STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ROBERT H. HICKAM, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 81-CE-96-D 81-CE-97-D 81-CE-122-D 10 ALRB No. 2

MODIFIED[1/] DECISION AND ORDER

On April 25, 1983, Administrative Law Judge (ALJ) William Resneck issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and General Counsel filed a reply brief.

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

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

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[1/]This Decision modifies the Decision issued on January 6, 1984 by expanding footnote 3 herein (footnote 2 of the earlier Decision).

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

to affirm the ALJ's rulings, findings, and conclusions,[3/] and to adopt his proposed order, as modified.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Robert H. Hickam, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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

(b) Granting unilateral wage increases to its employees without first notifying the UFW of the proposed change and affording the UFW an opportunity to bargain about the proposed

[3/] The ALJ concluded that Respondent's unilateral elimination of the hourly grapevine pruning crew and its replacement by labor contractor Hector Rodriguez' crew constituted unlawful subcontracting out of bargaining unit work. In the previous surface bargaining case, Robert H. Hickam (1982) 8 ALRB No. 102, Respondent contended that Rodriguez was a labor contractor yet Robert H. Hickam, testified that Rodriguez was a supervisor when he worked for Respondent. That testimony was unrefuted. In the instant case, General Counsel litigated the case under the theory that Rodriguez was a labor contractor when he worked for Respondent on property owned by Respondent. This fact was not contested by Respondent nor was the question of Rodriguez' status as either a labor contractor or a supervisor litigated in the instant case. Regardless of Rodriguez' status, Respondent's action constitutes a violation of section 1153(e) and (a) as it constitutes an unlawful unilateral change in the Employer's hiring practices. (D'Arrigo Brothers (1983) 9 ALRB No. 3.) Therefore, we need not make a determination as to whether Rodriguez was in fact a labor contractor or a supervisor.

change.

(c) Unilaterally changing its hiring practices and its method of compensation, and unilaterally implementing a new vacation system without first notifying the UFW of the proposed change and affording the UFW an opportunity to bargain about the proposed change.

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

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.

(b) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW, such makewhole amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, the period of said obligation to extend from January 1, 1981, until August 10, 1982, and continuing thereafter, until such time as Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(c) Upon request of the UFW, rescind the unilateral

wage increases granted to its employees; restore its method of hiring for the grape pruning operation; restore the method of compensation for the grape pruning operations from a piece-rate to an hourly basis; rescind the vacation plan; and meet and bargain with the UFW concerning any proposed changes in those, or any other, conditions of employment of its agricultural employees.

(d) Reimburse its agricultural employees for all losses of pay and other economic losses they have suffered as a result of the unilateral changes in wages, method of hiring, vacation plan, and method of compensation, described in paragraph 2(c) above, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(e) Preserve and, upon request, make available to the Board or its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay and makewhole period and the amount of the backpay and makewhole due under the terms of this Order.

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

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance

of this Order, to all agricultural employees employed by Respondent at any time during the period from January 1, 1981 to August 10, 1982 and thereafter until Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

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

(i) Provide a copy of the attached Notice to each employee hired by Respondent during the twelve-month period following the date of issuance of this Order.

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to 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 the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(k) Notify the Regional Director in writing, within

three days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

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

Dated: January 23, 1984

ALFRED H. SONG, Chairman

JOHN P. MCCARTHY, Member

PATRICK W. HENNING, Member

CASE SUMMARY

Robert H. Hickam
(UFW)

10 ALRB No. 2
Case Nos. 81-CE-96-D
et al.

ALJ DECISION

The instant case is a continuation of a previous surface bargaining case. (Robert H. Hickam (1982) 8 ALRB No. 102.) The ALJ concluded that Respondent violated section 1153(e) and (a) of the Act by unilaterally implementing a vacation plan, unilaterally granting wage increases, and unilaterally changing the method of hiring and compensating the grapevine pruning crew. In addition, the ALJ concluded that Respondent unlawfully refused to bargain with the UFW. The ALJ based his finding on Respondent's failure to submit any economic proposals over a 19-month period, its submission of only two non-economic proposals, Respondent's refusal to provide the UFW with information it had requested, its refusal to bargain over the custom harvest operations, and its implementation of the unilateral changes described above.

BOARD DECISION

The Board adopted the ALJ's Decision in its entirety and issued a modified order.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ROBERT H, HICKAM, Respondent, UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 81-CE-96-D 81-CE-97-D 81-CE-122-D

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DECISION

STATEMENT OF CASE

WILLIAM A. RESNECK, Administrative Law Judge:

This case was heard before me in Delano, California, on August 10, 11, 12, 17 and 20, 1982.

This case involves three unfair labor practice charges filed in June and July, 1981 by the United Farm Workers of

America. A Complaint and Order consolidating these charges was issued by the Regional Director on April 26, 1982, and a First Amended Complaint amending these charges was served on August 4, 1982, immediately prior to the commencement of the hearing. (G.C. Ex. 1-G)[1/]

The First Amended Complaint essentially alleges that since January 1, 1981 Respondent has refused to bargain in good faith; has unilaterally made changes in his wage structure; has unilaterally changed the terms and conditions of employment; and has unilaterally contracted out bargaining unit work.

The charges here are essentially the continuation of earlier charges and proceedings involving Respondents and these may be summarized as follows:

BACKGROUND INFORMATION"

Respondent is solely owned by Robert H. Hickam and his wife, Shirley. On October 21, 1975 the Board conducted an election among Respondent's agricultural employees, pursuant to a Petition filed by United Farm Workers of America, AFL-CIO (UFW or Union). On July 12, 1977 the UFW was certified by

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1/ General Counsel's exhibits will be designated (G.C.Ex.___) Respondent's exhibits will be designated (Resp.Ex.___) References to the transcripts of the proceedings will be a Roman Numeral, I through VI, indicating the transcript volume, followed by the page number of that volume.

the Board as the exclusive collective bargaining representative of all of Respondent's agricultural employees. Respondent refused to bargain with the UFW, and on October 19, 1978 the Board found Respondent in violation of Section 1153(e) and 1153(a) of the Act, and ordered Respondent to make his agricultural employees whole. Robert H. Hickam (Oct.19, 1978) 4 ALRB No. 73.

Respondent refused to bargain with the UFW and appealed the Board's decision. On December 28, 1979 the California Court of Appeals for the Fifth District denied Respondent's request for review.

Thereafter, Respondent continued to refuse to bargain with the UFW and another lengthy proceeding was held, lasting some 18 days over the latter part of 1980 and the first part of 1981. Transcripts of that hearing were incorporated by judicial notice in the present hearing, since at the time our hearing was concluded the Board had not reached its decision on the subsequent charges. Subsequent to the close of testimony in this matter, the ALRB has again found Respondent guilty of refusing to bargain. Robert H. Hickam (Dec.29, 1982) 8 ALRB No. 102. Accordingly, in the interest of judicial economy, I have not re-read the extensive transcripts of the earlier hearing, but instead have used the Board's decision, which upheld the decision of the Administrative Law Officer finding the Respondent guilty of refusing to bargain since 1980.

THE PRESENT UNFAIR LABOR PRACTICE CHARGES

The instant proceeding picks up where the last one left off and contains allegations that Respondent has refused to bargain from January 1, 1981 on. In this present proceeding Respondent has been charged with: (1) unilaterall[illegible] -4- ing from hourly to piece-rate wages, the wage structure for [illegible]lent's grape-pruning operations without notifying or bargaining with the UFW; (2) unilaterally changing the rates it pays its workers, including but not limited to tree pruning and harvest workers, without notifying or bargaining with the UFW; (3) repeatedly cancelling scheduled contract negotiation meetings; (4) delaying in responding to Union proposals; (5) failing to timely provide complete and accurate requested information to the UFW; (6) refusing to bargain concerning particular groups of agricultural employees, including Respondent's custom harvesting services; (7) refusing to bargain on a medical plan for its employees; (8) unilaterally changing the method of vacation pay computation without notifying or bargaining with the UFW; (9) unilaterally subcontracting out bargaining unit work and displacing bargaining unit employees without notifying or bargaining with the UFW; (10) bypassing the UFW and bargaining directly with his employees regarding terms and conditions of employment; (11) unilaterally changing from hourly to piece-rate wages

the wage structure of its grape-pruning operations without notifying or bargaining with the UFW.

These acts are alleged to be inviolation of Sections 1153 (a) and 1153 (e) of the Act. Respondent denies committing any unfair labor practices.

All parties were given full opportunity to participate in the hearing, and after its close General Counsel and Respondent each filed a Brief in support of its position.

Upon the entire record, including my observations 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

Robert H. Hickam is engaged in agriculture in Delano, California, and is an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

The UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4 (f) of the Act

II

THE EMPLOYER'S OPERATIONS

Respondent is solely owned by Robert H. Hickam (Hickam) and his wife, Shirley. Respondent owns farm land in Tulare County, California, upon which he grows table grapes, wine

grapes, plums, peaches, nectarines and persimmons. By himself Respondent owns or controls approximately 260 acres of farm land and has a peak work force of approximately 35 employees. In addition, he pays employees for work done on approximately 1,000 acres of land owned by others, with a peak force of approximately 150 employees. The exact nature and extent of Respondent's holdings have been discussed in detail in the Administrative Law Judge's decision in Robert H. Hickam (1982) 8 ALRB No. 102 and will not be repeated here.

In summary, Respondent owns or leases six parcels of land over which he has sole control, and he has an additional interest in properties known as H & M, HM&Z, El Dorado, property owned by Hubert "Dean" Wyrick, Poxin Ranch, Mountain View Ranch (Grewal Brothers), property owned by Howard Rainey, property owned by John Morton, M & B, property owned by Victor Glaze, Briggs Ranch, Goya Ranch, property owned by Kent Burt, property owned by Bruce Meyers & Zucca. Throughout the course of this proceeding and all prior proceedings, Respondent has consistently refused to provice the UFW with any information regarding property he did not solely own or lease. This issue was fully litigated in the prior hearing involving Respondent, and was not re-litigated here. Neither side presented any new information or contentions regarding this property. Accordingly, I am bound by the decision reached by the ALRB in

the prior proceeding, 8 ALRB No. 102. In that proceeding Respondent has been held to be the agricultural employer of all employees on his payroll since July 12, 1977, and it was held that Respondent's refusal to provide information to the UFW about the employees who work on the property not solely owned or leased by it and information about crops grown on that property violated Section 1153 (e) and 1153 (a) Accordingly, I reach the same conclusion.

Since the prior hearing, Respondent has made some changes in ownership interests in the various agricultural properties, He is still owner of the Kameo, Rowley, Young and Nelson ranches. He is still a partner of HM&Z. He still packs fruit for the El Dorado property and for Harold Rainey. However, there have been these changes in the following properties: (1) he sold the Griggs ranch in March of 1979; (2) H & M partnership which leased an orange ranch was dissolved in June 1980 after the lease ended on that ranch; (3) his lease on the property called the Vineyard ended in November 1980 when the property was sold; (4) Hubert Wyrick sold his property and Respondent did not pack his fruit in 1981; (5) he performed no services for the Poxin Ranch after 1980; (6) he performed no services for the Mountain View Ranch from 1981 on; (7) lie performed no services for the John Martin property in 1981 or 1982; (8) he performed no services for the Victor Glaze property in 1981 or 1982;

(9) he performed no services for the M & B property in 1981 or 1982; (10) he performed no services for the Goya Ranch in 1981 or 1982; (11) he performed no services for the Kim Burt property in 1981 or 1982; (12) he performed no services for Bruce Meyer's property in 1981 or 1982; (13) he performed no services for Zucca Farms in 1981 or 1982.

In conclusion, although the extent of Respondent's participation in various properties may have changed, the nature of his participation in the properties which he still manages has not changed since the prior hearing; nor has his refusal to bargain or to provide information about those properties. Accordingly, my conclusions on that issue, since no additional testimony was presented at this hearing, will be governed by Robert Hickam (1982) 8 ALRB No. 102, finding that he is a custom harvester and under a duty to bargain and provide information about all of those properties

III

SURFACE BARGAINING

Paragraph 6 of the First Amended Complaint lists in ten subparagraphs acts and conduct evidencing Respondent's refusal to bargain with the UFW. Four of the charges consist of unilateral changes by the Respondent: (1) a change from hourly to piece-rate wages for grape-pruning operations; (2) a unilateral change in the rates of pay for tree-pruning

and harvest operations; (3) unilateral change in the manner of vacation pay computation; and (4) unilaterally subcontracting out bargaining unit work. Additional acts evidencing surface bargaining is the repeated cancelling of scheduled contract negotiation meetings; delay in responding to Union proposals; failing to provide complete and accurate requested information to the Union; failing to bargain concerning groups of employees within the bargaining unit, including Respondent's custom harvesting services; failing to bargain on a medical plan for its employees; and bypassing the UFW by bargaining directly with its employees.

Negotiations between Respondent and the Union may be summarized as follows:

Although the unfair labor practice charges commence on January 1, 1981, the chronology begins on November 22, 1980 in a negotiation meeting when the UFW submitted a proposal on many contract articles to Respondent. Since Hickam did not have a negotiator at that meeting, he told the UFW negotiator he would have Michael Hogan, his attorney and negotiator, review the proposal and give the Union a response.

On December 8, 1980, in a phone conversation, Deborah Miller, UFW negotiator, called Hickam to arrange to examine his books. On December 10, 1980 Miller wrote Hogan a letter confirming that she wanted to examine the books and requesting a response to the UFW's proposal (G.C. Ex.10). On December 16,

1980 Miller told Hogan in a phone conversation that she wanted to have a meeting on the outstanding proposal; however, no meeting was arranged at that time.

On January 6, 1981, still not receiving a response, Miller wrote Hogan requesting a counter-proposal (G.C. Ex.11) On January 16, 1981 Hogan wrote to Miller discussing the setting up of a meeting (G.C. Ex.12). After receiving the letter, Miller called Hogan on different occasions, but was unable to schedule a meeting since Hogan was busy with a trial and could not return her phone calls.

On February 7, 1981 Miller wrote Hogan suggesting dates for a negotiation session (G.C.Ex.13). On February 27[2/] Miller wrote Hogan confirming a March 13 date to examine the books. Miller also requested a response to their last proposal of November 22, 1980 (G.C. Ex.14). On March 5[2/] Hogan wrote to Miller confirming the March 13 date to examine the books (G.C. Ex.15).

On March 13 Deborah Miller and Gloria Saldana, an experienced bookkeeper representing the Union, met at the office of Mr. Hickam's accountant, Paul Verissimo, along with Mr. Hickam. At that meeting a date was set for a negotiation session on March 23 at 10:00 a.m. at Hickam's office.

2/ All dates are 1981 unless otherwise stated.

On the morning of March 23, shortly before leaving for the meeting, Miller got a phone call from Hogan's office seeking a postponement as Hogan had the stomach flu. On that same day Miller sent a letter confirming April 9 as the next date to meet to negotiate.

On March 23, Spencer Hipp, an associate of Hogan, wrote to Miller enclosing a copy of the partnership tax returns for H & M Groves and HM&Z Farms, and copies of all articles initialed prior to November 22, 1980 (G.C. Ex.17).

On March 25, Hogan wrote to Miller indicating that April 9 was a satisfactory date for further negotiations (G.C. Ex.18). On the morning of April 9 Miller received a call from Hogan's secretary saying he was sick, and re-scheduling the meeting for April 14. The new date was confirmed by a letter from Miller to Hogan (G.C. Ex.19).

On April 14, the parties finally met for further negotiation, the first negotiation sessions since November 22, 1980, almost five months earlier. Present were Miller, Hogan and Hickam. At that meeting they confirmed the agreements made prior to November 22, 1980 and then reached an agreement on two articles that were initially agreed upon on November 22, 1980 concerning hours of overtime and injury on the job (G.C. Ex.20).

The company then presented a proposal on a grievance and arbitration procedure and on a no strike or lock-out

provision (G.C. Ex.21). The Union indicated they would study those proposals and make a response.

The company then re-proposed its last position on non-economic items on seniority, union security and subcontracting. The company indicated that its position on union security remained unchanged, which was that steady workers would be excluded from the Union and that there would be no dues checked off. Hogan also indicated there would be no changes at all on the economic items. The company did indicate that if the Union wanted to take the 10 cents that had been proposed for a pension plan and add it to the wages, the company would have no objection, but that the total wage package offered by the company would remain the same. The Union's position at that time was that the company would contribute 18 cents per hour towards the pension plan.

The company made no change from its last proposal on wages of $3.70 per hour. The Union's position was that $4.25 should be paid with a $5.00 per hour raise effective April 1. The Union indicated that the company proposal of $3.70 was unacceptable as other growers under contract in that area for the prior harvest season were paying $4.10 an hour.

The Union then requested information for grape-pruning and tying rates for the 1980-81 season, tree-pruning rates

for the same season, vacation for 1980 consisting of who received vacation and how much, and the 1980 Christmas bonus information. This information covered the period of time from the last meeting of November 22, 1980 to the present.

Other than the two proposals submitted by the company, no other proposals were submitted. The meeting lasted approximately an hour.

On April 28 Miller wrote Hogan confirming the information requested at the negotiation session of April 14 and requesting that it be sent. In addition, she enclosed another copy of the letter of September 27, 1980 (G.C. Ex.23) containing information requests that had been pending since, that time (G.C. Ex.24).

Also on April 28, Hogan wrote Miller enclosing information about Christmas bonuses and vacation bonuses and enclosing a copy of the summaries of payroll records (G.C. Ex.22 and Ex.25). Miller testified that the information provided was incomplete as most of the information referred to the hourly operation while the information requested was for the piece-rate operation (II:94). Also, only 1980 information was furnished instead of 1981 as requested (II:95). However, the information furnished enabled Miller to discover for the first time that the Union's vacation pay proposal had been implemented without any notification to the Union or agreement to it (II:97).

On April 30, Hipp wrote Miller stating that Hickam wanted to increase his general labor hourly rate to $3.65, increase the pay for Gus and Anna Almerol to $3.75 and increase the pay of steadies to rates varying from $4.25 to $4.75 an hour. The letter indicated that the raises were to become effective next Friday, May 8 (G.C. Ex.26).

On May 5 Hipp wrote Miller again stating that since there was no response to his April 30 letter the company would implement its annual wage increase as stated (G.C. Ex.27). Miller testified there were no discussions of any wage increases mentioned at the April 14 session, and she first heard of the wage increases on May 9 when she received the letter of May 5 (II:100).

On May 11 Miller wrote back to Hogan stating that she felt the wage increases were discriminatory, in that general laborers were only having their rates increased 15 cents an hour while steady workers were getting a 25-cent-an-hour increase. Miller stated that she would regard the increase as an interim one while bargaining continued. Miller also stated her objection to the unilateral change in vacation pay which was disclosed in a letter of April 28, 1981. Further, she confirmed that she needed information on last year's pruning season (1979-80), and confirmed the further information needed. Also attached to that letter was the Union's response to the two articles presented by the company at the April 14 negotiation session (G.C. Ex.28).

On May 20 Hogan wrote to Miller providing payroll records for 1981 and additional information about vacation pay and bonuses. Hogan also disputed Miller's contention that there had been a unilateral change in vacation pay contending that the vacation payments made in 1980 had been discussed during the negotiations that year. The letter also confirmed that the next negotiating session would be May 26 (G.C. Ex.29).

Miller testified that although there had been discussions and negotiations about various vacation proposals, the company had never indicated that they were actually going to implement a particular system nor pay any particular amounts. Thus, there had been no negotiations as to what system, if any, would be implemented nor the amounts to be paid (II:106).

On May 26 Hickam, Hogan and Miller met at Hickam's offices. At that meeting the UFW presented to the company a package proposal (G.C. Ex.30). The meeting first began with a discussion of the proposal the Union had sent in the mail on grievance and arbitration and no-strike. After a couple of clarifications, agreement was reached on those two articles, and it was agreed that it would be re-typed and initialled at the next meeting (II:108-109). In the proposal the Union presented the Union moved closer to the employer's position on vacation. The employer had wanted

1,100 hours to qualify; the Union had proposed 750 hours; the new package proposal by the UFW required 1,000 hours (II:109-110).

The UFW also proposed a change on pay. In November 1980 the UFW had proposed one week of pay be the equivalent of 54 hours of pay. The new proposal stated that one week would be the equivalent of 50 hours, which is what the company had already implemented (II:110). The Union also reduced the number of holidays from six to five (II:110).

On wages, the Union had been asking for $4.25 per hour retroactive to April 1, 1980. The Union now asked for $4.10 retroactive to January 1, 1981 (II:111). The Union also proposed that the new pay on April 1, 1981 be $4.80, down from the $5.00 an hour originally proposed (II:112). The Union also changed the piece-rate crew average from $7.50 to $6.50, and the other crew's average from $6.50 to $5.50 (II:112).

On the medical plan the proposal dropped the employer contribution from 38 cents an hour to 29 cents an hour (II:114). On the pension plan, the proposal dropped the employer contribution from 18 cents to 15 cents, retroactive to January 1, 1981 as opposed to April 1, 1980 (II:115). There was also a brief discussion of seniority and that particular article was initialed (II:116).

At this meeting the Union also learned for the first time that pruning was now being done by piece-rate instead

of on an hourly rate basis as in the past (II:116-119). The meeting ended with Hogan stating he would prepare a response to the proposal, mail it to the Union and set a meeting at that time.

On May 27 Hogan wrote to Miller sending her a copy of the letter regarding the termination of the lease of the vineyard (G.C. Ex.31).

On June 13, Miller wrote to Hogan confirming the phone call of the previous day indicating that no response had yet been prepared to the proposal of May 26, 1981, but that a response would be sent prior to the next meeting, which was set for Friday, June 26 (G.C. Ex.32). On June 23 Hogan wrote Miller with the names and hours worked in 1980 by certain employees. Hogan also indicated he was unable to present a counter-proposal at that time, but would be able to do so at the negotiation session on Friday (G.C. Ex.33).

On June 25 Miller received a call from Hogan's secretary cancelling the meeting the next day as Hogan had a skin graft on his nose and could not drive because of the medication he had been given. The meeting was re-scheduled for July 2.

On June 26 Miller wrote to Hogan confirming the cancellation of the negotiation session because of illness, confirming the next meeting set for July 2, and questioning

why no response had been submitted to the Union's proposal of May 26 as promised (G.C. Ex. 34).

On July 2 Hogan's secretary called at 11:30 a.m. to cancel the 1:00 p.m. meeting, contending that Hogan was tied up in an emergency meeting in Bakersfield and rescheduled the meeting for July 6.

On July 3 Miller wrote a mailgram to Hogan pointing out that meetings of March 23, April 9, June 25 and July 6 had been cancelled and no response had been received to the Union's May 26 proposal. She confirmed the July 6 meeting and requested a second meeting on July 13, 15, 16 or 17 (G.C. Ex.35).

On July 6 another negotiating session was held with Miller, Hogan and Hickam present at the company's office. The company agreed to the reporting and standby time proposal which had been pending since November 20, 1980 (G.C. Ex.36). The company then rejected all other proposals, made no counter-proposals and said that the Union had to accept the company's proposal from last fall (II:135). More discussion followed and the parties then agreed on a new job description and a supplemental agreement on Christmas bonuses (G.C. Ex.36). Further discussion then ensued on mechanization subcontracting, and Miller requested that they set a further date for negotiations. Hogan suggested that they use mediation, and after several calls a meeting was set up with a mediator, David Ruiz, on July 15.

On July 15 another negotiation session was held with David Ruiz (State Conciliation and Mediation Service), Miller and Hogan. Hickam was not present. Initially all of the parties reviewed their positions; the parties talked to the mediator separately; and then the Union presented a package proposal (G.C. Ex.37). The Union made some changes to conform to the company's position; for example, it accepted the employer's position of 1,100 hours for vacation. On Union security, the Union stuck to its last position. Other proposals were made on subcontracts, mechanization, and a harvesting procedure. The Union also made concessions coming down to a 22 cents per hour medical plan and accepting the 10 cents an hour pension plan that employer was offering, instead of the 15 cents an hour that it had been requesting. The Union came down on wages from $4.80 to $4.50 per hour.

Hogan went through and accepted all of the concessions the Union made to conform with the company's positions. On other proposals he either rejected the Union's position or said he had to consult with Hickam.

On July 23 Miller, David Ruiz (the mediator), Hogan and Hickam met in Visalia at the Convention Center. The parties rediscussed their various positions. The company indicated it had no changes to make. Hogan indicated he would again talk to Hickam and if there was some kind of

a proposal either for the contract or for the contract plus settling all of the unfair labor practice charges pending, that he would contact either Miller or the mediator.

No further negotiations took place between the parties from July until a meeting in March 1982 between Ben Maddock (UFW director in Delano) and Hogan. At that meeting Hogan was to get back to the Union, but there was never any response.

Prior to the March meeting, on January 27, 1982 Miller sent a letter to Hogan summarizing the UFW's position and requesting some information (G.C. Ex.38). No response was received to that letter, and on May 12 another letter was sent again requesting the information and suggesting a further negotiation session (G.C.Ex.39). No response was ever received to that letter.

IV

UNILATERAL CHANGES

As noted, Respondent is alleged to have made the following unilateral changes:

1. Changing grape-pruning operations from hourly to piece-rate wages;

2. Changing rates of pay for tree-pruning and harvest operations;

3. Changing the method of vacation pay computation;

4. Unilaterally subcontracting out bargaining unit work.

No factual dispute exists that these unilateral changes were made. Respondent's defense is that these changes were part of standard company policy periodically to raise wages (Respondent's Brief, p. 3). With respect to the allegation concerning the subcontracting out of bargaining unit work, Respondent contends that none of the employees in the unit contacted the labor contractor, Hector Rodriquez, to seek work, except for Margarito Cortinas. (Respondent's Brief, pp. 12-16).

ANALYSIS AND CONCLUSIONS

Section 1153 (a) of the Act makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce employees in the exercise of their right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and . . . the right to refrain from any or all such activities."

Section 1153 (e) makes it an unfair labor practice "to refuse to bargain collectively in good faith with labor organizations certified . . . " pursuant to the Act.

Section 1148 directs the Board to follow applicable precedents of the National Labor Relations Act, as amended in 29 U.S.C. Section 151, *et seq.* (hereinafter the "NLRA").

I

THE SURFACE BARGAINING ISSUE

Section 1155.2 (a) of the Act defines good faith bargaining as:

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

Employer's conduct here is a blatant example of a refusal to bargain. Preliminarily, prior unfair labor practice charges may serve as background for the instant case. See As-H-Ne Farms, Inc. (1980) 6 ALRB No. 9. In Robert H. Hickam (1978) 4 ALRB No. 73, the Board had found that Respondent had refused to bargain with the UFW. Similarly, in Robert H. Hickam (1982) 8 ALRB No. 102, the Board again concluded that Respondent had refused to bargain with the UFW. That same course of conduct has continued into our instant proceeding.

On November 22, 1980 the UFW submitted its last proposal to Respondent. After a delay of approximately five months and after repeated requests by the UFW for a response, on April 14, 1981 Respondent submitted only two articles as a counter-offer. These offers dealt with the non-economic items involving the grievance and arbitration procedure, and a no-strike or lockout provision (G.C. Ex.21). On May 11 the Union accepted the company's counter-proposals, and on

May 26 the Union submitted another package with major concessions on economic and non-economic items.

Although the parties met twice after that, on July 6 and on July 23, the company never submitted a counterproposal. Thus, during the whole course of the bargaining process, the company at no time submitted any economic proposals and only two non-economic proposals. Also, during this period, the company unilaterally granted wage increases.

In As-H-Ne Farms, Inc., supra, the Board noted Respondent's delay in submitting counter-proposals was indicative of bad faith bargaining. In that case the delay was seven months on non-economic items and another five and one-half months on economic items. 6 ALRB No. 9, p.9. In our present case we have a five-month delay before two non-economic proposals are submitted, and no submission of economic proposals.

Respondent argues in its brief the fact that it failed to reach a contract agreement with the Union is not per se bad faith bargaining. Further, Respondent cites the case of Kaplan Fruit and Produce Company (1980) 6 ALRB No. 36 for the proposition that wage increases do not have a detrimental effect on the bargaining process. However, the Court in Kaplan held just the opposite:

> Other indicia of bad faith are Respondent's unilateral wage increases granted to the grape workers during the pruning seasons in 1977 and 1978, discussed below. These increases tended to undermine the Union's authority as exclusive collective bargaining representative, making the Union appear ineffectual.
>
> 6 ALRB No. 36, at p.14.

In judging the totality of circumstances on the record before me, I find that Respondent had no real intention of reaching an agreement with the UFW. Its unilateral wage increases, its refusal to provide the UFW with information that had been requested, its failure to come up with any economic counter-proposals and its intransigent position throughout the negotiations compel me to such a conclusion.

II

UNILATERAL WAGE INCREASES

The allegations of the unilateral wage increases and the unilateral change from an hourly crew to a piece-rate crew have been set out supra. These allegations are uncontradicted. Instead, Respondent offers as a defense that it has been standard company policy periodically to raise wages, and that such wage increases were simply in line with those of other growers in the Exeter area. (Brief, p.3)

The so-called "past practice" defense or "business necessity" defense raised by Respondent here to justify its wage increases was recently discussed by this Board in Joe Maggio, Inc.,Vessey & Company, Inc., and Colace Brothers, Inc. (1982) 8 ALRB No. 72. Initially the employer must establish that the increases were automatically granted and not discretionary. Further, even assuming that the increases were automatically granted, the circumstances must still be examined to see what degree of discretion is involved as to the timing or the amount of the increases, and whether the

employer bargained about these discretionary aspects of timing or amount. 8 ALRB No. 72, p.18. Thus, the issue is not whether there will be a wage adjustment, but the amount of that adjustment. It is the failure to bargain over the amount of any such adjustment which would then give rise to the unfair labor practice.

Employer here has failed to carry his burden of proof on' either account. No evidence was offered to show that wage increases were automatically given at any particular times during the year. Basically, the amount and timing of the increases depended upon Hickam's view of what he felt a majority of growers were paying and how bad the workers were "squawking". (1:86-87) Thus, unlike cases where cost of living increments or automatic increases are built into the periodic adjustments, it is clear here that both the timing and the amount were solely up to Hickam's discretion, See 0. P. Murphy Co. (1979) 5 ALRB No. 63; Thomas F. Castle Farms, Inc. (1982) 9 ALRB No. 14.

Further indicative of the employer's bad faith is the fact that the wage increases granted were more than that pending in its last economic offer to the Union. Thus, on June 18, 1982 Hickam raised the hourly rates for its crew workers from $3.65 to $3.90 per hour (III:39-40), (G.C. Ex.41). These changes were made without any notice or opportunity to the UFW to bargain about them. However,

up to the date of the hearing in this matter Hickam's last wage proposal was $3.70 an hour, although by then he was paying employees $3.90 an hour (IV:50). Thus, employer's lack of good faith in attempting to negotiate the wage increases with the Union is only underscored by the fact that his current economic proposal did not even reflect the amount he was presently paying.

III

UNILATERAL SUBCONTRACTING OUT OF BARGAINING UNIT WORK

Prior to the 1980-81 pruning season, vine-pruning work on land owned by Hickam had been done by an hourly crew led by Gloria Verdin. At the start of the season workers were recalled to return to work for this crew by informing either Gloria Verdin, Margarito Cortinas (her father) or Margarita Lopez (her sister). In 1980 Hickam decided to eliminate that hourly crew and to have labor contractor Hector Rodriguez do all of the work and all of the hiring on the Hickam properties. When the 1980-81 pruning season work began in December, Hickam did not call Margarito Cortinas in order to have the hourly crew return to work. Cortinas therefore called Hickam in December 1980 and was told by Hickam that he should talk to Hector Rodriquez, the labor contractor, who was now in charge of hiring.

In addition to changing the method of hiring, Hickam also unilaterally changed the method of wage computation.

In the past the crew had worked on an hourly basis. For the 1980-81 season, the crew was to work by the more strenuous piece-rate method under Hector Rodriquez. Accordingly, without any notice to the UFW the hourly crew was completely eliminated during the 1981 season as was their method of securing work from Hickam. The UFW was first informed that this crew had been eliminated during the negotiations in May of 1981.

Respondent's defense to this allegation is somewhat misplaced. In the original complaint General Counsel alleged that Respondent failed to re-hire certain named individuals. Respondent contends as a defense that there was no showing that these individuals applied for work. However, in the first amended complaint, (G.C. Ex.l-G) the allegations was changed from a failure to rehire to an allegation that Respondent had unilaterally subcontracted out bargaining unit work. Thus, Respondent's arguments about the failure of individuals to apply for work did not address the question of Respondent's failure to bargain with the Union over the subcontracting out of bargaining unit work. In D'Arrigo Brothers (1983) 9 ALRB No.3, the Board held that:

> the use of employees provided by a labor contractor to perform tasks customarily performed by employees hired directly by the employer may constitute a unilateral change in the employer's hiring practices, and an employer would violate section 1153 (e) and (a) by instituting such a change without giving

> its employees' certified bargaining representative prior notice thereof and an opportunity to bargain about the proposed changed.
>
> 9 ALRB No. 3, pp. 3, 4.

Therefore, since the allegations are essentially unrefuted, I find this violation has also been established.

IV

ECONOMIC DEFENSE

As a general defense Respondent contends that economically he was unable to pay any higher wages. Thus Respondent argues that for the years 1979, 1980 and 1981 his adjusted gross income averaged only $24,641.33 per year (Respondent's Brief, p.10; Resp. Ex. B, C, and D). However, Respondent's financial position is somewhat different than contended.

Testifying at the hearing was Daniel Irwin, C.P.A., who stated that based upon the income records it was impossible to determine whether Hickam's farming operations were actually losing money since the packing house operation and the real estate development operation were all lumped together in the income tax statements. In fact, the income tax statements overstated losses since farm labor used to develop agricultural property was improperly deducted instead of capitalized. If these costs had been capitalized rather than deducted, the amount of income-over-expense ratio for the farm would have been much greater.

This testimony went unrefuted, although Mr. Hickam's accountant, Paul Verissimo, was present during the testimony.

V

CONCLUSION

The facts underlying the unfair labor charges were essentially not in dispute: the unilateral wage increases, the failure to provide information after numerous requests by the Union, the subcontracting out of bargaining unit work, the failure to bargain over the custom harvest operations and the unilateral changes in vacation pay computation. Although this present hearing commences with unfair labor practice charges as of January 1, 1981, the same pattern of conduct engaged by the employer in two prior unfair labor practice proceedings has continued. Accordingly, I find that General Counsel has met its burden of finding violations of Section 1153(a) and (e) of the Act, and issue the following recommended

ORDER

Respondent Robert H. Hickam, 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 collective bargaining representative of Respondent's agricultural employees.

(b) Failing or refusing in the course of collective bargaining to submit bargaining proposals with respect to its agricultural employees' wages, hours and other terms and conditions of employment.

(c) Granting unilateral wage increases to its agricultural employees without giving the UFW prior notice and an opportunity to bargain about such wage increases.

(d) Failing or refusing to furnish relevant information to the UFW, at its request, for the purposes of collective bargaining, including but not limited to, personnel, crop, and production information.

(e) Unilaterally subcontracting out bargaining unit work.

(f) Failing or refusing to give timely and accurate information to the UFW with respect to the job assignments and places of employment of Respondent's agricultural employees.

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

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 collective

bargaining representative of its agricultural employees at reasonable times and places to confer in good faith and submit meaningful proposals with respect to its employees' wages, hours and other terms and conditions of employment, and if an understanding is reached, embody such an understanding in a signed agreement.

(b) Furnish relevant information to the UFW, upon request, for the purpose of bargaining, including, but not limited to, personnel, crop and production information and information about work assignments and work locations of Respondent's agricultural employees.

(c) Upon request of the UFW, rescind the unilateral wage increases which Respondent implemented since January 1, 1981.

(d) Make whole all of the agricultural employees who were employed by Respondent from January 1, 1981 to the date on which 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 a result of Respondent's refusal to bargain, the amounts of the awards to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(e) Preserve and, upon request, make available Co the Board or its agents for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports and all other records relevant and necessary to a determination, by the Regional Director, of the backpay and makewhole period and the amount of backpay and makewhole due under the terms of this Order.

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

(g) Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from March 3, 1980, until the date on which said Notice is mailed.

(h) Post copies of the attached Notice, in all appropriate languages, for sixty days in conspicuous places on its property, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(i) Provide a copy of the attached Notice to each employee employed by Respondent during the twelve-month period following the date of issuance of this Order.

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent 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 during the question-and-answer period.

(k) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps which have been taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with the terms of this Order.

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

Dated: April 25, 1983.

WILLIAM A. RESNECK,
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges filed in the Delano Regional Office by the United Farm Workers of America, AFL-CIO (UFW), the certified bargaining representative of our employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by changing your wages without first notifying and/or bargaining with the UFW, by refusing or failing to bargain in good faith, by failing or refusing to provide information requested by the UFW relevant to contract negotiations, and by uni-laterally subcontracting out bargaining unit work. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

Because it is true that you have these rights, we promise that:

WE WILL NOT make any changes in your wages, hours, or working conditions without first notifying and bargaining with the UFW.

WE WILL give information relevant to our negotiations to the UFW when they request it.

WE WILL meet with the authorized representatives of the UFW, at their request, for the purpose of bargaining and reaching a contract covering your wages, hours, and working conditions.

WE WILL reimburse all of our present and former employees who suffered any losses of pay or any other economic losses as a result of our failure to bargain in good faith with the UFW, plus interest.

Dated:___________________, 1983. ROBERT H. HICKAM

By: ______________________________________

Representative Title