargaining Issues.

1. Dilatory Tactics.

(a) Scheduling Of Meetings

In 1981, Paul Chavez repeatedly requested that meetings be held more frequently. Gega was almost always

24/At the pre-hearing conference, I ordered the Respondent to state any defenses it would assert on this issue. Past practice was not mentioned. The Board subsequently failed to adopt a proposed regulation which would have required Respondent to plead affirmative defenses. Because the matter was fully litigated, and the General Counsel had an opportunity to file a supplemental brief on this issue, I will consider the Respondent's defense. .

unavailable to meet on the dates suggested by Chavez. Generally, the meetings were scheduled one to two weeks after the date initially requested by the Union. In 1982, Gega was unavailable to meet in January until after the interim wage increases were put in effect by the Company. The March and April meetings were each delayed by a week as a result of Gega's unavailability. There were also a few instances in which a short delay was attributable to Chavez's unavailability or an error on the part of his secretary.

Analysis And Conclusions

The Board has held that "[t]he number of meetings and the amount of time between meetings are factors to be considered in determining whether an employer bargained in good faith or engaged in surface bargaining." McFarland Rose Production, supra, at p. 12. In Bertuccio I the Administrative Law Officer concluded that a similar pattern of infrequent, short meetings was part of the totality of circumstances to be considered in evaluating the Company's good faith. Bertuccio I, Administrative Law Officer Decision, at pp. 77-82. Here, the Company has continued to follow the same general course of conduct.

(b) Delays In Providing Information And In Making Proposals

I conclude that the Company's delays in providing requested information (see Section "C," supra) are evidence of its bad faith in these negotiations. In Bertuccio I, the Board found that the Company had committed similar violations of its duty to provide the Union with

accurate information in a timely manner. Bertuccio I, Administrative Law Officer Decision, at pp. 108-113, 131-161.

I do not conclude that Respondent's delay of several weeks in May, 1981, in presenting an economic proposal is evidence of bad faith. The delay was insubstantial. Nor do I find Gega's delay in putting his July 10, 1981, oral hiring proposal in writing to be evidence of bad faith. The proposal, based on the Company's past practice, was immediately rejected by Chavez and was clearly unacceptable to the Union. It would have served no purpose for Gega to reduce the proposal to writing at the time. There is insufficient evidence in the record for me to evaluate Respondent's refusal to make further proposals on August 18, 1982. The conduct of the parties in July and August, 1982, can only be tested in the context of subsequent events.

2. The Relationship Between The Company And Its Negotiator.

The General Counsel argues that Paul Bertuccio failed to give Gega necessary authority to negotiate, that Gega was seriously misinformed or uninformed about the Company 's operations, that Gega repeatedly failed to give substantial reasons to support its positions, and that Paul Bertuccio and Gega contradicted each other on various issues. All of this, taken together, according to the General Counsel, is evidence of surface bargaining.

In Bertuccio I, the Board held that Paul Bertuccio failed to grant his negotiator sufficient

authority, that the Respondent frequently was unable to give the UPW explanations regarding its proposals, and that the negotiator did not appear to be familiar with the business operation. Bertuccio I, Administrative Law Officer Decision, at pp. 82-90. Here, the Company has continued to follow the same general course of conduct.

I do not find that Gega lacked the abstract legal authority to negotiate on behalf of the Company. Rather, I conclude that Paul Bertuccio's failure to inform Gega about Company operations and his position on critical matters relating to the negotiations, rendered Gega ineffectual as a negotiator. Of the many examples in the record, I shall cite only a few:

(a) Wages

Gega maintained throughout the negotiations that the garlic piece rate was $.60 to $1.34 per basket, when in fact it was $2.50 a basket. Gega claimed that he could not determine the 1980 corn rate because he was having difficulty getting the information from Quintero. In fact, Beltran turned over her payroll journals to the Company each week, because the employees were being paid on Bertuccio checks. Gega maintained that the variable wage rate proposals in onion and garlic were drafted, based on Company data, to ensure that workers would earn rates in the middle of the range most of the time. In fact, the proposals would have resulted in the employees earning the lowest rate virtually all the time. On July 10, 1981, Gega proposed an

interim wage increase for apricot harvesters. Paul Bertuccio testified that he never discussed this proposal with Gega, never authorized it, and was never informed of it. While Gega stated that he proposed rates for the garlic and onion harvesters in the event that the Company ever directly hired employees in these crops, Paul Bertuccio testified that the rates were meant to apply to the Quintero employees. These are far from minor matters. They reflect either a conscious effort at deception on Gega's part, or a woefully inadequate understanding of Company operations.

(b) Seniority Issues

The parties had many unproductive discussions concerning seniority because Gega was unfamiliar with the Company's current practices. Gega testified that he believed the Quintero employees in the mixed crops were hired as fill-ins, when there was an insufficient number of Bertuccio employees available. In fact, as Paul Bertuccio testified, the Company had operated in accordance with a classification seniority system since 1978, as a result of the Union's interest in the issue. At the beginning of the lettuce season, for example, employees are recalled based on seniority. If "Quintero's people have more seniority than our people, then they would go to work first." R.T. IV:78. Gega also repeatedly claimed that the Company did not have job classifications. When Paul Chavez told Gega that the Onion would work off the Company's classifications, Gega irritably replied that the Company had none. But Tina

Bertuccio testified that the Company used classifications, based on the Union's concepts in the negotiations. She stated that the Union had a good idea on seniority which had solved some problems for the Company. While Gega repeatedly found fault with the Union's seniority proposals, he never offered to draft one himself. Gega's lack of understanding of the Company's seniority practices was a major stumbling block to agreement on this issue.

(c) Hiring

In rejecting the Union's July 9, 1981, hiring proposal, Gega stressed the Company's opposition to the notice and other procedural requirements which would be imposed upon it. At the hearing, Paul Bertuccio carefully reviewed these provisions and stated that he had no problems with the proposal, except its limitation on the use of labor contractors. Again, either Gega was not familiar with Bertuccio's position, or he chose not to communicate it to the Union.

(d) Duration

Until July 26, 1982, Gega was adamant in his insistence that the parties agree to a three-year contract. He stated that a multi-year agreement was necessary so that the Company would know what its costs were when it engaged in long-range planning. Yet, Gega stated that the Company never attempted, except in a very general sense, to cost out the Union's proposals. Paul Bertuccio testified that he did not make long-range forecasts. He stated that market and

other conditions precluded him from being able to determine what crops would be planted even a year in advance. Similarly, acreage amounts could not be known even a year ahead of time. There is no evidence whatever that the Company ever attempted to determine its labor costs three years in advance. Gega's insistence on wrapping up every economic item for three years, in the face of persistent inflation, impeded agreement.

3. Allegations That Respondent Made Predictably Unacceptable Proposals And Failed To Give Substantial Reasons For Rejecting Union Proposals.

I have already concluded that the Company's regressive union security and seniority proposals of April 8, 1982, were predictably unacceptable to the Union, and were therefore evidence of Respondent's bad faith. I have also concluded that the Company's absurdly low garlic wage proposal was predictably unacceptable. The General Counsel contends that the following proposals made by the Company were also predictably unacceptable: the hiring proposal of July 9, 1981; and various hourly and piece-rate wage proposals.

To the extent that the hiring proposal of July 9 and 10 provided for the exclusion of the Quintero employees from the bargaining unit, I conclude that it was predictably unacceptable, because the Union would be required to abandon employees in the certified unit. However, I do not find the Company's proposal that it be permitted to continue hiring through labor contractors to be

predictably unacceptable.

In Bertuccio I, the Administrative Law Officer found that the Company had made a number of predictably unacceptable wage proposals. The Board rejected these findings. Because of this Board action, and because the record already contains overwhelming evidence of the Company's bad faith, I will not consider whether the Company's wage proposals, other than the egregious garlic proposal, were pre dictably unacceptable.[25/]

In Section "B," supra, I have discussed Gega's failure to give substantial reasons for making certain proposals and for rejecting others. In addition, the General Counsel contends that the Company failed to explain its rejection of the Union's proposal for a paid union representative. I do not agree. Gega stated the Company position that it did not believe it was appropriate to pay an employee for representing the Union, rather than working for the Company. I do not find that this position was evidence of the Company's bad faith.

4. Conclusions Relating To Surface Bargaining. The task of the trier of fact in a surface bargaining case was summed up by the NLRB in "M" System, Inc. (1960), 129 NLRB 527:

25/In William Pal Porto & Sons, Inc. (1983), 9 ALRB No. 4, the Board noted its general reluctance to infer bad faith from substandard wage proposals.

> Good faith, or the want of it, is concerned essentially with a state of mind. There is no shortcut to a determination of whether an employer has bargained with the requisite good faith the statute commands. That determination must be based upon reasonable inference drawn from the totality of conduct evidencing the state of mind with which the employer entered into and participated in the bargaining process. The employer's state of mind is to be gleaned not only from his conduct at the bargaining table, but also from his conduct away from it--for example, conduct reflecting a rejection of the principle of collective bargaining or an underlying purpose to bypass or undermine the Union manifests the absence of a genuine desire to compose differences and to reach agreement in the manner the Act commands. All aspects of the Respondent's bargaining and related conduct must be considered in unity, not as separate fragments each to be assessed in isolation. [129 NLRB at 547.]

Surface bargaining cases are often among the most difficult in labor law. Borg-Warner Controls (1972), 198 NLRB 726. This is not a difficult case. The Company's course of conduct with respect to the Quintero employees, taken together with its direct bargaining over apricot piece rates, its refusals and failures to provide information, the other indicia of surface bargaining examined in this section, and the Board's earlier determination that Respondent had bargained in bad faith, all combine to establish as clearly as is ever possible in a case of this type, that Respondent was determined not to reach an agreement with the Union. I therefore conclude that the Company engaged in surface bargaining, in violation of §§1153 (a) and (e) of the Act.

G. The Alleged Threat To Cancel Negotiations On July 9, 1981.

On July 9, 1981, approximately 350 of Respondent's employees engaged in a work stoppage to protest what they believed to be the Company's bad faith in negotiations and the direct bargaining with the apricot crew. A bargaining session was scheduled for the afternoon. During the morning, Tina Bertuccio and Ramiro Perez, President of the Union bargaining committee, had two conversations in the fields. In the first conversation, just Mrs. Bertuccio, who speaks only English, and Perez, who understands English imperfectly, were present. Mrs. Bertuccio asked Perez what was going on. Perez explained the nature of the protest. She asked Perez if he would be going to the negotiation meeting. He replied that he would. According to Perez, Mrs. Bertuccio told him that the Company would not attend the meeting if the employees did not return to work. Mrs. Bertuccio denied making the statement. She testified that she told Perez she was not sure if there would still be a meeting as a result of the protest, but that she would go unless her lawyers cancelled it. She urged Perez to call off the protest, because the apricots were falling to the ground.

Perez and Mrs. Bertuccio spoke again about an hour later. Perez brought along a man to act as an interpreter. Mrs. Bertuccio assured Perez that the meeting would go on as scheduled.

Conclusions

The General Counsel has failed to establish that Mrs. Bertuccio threatened to cancel the negotiation session if the workers refused to call off their protest. Although Salvador Santoyo was present when Mrs. Bertuccio allegedly made the threat, he was not asked about the incident, either to confirm that he had heard the threat or to establish that workers other than Perez were made aware of it. Mrs. Bertuccio's testimony could be read to imply that a continuation of the protest would result in a cancellation of the meeting, but her remarks were ambiguous. I do not credit Perez's testimony that Mrs. Bertuccio flatly conditioned bargaining on the employees returning to work. In any event, there is no record evidence that any employee other than Perez heard the remark or was told about it. Even if Mrs. Bertuccio's statements were characterized as an implied threat, the violation would be de minimis, because Mrs. Bertuccio clearly told Ramirez an hour later that the Company would attend the bargaining session. I conclude that Mrs. Bertuccio did not threaten to call off the negotiation session on July 9.

H. The Union's Bargaining Conduct.

In its Fourth Amended Answer to the Second Amended Complaint, the Respondent has set forth a number of affirmative defenses alleging that the Union has bargained in bad faith.[26/] In addition, Respondent's Brief contains

26/The Union's good faith, or lack of it, is clearly relevant in evaluating the Respondent's bargaining conduct. Admiral Packing Company (1981), 7 ALRB No. 43.

references to alleged mistakes made by Paul Chavez, delays by the Union in making proposals, and numerous other lapses. Both negotiators were relatively inexperienced. Both made mistakes in stating their positions. Both failed, at times, to present proposals when promised. It would serve no purpose to detail here each departure from perfection of the negotiators. They are part and parcel of the negotiation process and, in the absence of other evidence of bad faith, are without legal significance.[27/] In the early negotiating sessions, Chavez did not appear to have a thorough grasp of the negotiating history before his arrival. This failure might have been of some significance in the absence of the many violations of the duty to bargain in good faith committed by the Respondent.

In its affirmative defense, Respondent first contends that the Union demonstrated its bad faith by walking out of negotiations on July 10, 1981. At the time the Union walked out of negotiations on July 10, 1981, the Company had been bargaining in bad faith for nearly three years. When

27/Gega's correspondence with Chavez is a dreary litany of charges of bad faith. Even before Chavez and Gega first met on April 2, 1981, Gega was accusing the Union of bad faith. Gega's obsession with making a record on the issue of the Union's bad faith is, in the context of these negotiations, evidence of surface bargaining. It also is an extension of the Company's approach in Bertuccio I, where it attempted unsuccessfully to establish that the Union, rather than itself, was guilty of bad faith.

the Union made significant concessions on hiring and economic matters, the Company responded by regressing in its hiring proposal and refusing to agree to the inclusion of the Quintero employees in the proposed contract. The Union's legal obligation to bargain in good faith did not require it to devote its limited resources to meeting with an employer which was only going through the motions of bargaining. The Union was free to devote its resources to economic action against the Company until such time as the Respondent showed a willingness to begin good faith bargaining.

A similar analysis applies to the Union's April 8, 1982, walk-out. Once again, the Union had made major concessions to the Company, even on the bargaining unit issue, only to be met with regressive proposals by the Company concerning union security, hiring, and seniority. I conclude that the Union did not bargain in bad faith by suspending negotiations on these two occasions.

The Company contends that the Union made its proposal of April 8, 1982, without ever intending to agree to a contract on its terms. This contention is without merit. Paul Chavez explained that the Union was eager to sign a contract with the Company, because it was the largest grower in San Benito County, and its terms might set a pattern in negotiations with other companies. Therefore, the Union was willing to drop many demands, including its proposal for a paid union representative, retroactivity provisions, and coverage for the gourd, pea, and corn workers. The Company

rejected the proposal almost immediately. The only basis for the Company's argument is the Union's unwillingness in July to sign a contract based on the terms of its April 8 proposal. But the Union made clear to the Company on April 8 that it intended to conduct a boycott against its products and force the Company into making greater concessions. Gega conceded that the success of that boycott and the imminence of the present hearing were important factors in the Company's change of position. Manifestly, they were also important factors in the Union's change of position.

There is no support in the case law for the proposition that a party to collective bargaining negotiations remains permanently bound to agree to a contract based on its most major concessions. Where conditions change during a hiatus in bargaining, no inference of bad faith is drawn from modifications in the positions of the parties. Omaha Typographical Union v. N.L.R.B. (8th Cir. 1976), 545 F.2d 1138 at pp. 1142-1143; As-H-Ne Farms, Inc., supra, at p. 20. Here, the Union claimed changed circumstances in the cost of its medical plan. It also was making good on its statement of April 8 that it would conduct a boycott in order to extract better terms from the Company. I do not conclude that the Union rejected the Company's offer to sign a contract based on the provisions of its April 8 proposal in order to thwart agreement. I conclude, instead, that it was attempting to use what it perceived as a stronger bargaining position to achieve some of the ends it had pursued until

April 8.

The Company next argues that the Union has bargained in bad faith since July 26, 1982, by engaging in dilatory tactics, making regressive and predictably unacceptable proposals, and by disrupting negotiations. The bargaining between the parties in July and August, 1982, was conducted in a fishbowl. Both sides kept at least one eye on this proceeding. Chavez did take several weeks to prepare a counterproposal to the Company's July 26 offer, but this is in large measure attributable to his testimony in this case. While the Union departed from its April 8 proposal in many respects, this would at most be the basis of an inference of surface bargaining in the context of other similar evidence. There is no other evidence suggesting surface bargaining by the Union in this case. Chavez stressed at the August 18 meeting that his proposal was not a final offer; he solicited Gega to respond with his own proposal. Instead, Gega chose simply to reject the proposal and accuse the Union of bad faith. I am not prepared, on this record, either to find that the Union was bargaining in bad faith, or that the Company's acceptance of the April 8 offer demonstrates that it has abandoned its previous course of bad faith bargaining. As the Board noted in McFarland Rose Production, supra, where the Respondent engaged in a similar flurry of bargaining on the eve of an unfair labor practice hearing:

> . . . Respondent's actions during the weeks immediately preceding the hearing do not

> represent a significant break with its past unlawful conduct or the adoption of a course of good-faith bargaining. Respondent's willingness to meet and agree on some contract items is conduct perfectly consistent with surface bargaining which, by definition, is an approach which resembles good faith but is in fact calculated to frustrate agreement. [Citation omitted.] After a lengthy period of surface bargaining, conduct resembling "hard bargaining" may be all that is necessary to prevent the execution of any agreement or to cause acceptance of such an unsatisfactory agreement that the union's support among employees will be seriously eroded. Thus, the record must indicate a more significant change in bargaining posture than Respondent's above-described conduct before we will find that surface bargaining has ended. [6 ALRB No. 18, at pp. 24-25.]

The Company's July 26, 1982, offer clearly represented movement on its part. Whether this was the beginning of good faith bargaining or simply the continuation of its previous course of conduct, can only be determined by reviewing subsequent bargaining between the parties.

Finally, Respondent contends that the Union bargained in bad faith in failing to provide information concerning the costs of its medical plan. On June 9, 1981, the Union proposed that the Company agree to a maintenance of benefits provision for the Robert F. Kennedy Medical Plan in the third year of the proposed agreement. This proposal would have required the Company to contribute to the Robert F. Kennedy Fund at a level which would maintain the same benefits as its contributions in the first two years of the agreement. Gega asked Chavez to provide him with information which would enable the Company to determine what its

liability would be in the third year of the agreement. He also requested any relevant actuarial studies. On June 10, Chavez sent Gega a letter which set forth three general factors involved in determining the cost of medical benefits. Gega told Chavez that the information was insufficient. At the hearing, Respondent called as witnesses the Administrator of the Robert F. Kennedy Fund and the Plan's actuarial consultant. Both explained that, because a new Robert F. Kennedy Plan had just gone into effect on January 1, 1981, there was insufficient data available to project future costs. No actuarial studies had been made. It is clear that the Union provided the Company with what little information it had.[28/] As Respondent has failed to brief this issue, I assume that it has abandoned this affirmative defense.

I. Conclusion.

The record conclusively demonstrates that the Company continued the same pattern of bad faith bargaining conduct in the Bertuccio II period that it followed in the Bertuccio I period. The Company continued to refuse to bargain at all about 50% of the employees in the certified bargaining unit. With respect to the employees in the exclusive crops, it articulated a reason for its refusal to bargain, but it did so in utter bad faith. At the same time,

---

28/Cf. Admiral Packing, supra, where the UFW violated Section 1154 (c) of the Act by failing to provide information in its possession concerning the Robert F. Kennedy Plan.

it attempted to divert attention from its refusal to bargain by appearing to make proposals concerning these workers. With respect to the employees in the mixed crops, Respondent was completely unable to justify its refusal to bargain. It simply denied that its refusal was a refusal. During the Bertuccio II period, Paul Bertuccio continued to fail to communicate with his negotiator to the extent necessary to inform him of his position on critical bargaining matters and to be informed about what transpired in negotiations. The Company continued to withhold from the Union relevant information. It continued to grant unilateral wage increases and to set wage rates for the Quintero employees without bargaining with the Union. It also bargained directly with the apricot harvesters, bypassing the UFW. The facts of this case standing alone are more than sufficient to establish that the Company bargained in bad faith. Taken together with the evidence from Bertuccio I, there is overwhelming evidence of the Company's bad faith.

THE REMEDY

Having found that Respondent failed and refused to bargain in good faith in violation of §§1153 (a) and (e) of the Act, I shall recommend that it be ordered to meet with the UFW, upon request, and bargain in good faith. In particular, Respondent shall refrain from unilaterally raising wages, bargaining directly with its employees, and failing and refusing to furnish requested information relevant to collective bargaining in a timely manner. I shall further

recommend that Respondent make its agricultural employees whole for any economic losses they suffered as a result of Respondent's bad faith bargaining, pursuant to Adam Dairy (1978), 4 ALRB No. 24, together with interest as specified in Lu-Ette Farms, Inc. (1982), 8 ALRB No. 55.

Because the Board, in Bertuccio I, imposed the make-whole remedy effective January 22, 1979, and because this case is simply a continuation of the Board's review of Respondent's bargaining conduct, my recommended order will similarly award make-whole relief from January 22, 1979, until the Respondent commences to bargain in good faith and thereafter bargains to contract or impasse.[29/]

The evidence clearly establishes that the employees who walked off their jobs on July 10, 1981, were engaged in an unfair labor practice strike. In fashioning make-whole relief for the period of the strike, I will follow the approach of the Board in Admiral Packing Co. (1981), 7 ALRB No. 43.

Upon the entire record, the findings of fact and conclusions of law set forth above, and pursuant to §1160.3 of the Act, I hereby issue the following recommended:

29/As I noted in my discussion of Respondent's affirmative defenses, the bargaining during the hearing did not provide a proper context to test whether the Company has begun to bargain in good faith or is continuing to engage in surface bargaining.

ORDER

Respondent Paul W. Bertuccio, doing business as Bertuccio Farms, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Section 1155.2 (a) of the Act, on request, with the United Farm Workers of America, AFL-CIO (UFW) as the certified exclusive collective bargaining representative of its agricultural employees;

(b) Unilaterally changing its agricultural employees' wages, hours, or other working conditions without giving prior notice to the UFW, and an opportunity to bargain over such changes;

(c) Failing or refusing to furnish to the UFW, at its request, information relevant to collective bargaining;

(d) Bargaining directly with agricultural employees;

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

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

(a) 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;

(b) Upon request of the UFW, rescind the wage increases granted in January, 1982, and, thereafter, meet and bargain collectively with the UFW, at its request, regarding such changes;

(c) On request, provide the UFW with information regarding which parcels of land under its control will be farmed and which will be kept dormant, and other data relevant to collective bargaining;

(d) Make whole all agricultural employees employed by Respondent at any time between January 22, 1979, and July 26, 1982, and from July 27, 1982, to the date Respondent commences good faith bargaining with the UFW which leads to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain, such losses to be computed in accordance with this Board's precedents, plus interest computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982), 8 ALRB No. 55. Respondent shall make whole those employees who went on strike on or about July 10, 1981, in accordance with the formula established in Admiral Packing Company (1981), 7 ALRB NO. 43.

(e) Preserve, and upon request, make available to the Board or its agents for examination, photocopying, and otherwise copying all records relevant and necessary to a determination of the amounts of back pay, make-whole, and interest due to the affected employees under the terms of this Order.

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

(g) Post copies of the attached Notice in conspicuous places on its property for sixty (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.

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

(i) Mail copies of the attached Notice in all appropriate languages, within thirty (30) days after the date of issuance of this Order, to all agricultural employees employed by Respondent between April 2, 1981, and the date the Notice is mailed.

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be

determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice and/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.

(k) Notify the Regional Director in writing, within thirty (30) days after the date of issuance of this Order, of the steps which have been taken to comply with it. 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.

IT IS FURTHER ORDERED that allegations contained in the Second Amended Complaint not specifically found herein as violations of the Act shall be, and hereby are, dismissed.

Dated: March 14, 1983

AGRICULTURAL LABOR RELATIONS BOARD

By 

Joel Gomberg
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYER

After investigating charges that were filed in the Salinas 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 refuse to provide the UFW with the information it needs to bargain on your behalf over working conditions.

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 NOT bypass the UFW and bargain directly with employees.

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 January 22, 1979, 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:

PAUL W. BERTUCCIO, dba
BERTUCCIO FARMS

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 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE