Mendota, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUMNER PECK RANCH, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 81-CE-55-D 81-CE-72-D 10 ALRB No. 24

ERRATUM

In the last full paragraph on page 18 of our Decision and Order in the above-captioned matter "all of Respondent's agricultural employees" is hereby deleted and substituted therefor is "all of Respondent's agricultural employees employed at the Wasco Ranch Respondent purchased from Roberts Farms, Inc."

Dated: June 14, 1984

ALFRED H. SONG, Chairman

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

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 times and places 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.

(m) 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 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 FURTHERED ORDERED that the certification of the UFW, as the exclusive collective bargaining representative of all of Respondent's agricultural employees employed at the Wasco Ranch Respondent purchased from Roberts Farms, Inc. 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: June 14, 1984

ALFRED H. SONG, Chairman JORGE CARRILLO, Member PATRICK W. HENNING, Member

10 ALRB No. 24

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DECISION AND ORDER

On April 29, 1983, Administrative Law Judge (ALJ) Marvin J. Brenner issued the attached Decision in this proceeding. Thereafter Respondent Sumner Peck Ranch, Inc. timely filed exceptions to the ALJ 's Decision and a supporting brief. General Counsel timely filed a reply brief.

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 ALJ ' s Decision in light of Respondent's exceptions and the parties' briefs and has decided to affirm the ALJ ' s rulings, findings and conclusions with modifications, and to adopt his recommended Order, as modified.

Respondent Sumner Peck Ranch, Inc. (SPR) is a Mendota-based farming corporation owned by Carolan Peck and her

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

eight children. SPR purchased the 3300-3800[2/] Wasco vineyard at issue from Roberts Farms, Inc. (RFI) in late 1977, and escrow closed in January of 1978. The Wasco vineyard was part of RFI's over 15,000 acre McFarland-Porterville division, where a representation election had been conducted by the ALRB in early 1977. (Case No. 77-RC-2-F.) The tally showed a victory for the United Farm Workers of America, AFL-CIO (UFW or Union), but RFI timely filed objections and a hearing on the objections was set for April 1978. At the hearing, representatives of the UFW and RFI stipulated that RFI would withdraw its election objections in exchange for the Union's agreement to abandon its claim to two noncontiguous orchards which RFI had sold since the election. A certification then issued on June 27, 1978 "for all agricultural employees of Roberts Farms in the McFarland and Porterville divisions."

On March 21, 1981, the UFW filed the instant charges, alleging that Respondent was refusing to bargain with the UFW regarding terms and conditions of employment at the Wasco Ranch. Unrelated section 1153(a) charges were filed in June of 1981, alleging the unlawful discharges of nine Wasco vine planters. Shortly before the hearing commenced in April of 1982, an amended complaint was issued adding allegations that some of the discharged vine planters had been refused rehire in violation of section 1153(d) and (a).

[2/] Respondent's manager quoted the acreage at 3300 while entomologist Billy Newhouse testified that the Wasco vineyard sold to SPR consisted of 3800 acres.

Respondent's Bargaining Obligation Under the 1978 UFW Certification

Respondent excepts to the ALJ's finding that it failed and refused to bargain in violation of section 1153(e) and (a), contending that it is not a successor to RFI and, even if it were, it could not be bound by the June 1978 certification. Respondent concedes that owner Carolan Peck and manager Mike Noblatt met with the UFW representatives on numerous occasions between September 1979 and April of 1982, and Carolan Peck testified that she had every intention of negotiating a contract for Wasco employees. Respondent argues, however, that these negotiations were illegal under section 1153(f) and thus cannot be used to establish a bargaining obligation by estoppel or waiver. According to Respondent, its decision to bargain with the UFW stemmed not from the June 1978 certification but from an arrangement made with the Union concerning another SPR vineyard, the DiGiorgio Ranch, also purchased in late 1977 from RFI. Pursuant to a certification petition filed by the UFW, a representation election had been held at DiGiorgio in November of 1975. Like the McFarland-Porterville election, certification had not yet issued when SPR purchased the property. Unlike the McFarland case, however, SPR chose to intervene in the DiGiorgio challenged ballot proceedings in November of 1979. (See Roberts Farms (1980) 6 ALRB No. 5.) In September of 1980, a Board decision on the certification at DiGiorgio was still pending and Carolan Peck had decided to sell the property. She was encountering prospective buyers' reluctance to purchase property

potentially subject to a UFW certification. Peck therefore contacted the Union to propose an arrangement whereby she would meet with the Union to negotiate a contract for the Wasco Ranch employees if the Union would withdraw its claim to ("get off the thing at") DiGiorgio.[3/] Respondent contends that this unique arrangement should not be confused with or subjected to the same standards as bargaining pursuant to ALRB certification.

We reject Respondent's argument that the June 1978 certification did not apply to the Wasco vineyard purchased by SPR.[4/] The property was concededly part of RFI's McFarland-Porterville division, and the fact that the certification did not issue until after SPR had purchased the land does not affect the validity of that certification. A certification relates back to the election which it certifies; any other rule would prevent the finalization of representation proceedings. Post-election changes in the unit can be dealt with in unit clarification proceedings. Peck admitted to knowing of the McFarland election before escrow closed,[5/] but failed to intervene in the certification proceedings. She cannot now be heard to

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[3/] In January 1981, the ALRB dismissed the DiGiorgio petition (Case No. 75-RC-118-F).

[4/] We affirm the ALJ's denial of Respondent's motion for directed verdict on this issue. Evidence presented in General Counsel's case in chief that Respondent did bargain with the UFW over the Wasco vineyard is sufficient to establish a prima facie case that that property was included in the McFarland-Porterville division.

[5/] Although Peck later denied knowing of anything other than union activity, we are convinced, as was the ALJ, that her first response was the true response.

complain that SPR should not be bound by the result of the stipulation because SPR was not a party thereto.[6/] (See Dynamic. Machine v. NLRB (7th Cir. 1977) 552 F.2d 1195 [94 LRRM 3215, 3224].)[7/]

In addition, it is clear from the conduct of the negotiations that SPR did in fact recognize its obligation under the certification. (Cf. Grow Art (1983) 9 ALRB No. 67.) Respondent failed to assert its certification argument at any time prior to hearing on the instant charges. In fact, Peck and Noblatt agreed to a recognition provision in the contract specifying that SPR would recognize the UFW pursuant to the 77-RC-2-F certification.

Respondent's alternative contention is that, even if the certification covered the Wasco vineyard purchased by SPR, it could not bind SPR because SPR is not the successor to RFI.

[6/] Respondent repeatedly claims that the June 1978 certification issued "pursuant to" the stipulation. In fact, the withdrawal of RFI's objections was pursuant to the stipulation, but the Board issued the certification upon that withdrawal. (See section 1156(d).)

[7/] Respondent cites Code of Civil Procedure section 389 and Alaska Roughnecks & Driller Assn. v. NLRB (9th Cir. 1977) 555 F.2d 732, 735 [95 LRRM 2965] in support of its argument that a finding of successorship would deny it due process since it was never joined as a party at the time of the certification. Code of Civil Procedure section 389's provision for compulsory joinder of parties applies to "actions," not special proceedings such as ALRB representation cases. (Cf. Lu-Ette Farms (1982) 8 ALRB No. 55, pages 9-12.) Alaska Roughnecks involved a joint venture which had terminated before the union requested bargaining. In fact, the court suggested that had the union approached Mobil before termination of Mobil's joint venture with Santa Fe, it might have been required to bargain despite the fact that Santa Fe alone was certified as the employer. (555 F.2d at pp. 736-737.)

This argument suffers from the same defect as the certification argument in that Respondent failed to assert it as a defense at the time of the Union's request to bargain or even at the time of SPR's refusal to bargain. Successorship is not questioned in Respondent's answer to the complaint and is first raised at the hearing on the instant charges.

Among other arguments, Respondent now contends that the diminution in the bargaining unit resulting from the sale of the Wasco vineyard to SPR precludes a finding of successorship.[8/] The bargaining unit certified in June of 1978 included Robert's entire McFarland-Porterville division, of which the Wasco vineyard purchased by SPR represented only approximately 25%. This was the Only property in the certified unit which was purchased by SPR, and, since SPR had no other contiguous properties, the SPR unit consists only of employees who work on that property.

In fact, since grapes are acknowledged to be the most labor-intensive of the crops grown in Roberts' McFarland-Porterville division and the vineyard at issue constituted almost

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[8/] Respondent cites three NLRB cases for this proposition, Nova Services Co. (1974.) 213 NLRB No. 14 [88 LRRM 1239], Gladding Corp. (1971) 188 NLRB No. 40 [77 LRRM 1689] and IAM v. NLRB (D.C. Cir. 1974.) 498 F. 2d 680 [86 LRRM 2182TT The cases are inapposite. The employees in the new units in Gladding and Nova, assuming they were retained from the predecessor's work force, experienced drastic changes in their working conditions as a result of the sale. IAM involved the transfer of a mailing and distribution service which had been accreted to a much larger bargaining unit long after certification, and the court cited "inadequate evidentiary support" for the union's "pre-takeover claim of representation." (498 F.2d at 683.) Wasco was at peak season at the time of the instant election, and the Wasco employees undoubtedly played a major role in voting in the Union.

one-half of the McFarland property planted in grapes, the employees who worked on the vineyard must have represented a percentage of the unit much greater than the acreage on which they labored. In addition, it appears that the diminution of the bargaining unit resulting from Respondent's purchase of the Wasco vineyard did not make a noticeable change in the employees' conditions of employment. There was little evidence of interchange of employees between the Wasco Vineyard and other properties before or after the sale to Respondent. A majority of the steady employees hired by Respondent during the start-up escrow period had worked for Roberts Farms. New employees continued to be hired from the same area, and no one was laid off until the pruning season ended. All of the supervisors employed by SPR up to the date of the hearing had worked for RFI. It is clear that the change in the overall magnitude or scope of the operation would not be noticeable to the unit members, who continued to prune, tie and harvest grapes on the same property under the same supervision.[9/] Where a sale of part of a business has resulted in the breaking off of a part of the unit at such an "obvious cleavage line," the National

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[9/] RFI entomologist Billy Newhouse testified that he continued to work at the Wasco Ranch even after the sale to SPR on the recommendation of RFI owner Hollis Roberts, who "thought that because [he] had become familiar with those properties" Newhouse should go to work for Peck "operating in the same manner as [he] had for him." Newhouse also testified that he observed no change in the nature of the crops, irrigation, pruning or pest control between the sale and his return to RFI in August of 1978. Although Peck estimated that she had converted 25% of the Wasco wine grapes from red to white in the four years since she purchased the property, the record does not establish that the conversion resulted in a significant difference in operations.

Labor Relations Board (NLRB or national board) and federal courts have found the employer of the new and diminished unit to be a successor. (Stewart Granite Enterprises (1981) 255 NLRB 569, 573 [107 LRRM 1182]; Boston-Needham Industrial Cleaning Co. (1975) 216 NLRB No. 12 [88 LRRM 1249] enforced in 529 F.2d 74 [90 LRRM 3058]; Middleboro Fire Apparatus, Inc. (1st Cir. 1978) 590 F.2d 4 [100 LRRM 2182].)

Defense of Good Faith Doubt of Majority Support

Respondent argues that the ALJ improperly relied upon this Board's Decision in Nish Noroian Farms (1982) 8 ALRB No. 25 in his determination that the loss of majority support defense was unavailing under the ALRA. We have approved the application of the principle announced in Nish Noroian in cases where an employer refuses to bargain, claiming to have objective evidence that the majority of the unit employees no longer support the union. (See F & P Growers (1983) 9 ALRB No. 22 and Roberts Farms (1983) 9 ALRB No. 27.) Here Respondent's alleged belief in the UFW's loss of majority support is based on a mail "poll" in which, according to one of Respondent's own witnesses, a majority of the ballots were returned unopened. Even under National Labor Relations Act (NLRA) precedent, a more substantial showing of loss of support is required as the basis of a good faith belief that the union no longer represents the majority of the work force. (See Dayton Motels (1974) 212 NLRB 553 [87 LRRM 1347]; Orion Corp. v. NLRB (7th Cir. 1975) 515 F.2d 81 [89 LRRM 2133].) Therefore, even before issuance of this Board's Decision and Order in Cattle Valley Farms (1982) 8 ALRB No. 24 and in

Nish Noroian Farms (1982) 8 ALRB No. 25, Respondent's claim of loss of majority support was unreasonable. In addition, Respondent cannot reasonably claim to be protecting the free choice of its employees by questioning the majority support of their union while at the same time meeting with that union with the intent, according to owner Peck, of reaching a collective bargaining agreement. Moreover, the assertion of good faith doubt must, under NLRA precedent, be made at the time of the refusal to bargain. (West Suburban Transit Lines (1966) 158 NLRB 794 [62 LRRM 1101].) Respondent waited until the hearing to raise the issue. Respondent's refusal to bargain was, therefore, and in addition to reasons cited below, in bad faith, subjecting it to the makewhole order which we issue today. (F & P Growers, supra, 9 ALRB No. 22.)

Respondent's Bargaining Conduct

Respondent argues that the negotiations which took place between SPR and the UFW should not be judged by the standard measure for good faith bargaining because the relationship was a "unique" and "voluntary" one with its own ground rules. Having already rejected that premise, we proceed to employ the traditional tests for good faith bargaining.

In deciding whether a party has been bargaining in good faith, the Board, by examining the totality of the party's conduct, must determine whether the party acted "with a bona fide intent to reach an agreement if agreement [was] possible." (As-H-Ne Farms (1980) 6 ALRB No. 9.)

Delays and failure to respond to union requests to

meet[10/] and failure to offer counterproposals and follow through on agreements to contact the union for further meetings all are indicators of an intention not to reach a contract. (See, e.g., O. P. Murphy (1979) 5 ALRB No. 63; Grow Art, supra, 9 ALRB No. 67.) Disregarding the union's role as exclusive representative of the unit employees by resisting union proposals "in the interest" of the employees and in order to preserve a "family-like" relationship between employer and employees displays a basic lack of acceptance of the role of the union incompatible with good faith bargaining (Montebello Rose and Mount Arbor Nursery (1979) 5 ALRB No. 64; As-H-Ne Farms (1980) 6 ALRB No. 9; J. R. Norton Company (1982) 8 ALRB No. 89). Also destructive of the collective bargaining relationship are declarations of impasse without making counterproposals when other significant issues remain undiscussed. (Martori Brothers Distributors (1982) 8 ALRB No. 23.) Between the Union's initial request to bargain in April 1979 and the hearing date, Respondent did all of these things and more, including refusing to provide the Union with relevant information and instituting unilateral wage changes without notice to the Union. For these reasons and the reasons cited by the ALJ, we find that Respondent violated section 1153(e)

[10/] We note that Respondent delayed over five months in responding to Ben Maddock's original request to bargain and presumably would have waited longer had Maddock not filed unfair labor practice charges on September 19, 1979. We are precluded from finding Respondent's pre-November 21, 1980 conduct to constitute a violation of the Act due to Respondent's pleading the statute of limitations as an affirmative defense. (Lab. Code § 1160.8).) Nevertheless, the delay does shed light on Respondent's attitude toward the Union and its lack of good faith in negotiations. (See Holtville Farms (1981) 7 ALRB No. 15.)

and (a) of the ALRA by engaging in surface bargaining and declaring false impasses during the period between November 21, 1980 and June 10, 1981, the last day of the hearing in this matter.

Discharges of and Refusals to Rehire Protesters

We affirm the ALJ's finding that the nine vine planters who left work after eight hours on June 4, 1981 in protest of extremely onerous working conditions were discharged in violation of section 1153(a). Respondent does not pursue its original contention that the workers quit voluntarily, its own foremen having discredited that defense at hearing. Rather, Respondent now relies on the testimony of discriminatee Jose Moreno that he intended to work" only eight hours when he returned to work on June 5 in an attempt to show that the walkout of June 4 was the first of a planned series of intermittent unprotected work stoppages. However, Moreno also testified that there was no discussion between foremen and the returning strikers about the number of hours they would work when they returned. Moreno's own intention to stop after eight hours was presumably unknown to Respondent and cannot be imputed to the other strikers. Absent some objective indication that the stoppage would be repeated, Respondent was not justified in discharging protesters in response to a single walkout they engaged in only after numerous attempts to present their grievance to management. (First National Bank of Omaha (1968) 171 NLRB No. 152 [69 LRRM 1103], enforced (8th Cir. 1969) 413 F.2d 921 [71 LRRM 3019], Polytech, Inc. '13~2; 195 NLRB 695 ["79 LRRM 1474].)

In the alternative, Respondent contends that it was justified in refusing to reinstate the protesters when they returned to work the day following the walkout because they had already been replaced by employees transferred from other sectors of Respondent's operation. Having found that the protesters were discharged, however, we do not require that they apply for reinstatement before being replaced. Discharged strikers, whether economic or unfair labor practice strikers, are entitled to backpay from the time of their discharge until they are offered reinstatement. (Pappas & Company (1979) 5 ALRB No. 52.)

Refusal to Rehire Protesters

From August through December 1981, Respondent refused to rehire the protesters it had discharged the previous June.[11/] In its exceptions, Respondent argues that the evidence is insufficient to prove that vacancies actually existed at the precise moments when three of the protesters presented their applications. Respondent also argues that four of the protesters were rejected due to lack of seniority.

As noted above, the protesters' status as discharged strikers obviates their need to reapply at any particular time in order to establish their claim for backpay and reinstatement. Respondent's defense, therefore, is only relevant to the analysis

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[11/] Except for Apolinar Hernandez, who applied to work in the harvest in August, the protesters returned in December to prune. Two were hired, worked for a brief time, and then were precipitously discharged. Three never reapplied after the day following the walkout, and one did not apply to prune until January 10, 1982, more than a month after the start of the season and several days after the last hiring.

of the refusals to rehire as separate violations of section 1153(d) and (a), with a remedy independent of the remedy for the discharges.

Respondent's payroll records show that it continued to hire pruners through January 8, 1982. Nonseniority workers were hired after the first day. Except for Guadalupe Soriano, who only sought work on the first day of pruning and was discouraged from further application by foreman Zaninovich, the protesters returned on several consecutive days at the very beginning of the pruning season. Evidence that the protesters applied before a full complement of pruners had been hired indicates to us that work was available when the protesters applied, and we affirm the ALJ's finding that Respondent's claims of lack of seniority and lack of work were pretextual.

Remedy and Order

We shall adopt the ALJ's proposed Order with the modifications that (1) the makewhole period commence on November 21, 1980, six months before the instant refusal to bargain charge was filed, (2) the discharged vine planters be offered full reinstatement to their former or substantially equivalent positions, and (3) the name Socorro Rodriguez, apparently inadvertantly included in the ALJ's Order, be deleted from the list of protesters improperly denied rehire in August and/or December of 1981.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board; hereby orders

that Respondent, Sumner Peck Ranch, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW) with respect to wages, hours, and other terms and conditions of employment of its employees, or the negotiation of an agreement covering such employees, or in any other manner failing or refusing to so bargain with the UFW;

(b) Making unilateral changes in its employees' terms or conditions of employment without giving prior notice to and opportunity to bargain with the UFW concerning such proposed changes;

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

(d) Discharging or refusing to hire or consider for employment or otherwise discriminating against any of its agricultural employees because of their participation in a protected concerted work stoppage, processes of the ALRB, or other protected activities;

(e) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those 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, with respect to said employees' rates of pay, wages, hours of employment, and other terms and conditions of employment, 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 increase granted in May of 1981 and, thereafter, meet and bargain collectively in good faith with the UFW, at its request, as certified exclusive bargaining representative of its agricultural employees regarding such changes;

(c) On request provide the UFW with information regarding its employees' hours worked and other data relevant to collective bargaining;

(d) Make whole its 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 amounts to be computed in accordance with established Board precedents, together with interest thereon to be computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55. The make whole period shall extend from November 21, 1980 until June 10, 1982, and from June 10, 1982 until the date on which Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(e) Offer to the employees listed below, who were

unlawfully discharged on June 4, 1981, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for all losses of pay and other economic losses incurred by them as a result of their discharge by Respondent, such backpay award to be computed in accordance with established Board precedents, together with interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55:

Esteban Chavez
Crecensio Rodriguez
Jose Rodriguez
Socorro Rodriguez
Jesus Rodriguez Moreno
Guadalupe Soriano
Ruben Godinez
Apolinar Hernandez
Armando Lara

(f) Make whole the following employees for all losses of pay and other economic losses incurred by them as a result of Respondent's refusal to rehire them, such backpay award to be computed in accordance with established Board precedents, together with interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55:

Crecensio Rodriguez
Guadalupe Soriano
Ruben Godinez

Apolinar Hernandez Armando

Lara

(g) 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.

(h) 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.

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

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

(k) Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this Order to all agricultural employees employed by Respondent during the period from November 21, 1980, to June 10, 1982, and thereafter until Respondent commences good faith bargaining with the UFW which, results in a contract or bona fide impasse.

(l) 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 times-and places 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.

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

Dated: May 9, 1984

ALFRED H. SONG, Chairman

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Office, the General Counsel of the Agricultural Labor Relations Board (ALRB) issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by bargaining in bad faith with the UFW regarding a collective bargaining agreement and discriminating against employees for leaving work early on June 4, 1981 in protest of onerous working conditions and for filing unfair labor practice charges with the ALRB. 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 farm workers 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 to obtain a contract covering 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 or 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 do anything in the future that forces you to do, or stops you from doing any of the things listed above.

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 November 21, 1980 to the date we begin 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.

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 changes 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 terminate or refuse to hire or consider for employment or otherwise discriminate against any employees, previous employee, or applicant for employment because he or she has exercised any of the above-stated rights or because he or she has filed unfair labor practice charges with the ALRB.

WE WILL offer Esteban Chavez, Crecensio Rodriguez, Jose Rodriguez, Socorro Rodriguez, Jesus Rodriguez Moreno, Guadalupe Soriano, Ruben Godinez, Apolinar Hernandez, and Armando Lara their jobs back and pay them any money they lost because we terminated them, with interest.

Dated: SUMNER PECK RANCH, INC.

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California 93215. The telephone number is (805) 725-5770,

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

SUMNER PECK RANCH, INC.

10 ALRB No. 24
Case Nos. 81-CE-55-D
81-CE-72-D

ALJ DECISION

The ALJ found that Respondent violated the Act by bargaining in bad faith, making unilateral changes, and refusing to provide information to the UFW, starting on September 29, 1980, and by discharging nine vine planters for engaging in a protected work stoppage on June 4, 1981.

The ALJ rejected Respondent's defenses relating to successorship and the applicability of the UFW certification, finding an obligation to bargain stemming from an election, conducted among Respondent's predecessor's (Roberts Farms, Inc. or RFI) employees almost a year before Respondent purchased the vineyard but not certified until RFI stipulated with the UFW to withdraw its objections some four months after selling the vineyard to Respondent. Respondent was aware of the election and pending certification before close of escrow and advanced no credible reason for failing to intervene in the certification proceedings.

The ALJ also found that ALRA and NLRA precedent indicated that a diminution in the scope and size of an operation in a bargaining unit would not relieve the new owner of its obligation to bargain absent changes which could be expected to affect the attitudes and expectations of the employees. Despite the fact that only a minority of Respondent's employees had worked for RFI, the nature of the farming business did not substantially change and the continuity of the operation was sufficient to impose successorship status on SPR. The change in work force was due to a gradual employee turnover rather than any "alteration in managerial direction." The ALJ also found Respondent's successorship argument to be inconsistent and irreconcilable with its conduct in recognizing and negotiating with the Union and allowing union agents to distribute leaflets and resolve grievances.

The ALJ based his finding of bad faith bargaining on five factors: (1) Respondent's unwillingness to offer counterproposals; (2) owner Carolan Peck's inability to accept the role of the Union in negotiations; (3) the lack of communications on a personal level between Peck and UFW representative Schroeder; *(4)* the infrequency of meetings and lack of diligence in arranging them; and (5) the false impasse Respondent declared in December 1980 and May 1981. He rejected, based on the Board's finding in Nish Noroian Farms (1982) 8 ALRB No. 25, that a union is certified under the ALRA until decertified, Respondent's defense that the Union had lost its majority support. He also rejected the factual basis for

Respondent's argument that it was justified in refusing to bargain with the UFW because of the UFW' s failure to bargain in good faith with Respondent.

The ALJ further found that discretionary unilateral wage raises Respondent made in 1981 could not be justified by the workers' expectations or any prior established policy, and that Respondent had unlawfully refused to provide the UFW with available information relevant to collective bargaining.

Finally, the ALJ found that Respondent unlawfully discharged nine vine planters on June *4,* 1981, in retaliation for their protected refusal to work after eight hours. The ALJ also noted that, even if there had been no discharge, the protesters should have been rehired the following day since their replacements, in-house transfers, were not permanent. When five of the protesters sought rehire at the beginning of the next pruning season, they were rejected because of the charges they had filed with the ALRB following their June discharges. The ALJ rejected Respondent's defense that the protesters would not have been hired anyway because of lack of seniority or lack of work, finding the defenses to be pretextual.

BOARD DECISION

The Board affirmed the ALJ's rulings, findings and conclusions with modifications and issued a modified version of the ALJ's recommended Order. Specifically, the Board rejected Respondent's argument that the June 1978 certification did not bind Respondent because it followed a stipulation to withdraw objections to which Respondent, then owner of the property, was not a party. The Board held that a certification relates back to the election which it certifies. Due to owner Peck's admitted awareness of the pendency of the certification determination, she could have intervened in those election proceedings (see Dynamic Machine v. NLRB (7th Cir. 1977) 552 F.2d 1195), and waived the certification argument by failing to raise it during negotiations.

With respect to Respondent's successorship defense, the Board found that the defense was waived by Respondent's failure to assert it in response to the Union's request to bargain or at the time of Respondent's refusal to bargain. The Board rejected Respondent's argument relating to diminution of the bargaining unit on the basis of evidence that the sale of the Wasco vineyard to Respondent resulted in the breaking off of the unit at an "obvious cleavage line," citing Stewart Granite Enterprises (1981) 255 NLRB 569, 573 [107 LRRM 1182], such that the change in overall scope of the Employer's operation would not be noticeable to members of the new unit. The Board also rejected Respondent's defense of good faith doubt of majority support, based on the statutory differences cited in Nish Noroian Farms (1982) 8 ALRB No. 25, as well as the inadequacy, even under NLRA precedent, of the factual basis alleged by Respondent.

The Board approved the ALJ's reasons for finding Respondent's conduct in negotiations to have been in bad faith and relied, in addition, on background evidence of delays in responding to the Union's original request to bargain.

Finally, the Board rejected Respondent's argument that one discriminatee's testimony that he intended to continue stopping work early constituted evidence that the stoppage was part of unprotected intermittent strike activity. The Board also affirmed the ALJ's finding that Respondent's lack of seniority and lack of work defenses to its refusal to rehire the protesters were pretextual, noting that the protesters, discharged strikers, applied before a full complement of pruners had been hired and continued to apply after Respondent began hiring nonseniority workers.

The Board modified the ALJ's recommended Order to limit the makewhole period to six months before the filing of the refusal to bargain charge, to order full reinstatement for the discharged vine planters, and to delete one name which the ALJ had inadvertantly included in the Order.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	}	Case Nos. 81-CE-55-D
	}	81-CE-72-D
SUMNER PECK RANCH, INC.,	}	
	}	
Respondent,	}	
	}	
and	}	
	}	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	}	
	}	
	}	
Charging Party.	}	
	}	

Appearances:

Manuel M. Melgoza
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for Respondent

Before: Marvin J. Brenner
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

MARVIN J. BRENNER, Administrative Law Judge:

This case was heard by me on April 12, 13, 14, 15, 16, 19, 20, June 7, 8, 9, and 10 in Delano, California. The Complaint was based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter referred to as "Union" or "UFW") on May 21, 19R1 (Charge No. 81-CE-55-D) and June 5, 1981 (Charge No. 31-CE-72-D). A first Amended Complaint was filed on April 5, 1982.

All parties were given a full opportunity to present evidence and participate in the proceedings;[1/] the General Counsel and Respondent filed briefs after the close of the hearing.

Upon the entire record,[2/] including my observation of the demeanor of the witnesses and after careful consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent was engaged in agriculture in the State of California within the meaning of section 1140.4(c) of the Agricultural Labor Relations Act (hereafter the "Act"), as was admitted by Respondent in its Answer. Accordingly, I so find.

Respondent did not admit but I find that the UFW is a labor organization within the meaning of section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The First Amended Complaint raises two main areas of alleged violations, each independent of and unconnected with the other. First, it charges that Respondent is the successor to Roberts Farms, that it entered into contract negotiations with the UFW but that, beginning on or about September 29, 1980, it has failed to bargain in good faith, not only at the negotiating table, but also by refusing to provide relevant information and by unilaterally raising wages without notice to or bargaining with the UFW. And second, it alleges that on or about June 4, 1981, Respondent discharged and thereafter refused to rehire nine agricultural employees for engaging in a walkout to protest their

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1. Respondent made a "Motion for Directed Verdict" at the close of General Counsel's case, and I reserved judgement until the time the Decision was issued. I hereby deny the Motion.

2. Hereafter, General Counsel's exhibits will be identified as "G.C. Ex___"; and Respondent's exhibits as "Resp's___". References to the Reporter's Transcript will be noted as "TR.___(Arabic numeral), p.___".

working conditions. The above conduct is said to be in violation of sections 1153(e), (c), (d), and (a) of the Act.

Respondent denies these allegations and has raised several affirmative defenses, including bad faith bargaining on the part of the UFW.

III. THE BUSINESS OPERATION

A. General Background

Respondent, Sumner Peck Ranch (hereafter "SPR")/ is owned by Carolan Peck and her eight children. Mrs. Peck is president of the company, and the general manager is Michel Noblatt who, though he has no ownership interest, manages the corporation on a 50/50 basis with Peck.

Peck testified that the main office of the corporation is located around Arvin, Kern County, California. From there she and Noblat manage all the SPR properties including the Wasco ranch, which is the subject matter of this case. It is also from this main office that checks for the Wasco employees are issued and where the Wasco time and payroll records are maintained.

SPR owns at least two different ranches in Kern County, one near Arvin called DiGiorgio, where produce and grapes are presently farmed, and the other located in the vicinity of Wasco/McFarland, California, where only grapes are grown. The two ranches are approximately 45 minutes apart by car. Peck testified that generally, there was no interchange of crews on these two ranches, except occasionally for pruning (of the same crop) and that the work force was usually kept separate.[3/] According to Peck, the only real connection between the two farms was top management consisting of Noblat, John Zaninovich, a grape supervisor, and she.

B. The Purchase of the McFarland and DiGiorgio Ranches; the Operation of the Property Prior to the Close of Escrow

Roberts Farms (hereafter "RF") was a large farming operation that had been experiencing financial difficulties so it filed for reorganization under the Bankruptcy Act. SPR purchased both the McFarland and DiGiorgio ranches through these bankruptcy proceedings. Escrow closed on the DiGiorgio property on November 31, 1977, and on the Wasco/McFarland ranch 4/ on January 13, 1978. However, Peck testified that SPR actually took over complete management of both these ranches before the escrow closing dates —

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3. The previous owner, Roberts Farms, likewise engaged in very little employee interchange between these two properties.

4. RF identified this property as part of its "McFarland/Porterville" division. Peck calls that portion of the property she purchased the "Wasco" property. When referring to the property during the time it was owned by RF, I shall reference it "McFarland"; and when referring to it under SPR management or ownership, I shall call it "Wasco."

RF had no management input during this time5/ and commenced pruning at Wasco because RF, owing to its lack of funds, had neglected to do so. SPR also prepared the ground at DiGiorgio for potatoes and carrots because RF had likewise failed to perform this task.

William (Billy) Newhouse, the RF and later SPR weed and pest control manager, testified that pruning was commenced sometime in December at Wasco, which would have been the normal pruning time, and would have involved between 50-100 workers.6/

In addition, Enrique Davila, a rebuttal witness for General Counsel, testified that he was employed as a pruner for RF in December of 1977 and worked on the property later puchased by SPR. Davila testified that there were a total of 3 crews so employed, each with 25-30 crewmembers, and that after title passed, he continued to prune for SPR. According to Davila, during February of 1978 he recalled recognizing many of the same pruners working for SPR that had previously worked for RF.

The payroll records reflect that some pruning work was, in fact, performed before title changed hands and also, as Newhouse testified, that various other jobs associated with the vineyard were likewise being done on the Wasco property during this time. For example, between the last of November, 1977, and January 15, 1978, the planting of vines, irrigation, tractor work, fixing pipe lines, burning weeds, spraying, and miscellaneous shop services were performed on the property. (Resp's 8-14).7/

Finally, Newhouse also testified that within this same period labor contractors more than likely were used to supply workers for the land that was later purchased by SPR.

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5. Respondent's own wintesses differ on this point. Noblat denied SPR had the right to control how work was done at Wasco during the escrow period and testified that it did not take over the management from RF prior to the closing.

6. There is also a conflict in the testimony between two of Respondent's four witnesses on this point, as well, with Peck and Newhouse testifying there was pruning at Wasco before the close of escrow, Noblat and Lazarus testifing there was not.

7. As to who paid for any work performed before title transferred, Noblat testified that both parties executed an agreement covering the period of December 1 through January 15 in which RF agreed to pay the expenses during that time, and SPR agreed to reimburse it for all costs of the operation such as, for example, the tilling of the land for grapes. While denying that pruning was involved, Noblat admitted that quite a few workers performed some of the other jobs and that the bill for the work at both Wasco and DiGiorgio was sizeable.

C. The Operation of the Property Subsequent to the Close of Escrow

1. Crops Grown

Peck testified that at the time she was considering buying the McFarland property from RF, that property was entirely in wine grapes except for 160 acres of open land. Peck estimated that wine grapes comprised 95% of the land bought and further testified that she had increased the grape acreage to somewhere between 95-99%.8/

However, between 1978-1981 Peck, because of what she perceived as the public's preference for white over red wines, replanted over 300 acres with white grapes and also grew white grapes on the 160 acres that was open ground at the time of the purchase.9/ But Peck acknowledged that the harvesting techniques for wine grapes, red or white, were the same. Peck also testified that the pruning (spur) process both before and after the escrow closing was basically the same too.

Newhouse agreed. He testified that he observed no change in the nature of the crops between the time RF sold the land to SPR and the time of his departure in August of 1978 -— that the irrigation, pruning and pest control were the same.

2. The Work Force

Newhouse testified that at the time of the 1977 McFarland election the major portion of the workers employed on RF's properties, as depicted on Respondent's Exhibit 17A, were working in grapes.10/ Other crops were much less labor intensive. For example, Newhouse testified that only about 25% of RF's total work force was devoted to the almond crop, RF's second largest crop in terms of acreage (Resp's 17A); i.e., only 125 workers at peak as compared to over 500 at peak that would be employed in the grapes. As a matter of fact, Newhouse further testified that sometimes during the September-November peak period of the grape harvest,

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8. Peck planted a small number of acres in table grapes in 1979 and 1980 but those will not be ready for 4-5 years.

9. Peck testified that she unsuccessfully attempted to grow cotton on these 160 acres and that grapes were planted in February of 1979 so that all of the Wasco property is now in grapes, either wine or table.

10. Newhouse testified that as much as 75% of the grapes picked would have been sent to RF's winery for processing. This winery was operated as a separate entity from the farm, and the winery processed the grapes of growers besides RF. The winery workers did not do any work in the juice harvest and in fact, did no farm work at all. They also had their own union which was not affiliated with the UFW.

there might be 10 times as many grape workers as in almonds. And Newhouse also testified that during the growing, non-peak season, almonds would likewise require substantially fewer workers per acre than grapes. As a further example, Newhouse testified that during the pruning season (December-February, sometimes March) as many as 5-10 times as many workers would be employed in grapes as in almonds.

Peck testified that at the time she took over management of the RF property, before the close of escrow, it was between the harvest and pruning periods and no significant work was being performed on the property. To do the pruning, she decided to retain on her payroll those RF employees that had been working there and to hire others from the area (McFarland, Wasco, and Delano); and all these workers continued to be employed after the close of escrow, as well, until the pruning work slowed down and layoffs commenced around March 12, 1978. Peck testified that none of the workers hired during the escrow period were fired after SPR took over the ownership.

Newhouse also testified that during the time he was working for RF, most of the workers at the McFarland ranch were from the McFarland/Wasco/Delano area and during the time he worked for SPR, most of, those employed continued to come from those areas.

As has been mentioned, SPR paid for the work performed before the close of escrow, between late November, 1977 and January 15, 1978. During this almost two month period, a total of 36 different workers were employed irrigating, planting vines, driving tractors, fixing pipe lines and doing other work connected with keeping the vineyard in shape._11/ (Resp's 8-14.) Many of these were most likely steadies. (A review of the statistics in evidence 12/ shows that of this number, the majority (24) had been

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11. In addition to these workers, according to Newhouse, labor contractors were supplying workers during this same period.

12. Not introduced into evidence but attached to Respondent's Brief as Brief Exhibit 1, Parts A-E, were copies of printouts from a computer analysis of SPR's employees at various times as compared to RF's employees. Respondent makes frequent use of the statistics gathered from these printouts in its Brief. (Resp's Brief, pp. 108-116.) The UFW filed a "Motion to Strike Exhibits of Respondent's Post-Hearing Brief" on the grounds that said printout exhibits were evidence not authenticated, not based on the personal knowledge of any witness, and not subject to cross-examination. As such, the UFW argued they are hearsay. Respondent filed a "Points and Authorities and Declaration in Opposition to Motion to Strike" arguing that said exhibits were not evidence but merely "commentary on evidence which was admitted," and were within the scope of matters which may be included in a brief

(Footnote continued-----)

working for SPR on January 31, 1977, the date, according to the testimony of William Quinlan, when the petition for an election was filed (Compare Resp's Exhs 8-14 with Resp's 38 and especially 39).) Twenty-five workers were employed the week ending December 4, 1977 (Resp's 8), and the work force remained between 18-23 for the remaining 5 weeks dropping to 15 the last week before escrow closed. (Resp's 14).

However, following the close of escrow, SPR dramaticlly increased its work force —- occasioned by the need for pruners — the first week (ending January 22, 1978) to 121 workers.14/ (Resp's 4A). Of this number, it appears that 41 or approximately 33.8% had formerly worked for SPR either in January, 1977 and/or during the period of escrow, December, 1977.i_4_/ (Compare Resp's 4A with Resp's 39 and 8). The percentages did not vary very much after that. For example, by February 5, 1978, approximately one year after the date of the 1977 election, 121 workers 15/ were still employed, of which

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(Footnote 12 continued----)

since the "very purpose of a post-hearing brief is to comment on the evidence." The Motion to Strike is granted. These exhibits are not just comments on the evidence but are new documents presented to statistically bolster support for Respondent's continuity of work force argument. As such, the adverse parties must be allowed the opportunity to cross-examine the witness who prepared the documents. See Massachussett's Bending Co. v. Industrial Accident Commission (1946) 74 Cal.App.2d 911, 170 P.2d 36, cited with approval in Nick J. Canata (1983) 9 ALRB No. 8. If the documents are already in evidence, as Respondent claims, then this ALJ will analyze work force continuity from those documents and not from new ones not yet introduced. This ALJ does not recall, as Respondent claims, any off-the-record discussion in which it was specifically agreed that Respondent could submit a series of lengthy and voluminous computer printouts as exhibits to its post-hearing Brief.

13. This figure does not include the 6 foremen and crew bosses all of whom were employed by RF and later SPR and whose names appear on the exhibits, as follows: Mike Armendaris, Robert Garcia, Armando Jimenez, Luis Leon, Bennie Vasquez and Carmen Vasquez (Resp's 4I).

14. Arcadio Mirmontes (Resp's 8-14) is the same person as Arcadio Miramontes (Resp's 39). The last name of Angel Salvaza (Resp's 8-14) is spelled "Savalaez" on Respondnet's 39. Alejandro Becerra (Resp's 8-14) appears as "Becerra Alejandro" on Respondent's 38. Andiez Chavez (Resp's 11) is the same person as Andres Chavez (Resp's 39).

15. Again, this figure does not include 7 foremen and crew bosses who worked both at RF and SPR as follows: Mike Armendaris, Robert Garcia, Armando Jimenez, Luis Leon, Gerardo Vallejo, Bennie Vasquez and Carmen Vasquez. (Resp's 4I).

37 had worked for RF at the time of the election or approximately 30%. (Compare Resp's 4C with Resp's 39). However, the work force did reach 140 16/ on the week ending February 26, 1978 (Resp's 4F). Of this number 46 or 32.8% had worked for RF in either January, 1977 or November/December 1977_17 (Compare Resp's 4F with Resp's 39 and 8-14). 18/

Peck testified that after she purchased the property, she knew she would have to hire a manager for the Wasco ranch who was experienced in the growing of grapes so she at first hired a Joe Agajanian to be followed -- after 6-8 months -- by John Zaninovich. Zaninovich was responsible for the growing of grapes at both the Wasco and DiGiorgio ranches.

Neither Agajanian nor Zaninovich had previously worked for RF, but many of the other supervisory personnel hired by Peck had, as has been suggested above. For example, Peck testified that RF's foremen, Ernie Garcia, Mike Armendaris, and Robert (Bobby) Garcia (who ran the shop), worked with her before the close of escrow and were hired by her after title passed to SPR. In addition, other foremen at RF who were hired to be foremen at SPR were Benny Vasquez, Gilberto Chavez, Luis Leon, and Monte Jimenez.19/

And of course, a top management official, Billy Newhouse, worked in the same position — chief entomologist, responsible for

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16 . The following foremen or crew bosses have again been excluded: Ernest Garcia, Mike Peck, Mike Armendaris, Robert Garcia, Armando Jimenez, Luis Leon, Mario Ortiz, Gerardo Vallejo, Benny Vasquez, and Carmen Vasquez (Resp's 4C).

17. This aforesaid statistical analysis for 1978 is not meant to include the employees of labor contractor Frank Ramos that Ken Lazarus testified were hired after the close of escrow for 3-4 weeks until such time as SPR had sufficient numbers to finish the job itself. These workers would not be included on SPR's regular payroll records (Resp's 4A-4H) introduced at the hearing.

18. These percentages are based upon comparisons between the work force in early 1978 (Resp's 4A-4H) with the early 1977 work force (Resp's 39). One problem with the 1977 exhibit is that there is no way of knowing whether the workers listed therein were eligible to vote in the 1977 election. The parties, apparently through some confusion, (TR 9, pp. 79-80), failed to agree to or follow up on the introduction of the official 1977 eligibility list.

19 . Abundio Lopez is a present foreman at SPR and was employed at RF. However, the record is not entirely clear that Lopez was employed at RF as a foreman.

all weed and pest control —- at both RF and SPR, later returning to RF. 20/

3. The Equipment

Ken Harrison was office manager and responsible for small equipment purchases at Wasco between March of 1978-May of 1981 and testified that among the items purchased from RF and used at Wasco were large and small tractors, jeeps, a butane truck, two pickups, grape harvesters, gondolas, (7 or 3 which were used for the grape harvest), a small mobile weed sprayer, radio equipment for the vineyards, portable toilets, vineyard discs, and electric motor pumps used for irrigation. (Peck added French plows to the list.) But Harrison also testified that RF's equipment was in a grave state of disrepair and much of it did not run at all; nor was it serviceable. According to Harrison, some equipment was repaired but would continue to break down and ultimately, the Company decided to fix some of the better pieces and to acquire new equipment including, in the spring of 1978, 10 sulphur tractors and 10 Massey-Ferguson 230's to be used in the fall grape harvest. Also pruchased were a manure spreading truck, 5 Randall spray rigs, French plows, new pickups, another disc and 2 more pumps for irrigation.

Harrison acknowledged, however, that the company continued to use a lot of the old RF equipment for quite a long time — at least for more than a year, sometimes for as long as 2-3 years. In fact, according to Harrison, RF's equipment continued -to be repaired and used during the entire period he worked there.

Harrison also testified that the purchased replacement equipment was of the same type that had been originally bought from RF.

4. The Shop, Shed and Houses

Also included in the sale of the McFarland property was a shop building and a shed in which chemicals were stored. Newhouse testified that after the sale, both buildings were used by SPR for storing things such as the grape harvesters, dusting sulphur, and the herbicide equipment.

Harrison tetified that inside the shop there was a basic welder, an air compressor, and possibly a cutting torch and grinder. Thereafter, SPR added a drill press and hydraulic jacks.

Peck testified that there also existed on the property two houses, one of which was occupied by Abundio Lopez, presently an SPR foreman.

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20. Newhouse had worked continuously for RF from 1970 until SPR purchased the property at which point Newhouse commenced working at SPR. Approximately 5 months later, Newhouse returned to his old position at RF.

5. The Benefit Programs

Though Peck testified that she did not send out any announcement of new ownership or changes to be anticipated, there was testimony that the new owners did introduce certain benefit programs._21/ Ken Lazarus testified that in January of 1978, right after SPR purchased RF's property, SPR instituted the same benefit programs in force at its other properties, as follows:

a. Medical Plan - SPR contributed 75% of the monthly premium. However, there was a 3 month waiting period to be eligible, meaning that pruners and grape harvesters would never qualify because their season never lasted that long. Nor would the plan cover employees hired through a labor contractor. Basically, the program only covered approximately 25% of SPR's employees, steadies such as tractor drivers. (15), irrigators (15-20), and shop employees. There was an attempt to remedy this shortcoming when Respondent offered an additional plan (Resp's 7), employer funded, in July of 1979 in which eligibility was attained after an employee worked 80 hours during any month. Lazarus testified that all employees who were not on the other medical plan qualified under the new plan.

b. Pension Plan - It was also employer funded, but employees could only be eligible after 1,000 hours of work or approximately 6 months of employment. Labor contractors' workers were not eligible.

Lazarus did not know of his own personal knowledge whether during 1978 the workers were even notified they were eligible for benefits under either the pension or the 1978 medical plan, but he testified he gave information on the plans to the crew foremen.

c. Holidays - In January of 1978, SPR gave its employees July 4, Thanksgiving and Christmas. The workers of labor contractors were not eligible.

d. Vacation Pay - Lazarus testified that sometime in 1979 employees with 1,500 hours of service who had worked for the ranch 1-4 years received 2% of their gross wages for the year; employees who had worked 5 to 9 years received 4%; and employees with 10 or more years received 6% as vacation pay. As a result of this program, vacation pay was paid for the first time in 1980 for 1979 accrued vacations.

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21. It is not clear if these were new programs since Lazarus did not know if RF had instituted any benefit plans. Newhouse testified that the Teamsters had a labor contract at DiGiorgio, but it is uncertain who it covered, what ranches, when it expired, and whether it contained any benefit programs.

6. The Improvements

a. Red Grapes to White Grapes

Peck testified that when she bought the property, its grape acreage was 3/4 red grapes and /4 white grapes and that for the next 2-3 years she authorized the removing of existing vines 22/ and their replacement with new white grape varieties so that at the time of the hearing the ratio had shifted to 50/50. Peck also testified that the work required to be performed on new vines was more arduous and expensive than for old vines, but she acknowledged that the work did not necessarily require any greater expertise or more skilled labor.

b. The Wells

Peck testified that she went over all the existing wells on the Wasco property and found a number of them below par, and one, completely inoperative. These wells were used for grape irrigation and were adjacent to vineyards. Peck testified that shortly after the close of escrow, she repaired the wells and was able to continue to farm the vineyard; it was not necessary to pull out any of the vines.

c. The Ripping up Process

Peck testified that the cultivation of grapes caused a compacting of the ground which was a harmful condition and that she belived in using caterpillars to "rip up" the ground periodically, which she did in November of 1978. However, Peck added that the procedure was not necessary to an ongoing grape harvest operation; and that except for another 400 acres in the fall or winter of 1981, she had done very little of it.

d. The Office

Newhouse testified that while he was working for SPR, an office was installed at the shop by moving a trailer there and equipping same with furniture.23/

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22. Peck did not believe that any of the existing grapes on the property were torn out or removed during 1978.

23. When RF owned the property, it operated an office in McFarland, about 12 miles away from the shop, which was headquarters for its entire state-wide operation. The Porterville properties also had their own branch office.

IV. THE UFW'S CERTIFICATION ON ROBERTS FARMS' PROPERTY

The UFW had been seeking to represent the workers on both the McFarland and Digiorgio properties before the sale of same to SPR. The ALRB had conducted an election at DiGiorgio in 1975 (6 ALRB No. 5) and at the McFarland/Porterville division on February 7, 1977. At the time of SPR's purchase of both properties in late 1977/early 1978, no certification had occurred as the matters were still being litigated. Peck testified that just before escrow was to close at Digiorgio (November 31/ 1977)/ she learned there had been a representation election at that ranch, as well as at the McFarland property. Both sales proceeded.24/

On June *27*, 1978, the UFW was certified as the exclusive bargaining representative for "all agricultural employees of Roberts Farms in the McFarland and Porterville divisions." (G.C. Ex 1-F.) Pursuant to a stipulation between RF and the UFW, RF's objections to the election were dismissed,25/ and the UFW withdrew its claim of representation to RF's Kingsburg 26/ and Viktoria Orchards 27/ divisions. (G.C. Ex 1-F; Resp's 33.)

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24 . On November 12, 1979, SPR filed a "Notice of Entry of Appearance" in the DiGiorgio challenged ballot proceeding, and 3 days later filed a document entitled, "Intervenor Sumner Peck Ranch's Exceptions to Amendment to Challenged Ballots; Alternative Petition to Dismiss Petition for Certification, Case No. 75-RC-188-F." In this pleading, Intervenor, SPR, took exception to several of the recommendations of the Fresno Regional Director regarding his Challenged Ballot Report issued on October 19, 1979. In its alternative Motion to Dismiss one of the grounds raised was that there was *a* possibility that SPR was not a successor to RF. SPR stated in its pleading: "Indeed, given the substantial operational and structural changes made by Sumner Peck Ranch, and the fact that the property was purchased out of bankruptcy, there is a substantial likelihood that Sumner Peck Ranch will not be found to be a successor to Roberts Farms' bargaining obligations." (P. 10, fn. 1.) SPR's Exceptions were filed by the same law firm that represents it in the proceeding herein. It does not appear that Respondent ever filed any pleadings with respect to the McFarland/Porterville election.

25. The parties stipulated that the UFW received a majority of votes cast by employees in the election held on February 7, 1977, at the McFarland and Porterville divisions (Resp's 33).

26. The parties stipulated that the Kingsburg unit was, at the time of the election, a separate division of RF and non-contiguous with the McFarland and Porterville divisions (Resp's 33).

27. The parties further stipulated that the UFW was withdrawing its claim to Viktoria Orchards because the property had been sold and farther provided that "(f)uture representation will he based upon a new petition and a new election, if any." (Resp's 33.)

V. THE LAND SUBJECT TO THE CERTIFICATION

Newhouse testified that RF owned land in the following areas: McFarland/Porterville (Wasco ranch), Arvin (DiGiorgio ranch), Kingsburg (California Mission Orchards), and Merced (Cal-Mission Orchards). According to Newhouse, it was the location of the property and not the crop grown that determined the division within RF's family. Thus, though grapes were the largest crop grown in the McFarland/Porterville division in terms of acres, there were, as has been shown, various other crops grown within that division, as well. (Resp's 17A.)

According to Newhouse, as of the time of the February, 1977 union election, the McFarland/Porterville division consisted of a large geographic area as represented by Respondent's Exhibits 17A-17D._28/ He also testified that Respondent's Exhibit 17A represented the same area as General Counsel's Exhibit 36,29/ the map that UFW representative Ken Schroeder testified had been given to him by RF's personnel during the UFW negotiations with that company around September of 1978.30/ Referring to said General

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28. These maps include all the McFarland/Porterville property that was owned or operated by RF, regardless of whether same was actually being farmed in any way at the time. There are four separate maps because some of the areas are non-contiguous. For example, Respondent's Exhibit 17B is an area located approximately 12 miles west of McFarland, and Respondent's Exhibit 17C is 160 acres of land located in the Rosedale area west of Bakersfield, about 20 miles from DiGiorgio. Both Respondent's 17B and 17C were considered part of the McFarland division. Respondent's 17D is an area northwest of Porterville, roughly half way between Porterville and Visalia; it was considered part of the Porterville division. It also should be noted that some of the acreage listed on Respondent's Exhibit 17A as belonging to RF had been sold by it to others prior to the certification of the 1977 McFarland election; e.g., at least 200 acres of walnuts in Farmersville and 1,100 acres of vineyards in the Porterville area.

29. Newhouse testified that there were 4 ranches RF owned which appear on General Counsel's Exhibit 36 and that SPR bought one of them, the R & B ranch, coded as parcel No. 277. He also testified that there was no other property in the McFarland area sold to SPR that was not depicted on this map. But another witness for Respondent, RF's head accountant, Betty McLeod, testified that the sale also included one additional piece of property that adjoined parcel No. 277, which was coded as parcel No. 777 and may have included around 500 acres (See Resp's 16).

30. Schroeder testified he originally thought he was negotiating over land RF still owned following their various sales of other properties. Comparing General Counsel Exhibits 35 and 35, Schroeder testified that SPR bought one-half to two-thirds o McFarland property.

Counsel Exhibit, Newhouse testified that the ranch sold to SPR was approximately 3,800 acres (Noblat had testified it was 3,300) 31/ and was totally planted in grapes right before the sale except for 160 acres of open ground. In addition to these acres, RF was also farming in this same 1977 period another 4,325.7 acres of grapes. (Resp's 17A.)

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31. Newhouse testified that the acreage in dark green depicted on Respondent's Exhibit 17A represented that 3,800 acre McFarland portion owned and farmed by RF in 1977 and sold to SPR in January of 1973. McLeod testfied that (as of November 18, 1977} RF was farming grapes on property later sold to S?R but her computations of the actual number of acres involved was approximately 300 acres less than that of Newhouse (See Resp's 16, parcel numbers 277 and 777.)

VI. THE CERTIFICATION ISSUE — ANALYSIS AND CONCLUSIONS OF LAW

Respondent argues that it has not been shown that the Wasco property purchased by SPR was, in fact, covered by the certification in Case No. 77-RC-2-F, that any bargaining relationship established between Respondent and the UFW was voluntary, in contravention of section 1153(f) of the Act, and therefore, unenforceable, and that as a result, Respondent was under no legal duty to bargain. According to Respondent, RF's certification only described its employees in its McFarland/Porterville Division and did not specify if it went to all the properties within those divisions or whether it was directed to those divisions as they existed at the date of the certification or at the date of the election.

Essentially, Respondent contends that it was not a successor because the unit it bought was no longer an appropriate one for purposes of any bargaining obligation. According to Respondent, it is not arguing that anytime less than an entire bargaining unit is sold the purchaser is thereby relieved from bargaining but that in this case, the nature of the employing industry has significantly changed. (Resp's Brief, p. 87). Thus, the fundamental question here is what kind of business did SPR run after the sale.

To begin with, it is clear that the duty to bargain is not dissipated by the fact that the purchaser has bought less than the seller's entire property. The ALRB has held that a reduction in the size of the bargaining unit does not necessarily render the unit inappropriate; what is necessary is to determine from the totality of circumstances whether the change in ownership has affected the essential nature of the business. Rivcom Corporation and Riverbend Farms, Inc. (1979) 5 ALRB No. 55. The Board based its conclusion upon a substantial body of NLRB case law which holds that a much reduced bargaining unit may serve as a miniature of the former unit, even where it is not certain that the majority of the employees at the successor organization support the union. As made clear in Zim's Foodliner, Inc. v. N.L.R.B. (7th Cir. 1974) 495 F.2d 1131 [85 LRRM 3019] cert. denied (1974) 419 U.S. 838 [87 LRRM 2398] (where 2 grocery stores, part of an 11-store bargaining unit, were sold to 2 separate purchasers):

> . . . the courts and the Board have imposed the bargaining obligation in situations where mathematics alone might indicate a reasonable basis for doubting continued majority. Numerous cases hold that employee turnover, standing alone, does not give rise to good faith doubts regarding a union's majority status. See, e.g., NLRB v. Bachrodt Chevrolet Co., supra at p. 963; NLRB v. John S. Swift Co., supra, at p. 345; NLRB v. Little Rock Downtowner, Inc. 8 Cir. 414 F.2d 1084, 1091, 72 LRRM 2044

(1969). Likewise, mere diminution in the employee complement of the bargaining unit does not relieve the successor of his duty to bargain. Rohlik, Inc. 145 NLRB 1236, 55 LRRM 1130 (1964) (successor's work force one-third as large as predecessor's); Western Freight Association, 172 NLRB 303, 68 LRRM 1364 (1968) (work force reduced from 500 to 110); Royal Brand Cutlery Co., 122 NRLB 901, 43 LRRM 1222 (1959) (work force reduced from 296 to 134). Indeed, this court has enforced a Board bargaining order where the successor retained only 8 of its predecessor's 25 employees. NLRB v.Armato,7 Cir., 199 F.2d 800,31 LRRM 2089 (1952). . . . (85 LRRM at 3026).

In N.L.R.B. v. Band-Age, Inc. (1st Cir. 1976) 534 F.2d 1 [92 LRRM 2001] cert. denied (1976) 429 U.S. 921, cited in Rivcom Corporation and Riverbend Farms, Inc., supra, the predecessor employer had gradually curtailed operations from 150-170 employees in 1972 to around 80 for most of 1973 with only 25-30 at the end of the year at which time it went out of business. Before doing so, it sold some of its business assets to Band-Age which started up a reduced operation consisting of only 37 employees.

The company had argued that it ought not to be held a successor because the scope of its operations" was far smaller than that of its predecessor in both the size of its work force and the number of its products. However, the Court found that though the business had shrunk and there were fewer employees, the essential nature of the enterprise and the work performed by the employees were the same; successorship was found.

The company had also argued that there was no longer any unit support for a labor union, but the Court held that "... the diminution of the enterprise did not represent changes so substantial from a labor-relations prespective as to compel the rejection of the presumption of a continued majority." 92 LRRM at 2004-2005, citing Zim's Foodliner, Inc. v. N.L.R.B., supra. See also, Nazareth Reg. High School v. N.L.R.B. (2d Cir. 1977) 549 F.2d 873 [94 LRRM 2897] (where an independent local community group took over the management of one high school that had been part of a nine high school bargaining unit and was found to be a successor).

In Fabsteel Company of Louisiana (1977) 231 NLRB 372, enf'd (5th Cir. 1979) 587 F.2d 689, 100 LRRM 2349, a certified unit consisted of an employer's seven geographically separated plants. Thereafter, the employer sold one of its plants. The Board found successorship:

> . . . Normally slight increases or decreases of employees in a bargaining unit are presumed not to affect the majority status of the representative. It would appear that the presumption of majority accorded a representative as to an overall unit of plants would be a presumption of equal distribution throughout the whole unit and that the

presumption would apply equally as to the individual plants involved. . . . (231 NLRB at 378).

And in N.L.R.B. v. Middleboro Fire Apparatus, Inc. (1st Cir. 1978) 590 F.2d 4 [100 LRRM 2182], also cited in Rivcom Corporation and Riverbend Farms, supra, the purchaser's work force was reduced from 100 workers to 10. Yet, successorship was found as the Court held that reductions in the size of the bargaining unit was not determinative and did not render the unit inappropriate where there was no reason to believe that such a reduction would significantly affect employee's attitudes. See also, Boston-Needham Industrial Cleaning Co., (1975) 216 NLRB No. 12, [88 LRRM 1249], enf'd (1st Cir. 1975) 526 F.2d 74, [90 LRRM 3058] (successorship found where a buyer, not a part of a multi-employer association, bought a maintenance service employing only around 32 employees that had been part of the association which had collectively covered over 3,000 employees, the Court holding that slight changes which did have the effect of diminishing the unit's size and the scope of its duties would not significantly affect employee attitudes); and Quaker Tool & Die, Inc. (1967) 162 NLRB No. 124, [64 LRRM 1202] enf'd(6th Cir.1968)403 F.2d 1021 (successorship found where purchaser bought 1 of 2 plants of predecessor but continued the same basic operation and was aware of the former certification).

As pointed out above, under the ALRB the critical inquiry is always the nature of the change in the successor's business. If, the changes have been substantial to the extent where employees' attitudes and expectations may have been affected, than, in balancing the interests, it would only be appropriate to relieve the new agricultural employer of any duty to bargain with the previously certified union. On the other hand, if the purchaser of agricultural property, albeit a smaller portion than what was farmed before, runs the same basic kind of operation, grows the same main crop, processes it in the same way, uses the same equipment, hires the same supervisors, and employs the same kinds of workers, who possess the same skills, from the same geographic labor pool as before, the certification will pass and successorship will be found.

Here, SPR was seeking a vineyard to buy and found a large one consisting of 3,300-3,800 acres on RF's McFarland ranch where grapes was the largest crop grown and harvested and where grapes had already been planted on almost all the acreage. SPR purchased this land with the intent of continuing to grow and harvest grapes, which it did. To this day the precentage of that land RF had previously devoted to wine grapes (approximately 95%) has remained the same under SPR. Though some of those grapes have changed from red to white, this has had no significant effect upon the farm operation, the harvesting, purning, irrigation, and pest control remaining basically the same. This farm was a grape operation before the transfer of title; it is still a grape operation,

I conclude that the reduction in the size of the bargaining unit here did not render the unit inappropriate as the totality of

circumstances supports the view that the change in ownership from RF to SPR did not affect the essential nature of the business. Rivcom Corporation and Riverbend Farms, Inc., supra.

Though Respondent denies it/ the essence of its argument would ultimately limit successorship to only those cases where all the property subject to the certification was sold to the new purchaser; anything less (or more) than this would constitute an invalid imposition of an inappropriate unit. The application of this rather limited view of successorship would mean that the employees' free choice of bargaining representative could easily be defeated anytime by the simple expedient of allowing the predecessor to sell to the would-be successor land constituting a portion less than that property upon which the original certification rested. This would happen regularly in an agricultural setting as it is well recognized that "changes occur with unusual frequency in the ownership of property interests in land and crops." Highland Farms and San Clemente Ltd. (1979) 5 ALRB No. 54, at p. 12.

In truth, what actually underlies Respondent's basic approach to whether RF's certification should apply to it is its feeling (or hope), expressed throughout its post-hearing Brief, that the majority of its employees may not have wanted the UFW to represent them and that only a new election would have resolved the issue. Why else would Respondent have bothered to poll its own workers regarding their union sentiments, infra? But this type of argument was specifically repudiated by the California Supreme Court in San Clemente v. A.L.R.B. (1981) 29 Cal.3d 847, 176 Cal.Rptr. 768. Though not addressing the diminution of a certified unit question, the Court, in terms of policy, made its view clear:

> We thus reject as totally without merit the suggestion of one amicus that Labor Code section 1156 should be interpreted to preclude the imposition of successorship liability upon a new employer under any circumstances. Amicus claims that because section 1156 permits the selection of an exclusive bargaining representative only through a secret ballot election, the section should be interpreted to permit the imposition of a bargaining obligation upon a new employer only after an election has been held among the new employer's employees. Amicus points to absolutely nothing in the legislative history of the ALRA, however, which suggests that section 1156 was intended to abrogate the obligations of a successor employer with regard to a union that has been selected in a secret ballot election among its precedessor's employees, and, in our view amicus's proposed interpretation would go far to completely undermine the integrity of such election results by permitting an employer to subvert a union's victory by a simple change in corporate ownership. If the drafters of the ALRA had in reality intended to eliminate the concept of successorship liability that has been firmly recognized by federal labor precedents for more than four decades, we are confident that they would have included a

provision in the act specifically so providing. (Id, ft. 12. See also Rivcom Corporation and Riverbend Farms, Inc., supra, ft. 9 at p. 21; and John Elmore Farms, et al. (1982) 8 ALRB No. 20.)

I have considered Respondent's other arguments, and they are not persuasive. Respondent argues that the ALRB failed to join it as an indispensable party in the certification proceedings following the 1977 election and by the time of the hearing on RF's objections, the property had been sold to Respondent. Therefore, Respondent argues, it cannot be bound by the results of the certification. (Resp's Brief, p. 56.)

A similar claim was rejected in Dynamic Machine Co. v. N.L.R.B. (7th Cir. 1977) 94 LRRM 3217, 3224 where the Court pointed out that the successor was aware at the time it purchased the property that the union might be certified. Moreover, that possibility could have been reflected in the price paid for the business. Id; Golden State Bottling Co. v. N.L.R.B. (1973) 414 U.S. 168, 185, [84 LRRM 2839].

Carolan Peck testified she knew about the ALRB conducted elections at both the DiGiorgio and McFarland ranches prior to the close of escrow at DiGiorgio, late in 1977. Peck saw fit to instruct her attorneys to intervene in the DiGiorgio election proceeding, Case No". 75-RC-118-F. Certainly, she had every opportunity to file a similar legal action in the McFarland matter, Case No. 77-RC-2-F, as the certification did not issue until June 27, 1978, approximately seven months after her first notice of the election. No credible reason has been advanced why Respondent chose not to become involved in that litigation, and it cannot be heard to complain now that it was deprived of due process.

VII. THE SUCCESSORSHIP ISSUE -— ANALYSIS AND CONCLUSIONS OF LAW

The federal cases have established a number of factors to serve as indicators of a successorship relationship including, inter alia, the continuity of work force, the continuity of business operations, the similarity of supervisory personnel, the similarity of product or service, the similarity in methods of production, sales, and inventorying, and the use of the same plant. N.L.R.B. v. Security-Columbian Banknote Co. (3rd Cir. 1976) 541 F.2d 135, 93 LRRM 2049. But, as that Court pointed out:

> These factors should be seen from the perspective of the employee (citations omitted). This 'employee viewpoint' derives from the concept that the only reason to limit a successor employer's ability to reorganize his labor relations is to offer the employees some protection from a sudden change in the employment relationship (citations omitted). Thus, the inquiry must ascertain whether the changes in the nature of the employment relationship are sufficiently substantial to vitiate the employee's original choice of bargaining representative (citations omitted) 541 F.2d at 139, 93 LRRM at 2051-52.

That is to say that the right of employers to a free hand in the buying and restructuring of a business enterprise must be balanced with some protection to the employees who stand to lose from any such sudden changes. San Clemente v. A.L.R.B., supra, (1981) 29 Cal.3d 847, 176 Cal.Rptr. 768; John Wiley & Sons v. Livingston (1964) 376 U.S. 543, 549. As stated by Judge Leventhal in his frequently cited concurring opinion in International Association of Machinists, Dist. Lodge 94 v. N.L.R.B. (D.C. Cir. 1969) 414 F.2d 1135, 1139, 71 LRRM 2151, 2153, cert. denied (1969) 90 S.Ct. 174, cited in Rivcom Corporation and Riverbend Farms Inc., supra, (1979) 5 ALRB No. 55:

> The purchaser of a business does not take title unencumbered by the labor relations obligations of his predecessor. He is well advised to analyze labor title as much as real title. Rooted in our competitive enterprise system is a strong policy in favor of free transfer of assets and flexibility of new management attuned to economic efficiency. This is not, however, an absolute value. It must be balanced against the policies of protection for labor and stability of labor relations that are embodied in the federal labor statutes. Under the policies of these laws the new owner does not start with a completely blank slate - - -. (Footnote omitted.)

In the present case, the largest factor arguing against successorship is the fact that, excluding SPR's control during the escrow period, there does not appear to be any time after title passed in which the percentage of work force continuity reached 50%. Thus, it is necessary to analyze the successorship question here by

focussing on the degree of importance currently attached to the continuity factor within the agricultural setting by the courts and ALRB. Any such analysis must, of course, begin with the California Supreme Court's decision in San Clemente Ranch, Ltd, v. A.L.R.B., supra. In that case, the purchaser of the property was aware that the UFW had won a representation election held among the predecessor's employees and was cognizant of the union's relationship to the ranch. The Court found that in purchasing the ranch, San Clemente planned to carry on substantially the same farming operations as had the predecessor; i.e. using the same equipment to grow and harvest the same crops in basically the same manner at the same time and places using bargaining unit employees to perform the same tasks. San Clemente also hired several of the predecessor's supervisors, including a principal one. In addition, it began its new operation by hiring employees who had previously worked for the predecessor, and its work force continued to be made up primarily of those employees for almost the entire initial four months of its normal farming operation.

Cautioning against the undue reliance upon work force continuity as the single most important factor in successorship, as federal labor law decision often did, the Court said:

> - - - we believe that the ALRB was additionally justified in concluding that, in light of the unique characteristics of California's agricultural setting, considerations in addition to workforce continuity should generally play an important role in defining successorship liability under the ALRA.
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Because a substantial turnover in an employer's workforce is a typical feature of California agriculture, the ALRB sensibly reasoned that a change in the composition of a successor employer's workforce does not necessarily have the same significance in this context as such a change may have in the industrial setting of the NLRA. As a consequence, we think the Board properly concluded that in general its evaluation of potential successorship liability should go beyond the question of workforce continuity and include other relevant factors as well.

In the instant case, the Board noted that despite the change in the ranch's ownership, 'the agricultural operation itself remained almost identical.' San Clemente farmed the sane land, used the same equipment and processed the crops in essentially the same manner as Highland had. In addition, the change in ownership brought no alteration in either the nature or size of the bargaining unit. (See N.L.R.B. v. Burns Security Service, supra, 406 U.S. at p. 280.) Finally, the employees in the bargaining unit performed the same tasks for San Clemente that they had previously performed for Highland.

Subsequent ALRB cases have diminished the continuity of work force factor in agriculture by emphasizing that it was but one of several factors to be analyzed. In John V. Borchard, et al. (1982) 8 ALRB No. 52, a case similar in some respects to the present matter, a sole proprietorship, owned and managed by John Borchard and John V. Borchard Farms, was farming cotton, alfalfa, beets, lettuce, milo, rye grass and sudan grass on 6,000 acres in the Imperial Valley. Experiencing financial difficulties, it filed for bankruptcy under Chapter 11, was reorganized, and later bargained to a contract with the UFW.

Thereafter, a new corporation was formed, All American Ranches, which bought the property,32_/ but not all of it; John Borchard retained 1,000 acres and contracted with All American to raise crops on a custom basis.

All American kept some of the same crops Borchard had had but made a number of acreage changes. For example, All American decreased cotton by 2,684 acres, alfalfa by 283 acres, increased lettuce by 425 acres, beets by 183 acres, and rye grass by 331 acres. At the same time, All American grew crops Borchard had not; e.g. 150 acres of onions, 120 acres of carrots, 50 acres of cucumbers, 47 acres of carrots, and 22 acres of cantaloupes.

All American retained 5 of 7 Borchard supervisors. It also utilized all the agircultural equipment used by Borchard, but All American purchased 5 additional machines.

As of February 8, 1979,33/ 29 of the 51 All American employees had previously worked for Borchard and as of July 10, 1978,_34/ the figures were 29 of 48.

All American refused to recognize the UFW and claimed that at the time the UFW made its demand to bargain, less than a majority of its employees had been working for Borchard so that therefore, it could not be considered a successor employer.

The Board found that the agricultural operation itself had remained almost identical and that there was no significant

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32. The former owner continued to pay the employees for a 2 ½ week period but was reimbursed by the successor.

33. This was the date All American, following its purchase, had reached its "full complement" of workers.

34. This was the date the UFW first requested bargaining.

alteration in the composition of the bargaining unit.35/ See also Babbitt Engineering, et al. (1982) 8 ALRB No. 10 (where work force continuity was said to be but one factor among many circumstances in the transfer of ownership).

However, the facts concerning the continuity of the work force in the present matter appear to be different from the other cases heretofore cited for the reason that there is no evidence that at any time during the January/February, 1978 pruning season the majority of SPR's employees had previously been employed by the predecessor employer, RF. Thus, the ultimate question here is whether this lack of work force continuity36/ is of such significant import as to render inappropriate, despite any other factors showing a similarlity in the nature of the business, a conclusion that SPR is the lawful successor to RF.

The work force continuity question being, in the agricultural setting, but one of several factors for me to consider, I conclude that its absence here is not sufficient to persuade me that SPR is not otherwise a successor. Wine grapes were the main crop grown in RF's McFarland/Porterville division at the time of the February, 1977 election, and grape workers were the largesst voting block. Though other workers in other crops were employed, wine grapes, as the testimony of Newhouse made clear, were significantly more labor intensive both during the growing/pruning season (January-February) and the harvest (fall) than were almonds (RF's second largest crop) or any of the other tree crops RF grew at McFarland. All these other crops just plainly required fewer workers per acre than did wine grapes.

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35 . It is worthy of note that the Board analyzed the question of the continuity of operations by looking to two separate dates, the date the "full complement" was reached after the sale but before the union was given notice of the changeover and the date the UFW request for bargaining occurred. In the present case, these two dates were much further apart than in Borchard. Here SPR reached its full complement shortly after the sale and during the vineyard pruning season in January/February, 1978. But the UFW's request to bargain, made shortly after it discovered the sale, did not cone until May of 1979.

36 . Of course, it is of some relevance that a majority of the steady employees and supervisors hired by Peck during the start-up period before escrow closed had worked for RF and were retained. It seems to me fair to conclude that for all practical purposes, effective the end of November, 1977, SPR had become the new employer owing to the financial arrangement between SPR and RF that saw the former reimbursing the latter for all costs of continuing the operation during the escrow period.

Just as there was pruning in the 1976-1977 winter season around the time of the election, so too did pruning take place again during the 1977-1978 season, actually beginning during the escrow period.37/ To do the iniital pruning, as well as several other preliminary jobs associated with preparing the vineyard, Peck employed many workers that had previously worked for RF. In fact, the majority of those hired by her during this early period had been so employed, and Peck retained them after the close of escrow. Thus, from the standpoint of the employees' perspective, there was no hiatus_3_8/ and not much of a change between the time RF sold its property to SPR, the escrow period transpired, and SPR became the new owner. SPR hired some of the same workers RF had provided during escrow, both steadies and pruners. Its supervisors, including the Garcias, Ernie and Robert, Armendaris, Vasquez, Chavez, and Lopez, still employed as of the time of the hearing, had all formerly worked for RF. And, of course, SPR ran the same basic operation. The degree of continuity between employers in business operations is significant because it serves as an indicator of the corresponding change in the expectations and needs of this employees and their views with respect to continued union representation. Saks & Company v. N.L.R.B. (2nd Cir. 1980) 634 F.2d 631, 105 LRRM 3274, citing Zim's Foodliner, Inc. v. N.L.R.B., supra.

As regards the large numbers of pruners hired by Peck after she assumed formal ownership and after the pruning really started up in earnest, those workers came from the same geographic area as RF's employees had in the past. It appears that any personnel changes in

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37. Insofar as any conflict of testimony exists between Respondent's witnesses on this point, I credit Peck and especially Newhouse that pruning (as well as various other jobs assocated with the vineyard) took place on the Wasco property during this escrow period. Newhouse exhibited throughout his testimony a familiarity with the land in question, both under RF and SPR, and a thorough knowledge of farming techniques and practices. In addition, his testimony was characterized by honesty and neutrality. I credit Peck because her testimony here was logical and consistent with her objective of buying a vineyard and getting it in shape as soon as possible in the hopes of producing a successful crop. I also credit Enrique Davila that he pruned on property before the close of escrow that belonged to RF and on the same property after the transfer of title despite Respondent's argument that Davila confused SPR's property with adjacent property belonging to RF. Davila testified in a clear and consistent manner on this point, and there is no reason to discredit him here.

38. I find no hiatus here. But even where the NLRB has found one to exist, it must be for a substantial period between the termination of the employer's operations and the commencement of the new business, and this factor is usually but one of many factors pointing to a significant transformation between the nature of the old and new businesses. N.L.R.B. v. Band-Age, Inc., supra.

the actual individual makeup of the work force were not due to any alteration in managerial direction of the new business from that of the predecessor but rather were occasioned by a gradual employee turnover, certainly not an uncommon event in agriculture.

Moreover, I cannot give much weight to Respondent's argument concerning its commencement of employee benefits after it took over the management of the Wasco property. It is difficult to conclude that Respondent's institution of its own medical, pension, vacation, and holiday coverage was a major change since there was no evidence either that RF had any benefit program or if it did, that SPR's was an improvement over it. But equally important, the SPR benefit package, at least for the first 1½ years, was limited to a small percentage of the work force -- the steadies —- and did not include the vast majority of workers — the pruners, grape harvesters, and labor contractors' employees. In addition, it is not clear if the entire work force was ever made aware of the benefit programs' existence or if they were, what percentage of them became eligible and were enrolled.

Thus, I conclude from this evidence that the nature of the farming business RF sold to SPR did not substantially change following the sale. SPR continued to operate the property as a vineyard, continued the same pruning and harvesting techniques, continued to hire its work force from the same geographic area, continued to utilize labor contractors, continued to require the same work skills from its bargaining unit employees,39/ continued to use the same tools and machinery for the same purposes, and continued to use the same buildings that came with the land. From the standpoint of the totality of circumstances involving the transfer of ownership, of which work force continuity is but one factor, this transfer did not affect the essential nature of the enterprise. Babbitt Engineering, et al., supra; Rivcom Corporation and Riverbend Farms, Inc., supra. SPR was the lawful successor to RF and was obligated to recognize and bargain with the UFW as the representative of its employees.

One final point needs to be made. In most successorship cases, the alleged successor claims it is under no duty to bargain with the union of its predecessor, so informs the union and refuses to bargain with it. The Board must then determine if a legal obligation to bargain ever existed and if it did, at what point after the takeover did it arise.

In this case, however, Respondent never told the UFW it did not recognize it as the representative of its employees at its Wasco ranch, did not refuse to bargain with it, and in fact, even represents at the hearing that though it still believes it was never

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39. Minor changes in the work of employees is not sufficient to prevent a finding of successorship. Saks & Company v. N.L.R.B., supra; Middleboro v. Fire Apparatus, Inc., supra.

under any duty to bargain, at all times when it was bargaining, it did so with the intent of reaching an agreement. There is a fundamental irreconcilability in Respondent's position, of course, and this condition is highlighted in the contrasting testimony of Respondent's two main negotiators, Peck and Noblat. While Peck testified that throughout negotiations and up to the time of the hearing she had the intent of meeting with the UFW and reaching an agreement as soon as possible, her colleague, Noblat, was testifying that to this day, he believed SPR was not a successor to RF and that he strongly felt there was absolutely no duty to bargain with the UFW over a contract.

Yet, Noblat also testified, as did Peck, that as early as October 14, 1980, he agreed to the UFW's recognition article (G.C. Ex 20) accepting the UFW as the representative of all Respondent's agricultural employees at the Wasco ranch. (See also, Resp's Brief, p. 142.) Noblat further admitted that he wrote on his negotiations notes, "as per map" (G.C. Ex 4), meaning that recognition would extend to the area set forth on a map he had given to Schroeder (G.C. Ex 35), which was precisely the property purchased by SPR from RF.

In addition, Schroeder testified that in September/October, 1980 he distributed to workers on Company property at the Wasco ranch *a* leaflet (G.C. Ex 33) which indicated that SPR would soon be negotiating with the UFW over a contract and asked them to offer the Union suggestions about what kind of wages and fringe benefits should be negotiated. The leaflet stated, inter alia:

> As you remember, two years ago, when the ranch was owned by Roberts Farms, the workers voted in an election to be represented by the UFW. The State has certified the election and the new company, Sumner Peck Ranch, is now ready to negotiate with the union for a contract.

Before passing out these leaflets, Schroeder testified that he received Peck's permission to do so; and while passing them out, he testified he was observed by foreman Ernie Garcia. Schroeder testified that at no time did anyone from Respondent's disavow or repudiate any statements made in the leaflet.

Similarly, Schroeder distributed on Company property a flyer advertising a coming Union meeting on October 16 1980 regarding the negotiations (G.C. Ex 34). He testified he was observed by foremen. Again, at no time was anything contained in the announcement disavowed by Company personnel.

Finally, Schroeder also testified that a group of SPR workers had complained that their paychecks were short and they were being cheated. As a representative of the Union, Schroeder (and Haddock at one of the meetings) met with Peck and Noblat on three occasions between October 15-November 15, 1980 to discuss the problem. Schroeder testified that the matter was resolved and future occurrences were avoided, as the Company changed certain

payroll practices.40/

Why then would a management negotiating team agree to recognize the Union, allow it to distribute leaflets, and use it to resolve grievances, yet claim that in fact, it was under no obligation to bargain with it during this time period. I believe Respondent used the Union when it suited it; rejected it when it was no longer beneficial to do so. In effect, Respondent's conduct, consciously intended or not, enabled it to buy itself some labor peace 4l/ by representing to its employees, or allowing such representations to be made, that it recognized the UFW, and that it was actively seeking a contract while in reality, it was engaging in surface bargaining, infra.42/ It now seeks to justify its conduct on the grounds that it had no duty to bargain with the union anyway because it was not a successor.43/

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40. None of Respondent's witnesses denied Schroeder's testimony regarding either his grievance handling or the distribution of leaflets.

41. For example, though now claiming that the poll of employee sentiments at the Wasco ranch showed a lack of union support, it would seem that at the time the poll itself was another means by which the Company led its employees to believe that it was recognizing the UFW as their representative. What other conclusion could the employees have reached given the fact that a poll was conducted and that afterwards, the Company negotiated with the UFW, agreed to recognize it, and did not claim that the poll proved the Company was not the lawful successor because of any lack of union support among its employees?

42. It is clear from the testimony of Maddock, Schroeder, and Burciaga that neither Peck nor Noblat ever stated during negotiations that they believed there was no duty to either recognize or bargain with the Union. It is established, of course, that if Respondent's failure to raise the successorship issue once during the 1^ years of bargaining was motivated by a desire to delay bargaining and dissipate union support, then it was not bargaining in good faith. Holtville Farms, Inc. (1981) 7 ALRB No. 15; Robert H. Hickam (1978) 4 ALRB No. 73. (See section on the bad faith bargaining allegation, infra.

43. As pointed out by the Court in N.L.R.B. v. Band-Age, Inc., supra, 92 LRRM at 2004, "- - - if it can be said that the employer is reaping the advantages of continuity, the employees' interest in some stability of representation during a period of volatility takes on added significance." Accord, N.L.R.B. v. Middleboro Fire Apparatus, Inc., supra (1st Cir. 1978) 590 F.2d 4, 100 LRRM 2184.

Clearly from a policy standpoint, this kind of conduct is undesirable and not consistent with the purposes of the Act. It would seem appropriate to say that once a labor organization makes a demand for bargaining upon an alleged successor and the would-be successor, rather than contesting the claim by refusing to bargain, instead takes certain actions which connote its acceptance of the union's claim that it is indeed the bargaining representative of the said successor's employees, such conduct must, in the totality, be given some evidentiary weight. In Knapp-Sherrill Co. (1982) 263 NLRB No. 60, 111 LRRM 1068, an employer was estopped from claiming that the union was not the exclusive bargaining representative when the employer had dealt with the union for two years, and the union had relied to its detriment upon the employer's recognition. The Board said:

> - - - in challenging the merger procedures at the expiration of the collective-bargaining agreement, two years after extending recognition and, as indicated above, after in all respects dealing with Local 171 as the representative of its employees, the Employer disrupted the bargaining relationship at a time when Local 171's role as bargaining representative is most vital to the employees: at the commencement of negotiations for a new collective-bargaining agreement. Therefore, as the Employer had but to question initially the merger procedures rather than recognize Local 171, and as the Employer conducted business with Local 171 in a manner fully consistent with its recognition for two years thereafter, we find the Employer may not now challenge the procedures employed in the merger. (Footnote omitted) (111 LRRM at 1070.)

In short, if one said to be a successor recognizes itself as a successor, agrees contractually that it is, and relates to its employees and the union as a successor, then it may very well be a successor._44/ *I* so find and will recommend this conclusion to the Board.

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44. Respondent cites Highland Ranch and San Clemente Ranch Ltd. (1979) 5 ALRB No. 54, p. 14, ft. 14, for the proposition that a letter sent to the UFW by San Clemente stating its intentions to bargain was not relevant as an admission of successorship. But Respondent fails to mention that this attmept to bargain did not occur until after the close of the unfair labor practice hearing and after the issuance of the ALJ's Decision. Furthermore, the letter offering to bargain also specifically stated that San Clemente was reserving all of its defenses to the unfair labor practice charges.

VIII. THE BAD FAITH BARGAINING ALLEGATION

A. Findings of Fact

1. The Bargaining History

a. The Union's First Notice of the Sale and Its Request to Bargain

UFW official, Ben Maddock, testified that around the third week in April, 1979, while engaged in the negotiations for a RF/UFW contract, he learned from RF personnel that SPR had bought a portion of RF's property in Kern County. This, of course, was more than *a* year after the transaction had occurred.

Approximately a month later, May 22, 1979, Maddock wrote his first letter to Carolan Peck, Respondent's owner, stating:

> It is our understanding that you have bought property in Kern County, California that was formerly part of the McFarland Division of Roberts Farms and also property that was formerly Robert-Digiorgio. (sic) The United Farmworkers of American, AFL-CIO, is a certified bargaining representative for all_the agricultural employees of Roberts Farms in the McFarland and Porterville divisions (Certification No. 77-RC-2-F).
>
> We are requesting a collective bargaining meeting with you, as a successor employer under the Agricultural Labor Relations Act, to negotiate terms and conditions of employment for all Sumner Peck employees in Kern County, California, except for those employed in what was formerly Roberts-DiGiorgio. Please advise our office of convenient dates, time, and place for such meeting. (G.C.Ex 14.)

On June 22, 1979, lawyers for SPR responded, indicating that they had not yet had an opportunity to meet with their clients but that they would be in contact with Maddock after they had talked to them. (G.C. Ex 15.)

But Maddock heard nothing from Respondent's attorneys for around four months so on September 18, 1979, he wrote them and asked to schedule a meeting for September 27 or 28. (G.C. Ex 16.) The next day, September 19, he filed an unfair labor practice charge alleging a refusal to bargain.45/

b. The Initial Meeings - the Informal Poll

A meeting was thereafter held in Fresno at the offices of Baker, Manock, and Jensen, counsel to Respondent. Maddock testified

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45 . The record does not indicate the disposition of this charge by the General Counsel.

that Respondent's attorneys were mainly interested in talking about the DiGiorgio property because it was pointed out to him that Peck wanted to sell it but was concerned over the fact that the pending litigation 46/ might hold up a potential sale. Although not much attention was paid to the Wasco ranch at this meeting, Maddock testified that Respondent's attorneys indicated they wanted to schedule another election there to see if the workers really wanted to be represented by a union and also wanted to conduct a poll of the workers. Maddock testified he told the attorneys that in his opinion such procedures were illegal but that if Respondent was having a problem with the successorship question on both properties, negotiations could proceed anyway, pending final ALRB resolution of the issue.

In fact, Respondent did conduct such a poll. Peck testified she desired to obtain the views of her workers towards the UFW so she authorized the preparation of a questionnaire (G.C. Ex 2) and distributed same to all employees at the Wasco ranch and she believes also at the DiGiorgio ranch around October of 1979.

Thereafter, no further meetings between these parties occurred until late in September of 1980 when Peck called Maddock and indicated she would like to meet to resolve some of the problems that she was having at both the DiGiorgio and Wasco ranches.

c. The 1980 Bargaining over Recognition at Both the DiGiorgio and Wasco Ranches

A meeting was held in September of 1980 between Maddock, Peck, and Michel Noblat, Respondent's General Manager. This was the first meeting between these individuals. One of the problems discussed was the straw vote of union support Respondent's personnel had taken at both ranches. According to Maddock, Peck told him that the results of the vote indicated a lack of union support at DiGiorgio but just the opposite at Wasco 47/ and that she sought the Union's agreement to withdraw its interest on the DiGiorgio property. But Maddock testified that Peck did not require this as a

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46. At this time, the RF/DiGiorgio certification question was still being litigated.

47. However, later in the hearing, SPR's witness, Ken Lazarus, testified that based upon a final poll tally he made in August of 1979, the UFW had lost its majority support. Of course, the results of any such poll are irrelevant in view of the clear guidelines sat forth in Nish Noroian Farms (1982) 8 ALRB No. 25, infra.

condition precedent to bargaining; i.e. that Peck did not agree to bargain over Wasco only if the UFW withdrew from DiGiorgio.48/ According to Haddock, Peck told him that she was anxious to sell DiGiorgio and thought she had a ready buyer but that said buyer was hesitant to make the purchase because of the existence of a union on the property. Thus, she was willing to enter negotiations over the Wasco property, hoping the UFW would give her some relief on DiGiorgio somewhere down the line. Maddock further testified that he agreed to at least explore with UFW attorneys the possibility of withdrawing what apparently was a weak claim to the DiGiorgio property.

In her testimony, Peck agreed that she contacted Maddock and asked to meet because she had been trying to sell the DiGiorgio property 49/ and was encountering reluctance from prospective buyers because of" what she described as union activity on the premises. According to Peck, she explained to Maddock the difficulty she was having in selling the DiGiorgio property and that "perhaps we could settle the - - - if they would get off the thing at Arvin,50/ which was the most confusing of the two, and if we could arrive at some kind of a mutual settlement on the Wasco Ranch." (TR 7, p. 53.) By this she explained that she wanted the UFW to withdraw its claim that it represented the workers on the DiGiorgio property.

Noblat also expressed his opinion as to the reasons SPR decided to negotiate with the UFW. Unlike Maddock, he put the matter strictly in "quid pro quo" terms: "Well, the discussion was - - - we need to have the clear title without any UFW threat on the DiGiorgio property so we can deliver it to a buyer. And in exchange for that, we would sit down with the UFW and - - - to work out a viable contract on the McFarland Ranch." (TR. 10, p. 127.)

A week later there was another meeting at the UFW Delano office at which Peck, Noblat, Maddock and Richard Chavez, head of the UFW's Negotiations Department, attended. Maddock testified that Peck again stated that she wanted the UFW to give up its claim to represent the workers at DiGiorgio. Maddock testified that he would again have the UFW's Legal Department look into the matter.

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48 . Maddock testified it would have been foolish for him to negotiate away his claim to DiGiorgio for the Company's consent to bargain over Wasco —- something he already had as the result of the certification of that ranch in June of 1978 (G.C. Ex. l(f)).

49 • Peck testified that as early as September of 1979 (around the time of the Maddock/Manock meeting in Fresno), she had made a decision to sell the DiGiorgio ranch and has since sold some but not all of it. She testified that so far there have been as many as 3 or 9 sales including a lot of equipment.

50 • "Arvin" was a reference to the DiGiorgio property.

However, Noblat recalled the UFW response a little differently and testified that the UFW made a commitment to "take care of the DiGiorgio problem." (TR. 10, p. 128.) At this point, Noblat testified that he felt SPR had a "moral obligation" to negotiate a contract with the UFW on the Wasco property. (TR. 10, p. 129.)

Peck testified that she also felt there had been an understanding reached that the Union would try to work out the DiGiorgio matter to her satisfaction, but she also testified that there was no discussion that if DiGiorgio couldn't be worked out, the Company would not feel itself obligated to bargain over the Wasco property. In fact, Peck testified that she told the Union representatives that she was willing to meet and negotiate a contract but made it clear to them that it would only be for the Wasco property.

Shortly thereafter, on January 8, 1981, through no action taken by the UFW on the matter, the ALRB dismissed the DiGiorgio Petition.

d. The 1980 Bargaining for a Collective Bargaining Agreement at the Wasco Ranch

(1) September 29, 1980 Meeting [51/]

The next meeting occurred on September 29, the third September meeting between these parties. Present were Peck, Noblat, Ken Harrison and SPR attorney, Ken Manock. Representing the UFW were Maddock, Chavez and Ken Schroeder. Maddock testified that he introduced Schroeder and then informed those present that Schroeder would be neogtiating thereafter as UFW representative with full authority. Maddock also testified that he was Schroeder's supervisor.

Maddock testified that Manock presented a UFW contract negotated with the Radovich Company (G.C. Ex 18) and stated that although there were some concerns over hiring, seniority, and other articles, SPR could probably agree to most of it. According to Maddock, although Radovich was a table grape company, some of its contractual provisions could be adaptable to the SPR operation.

Peck testified that she told Maddock that despite the fact that the Company was losing money in grapes, it could live with the Radovich contract and that the Union agreed to use Radovich as a basis for negotiations. Peck further testified that Noblat asked Schroeder for a wage proposal.

Schroeder corroborated the testimony regarding the presentation by Company representatives of the Radovich contract.

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51. The Complaint herein alleges bad faith bargaining from the date of this meeting forward.

He added that Manock expressed no problem with the recognition article but stated that recognition would be limited to Wasco and not to the entire SPR operation.

(2) October 7,-1980 Meeting

The parties,52/ using the Radovich contract as a basis for discussion, talked about various articles.

Recognition

Referring to Article I of Radovich, the parties agreed that SPR was recognizing the UFW as bargaining representative for the agricultural employees only at the Wasco ranch.

Seniority

Schroeder provided Peck with a seniority proposal (G.C. Ex 19) which suggested two seniority lists, one for piece rate workers and the other for hourly, on the theory that it would not be fair for pruning workers to lose seniority if they didn't want to do the gondola work and vice versa. Schroeder testified that Noblat objected on the grounds that two lists would be too burdensome on the Company and would never work. Schroeder then proposed that only one list be used but that notations be added to the side to indicate whether the worker was employed in the gondola or pruning. Noblat rejected this idea, as well. Schroeder also testified that Peck said she thought the proposal was too complicated and that she couldn't live with it.

Hiring

Peck objected to this proposal, according to Schroeder, on the grounds that crew foremen would have no ability to hire new employees and that was one of the benefits given to foremen; Peck wanted the practice to continue. Schroeder responded that what she considered a "benefit" actually resulted in unfair hiring practices based upon favortism.

Discipline and Discharge

Schroeder testified that Peck did not think it necessary that a union representative be notified prior to any discharge so that he could be present, and she wanted her foremen to have the ability to fire anyone on the spot.

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52. Hereafter, the parties consisted only of Peck, Noblat, and Schroeder until the end of April, 1981 when David Burciaga replaced the latter as UFW representative, infra.

Supervisors

Schroeder proposed restrictions on the type of bargaining unit work supervisors could perform. According to Schroeder, Peck, became very upset, told him the Union was ruining the spirit of their relationship by taking all the fun out, and that there was no way she would agree to this provision.

Housing

Schroeder testified that Peck said she was insulted that something about housing had to appear in the contract in view of the fact that her family had provided housing for farmworkers for many years.

On the other hand, there were several articles thought to be agreed to along the lines of the Radovich contract; e.g. access, location of company operations, discrimination, changed operations, rest periods, union label, leave of absence, reporting and standby, and credit union withholding._53/ Despite the agreements, however, Schroeder testified the meeting ended on a sour note when Peck accused him of trying to tell the Company what to do, restricting its freedom, insisting that things be put in writing, and killing the spirit of their relationship.

(3) October 9, 1980 Meeting

The parties agreed to employee security, income tax withholding, camp housing, family housing, modification, and savings.

Recognition

There was further discussion of the recognition clause. Schroeder proposed (G.C. Ex 20) that SPR recognize the UFW as the sole representatives of "all of the Company's agricultural employees at the Wasco area ranch in the bargaining unit set forth in the ARLB's certification in case number 77-RC-2-F." According to Schroeder, Peck agreed to this language so long as it was limited only to the Wasco ranch.54/

Hiring

Peck retained her basic disagreement to the Union's hiring proposal (G.C. Ex 21), as she wanted to fire people on the spot

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53. Schroeder testified that some of the articles supposedly agreed to on October 7 were said to be unacceptable, in part, on October 9; e.g. reporting and standby, leave of absence, and changed operations. The latter was finally agreed to on October 14.

54. Neither Peck nor Noblat denier) this during their testimony.

without having to bring in a Union representative.

Supervisors

Again Peck objected that members of her own family could not do the bargaining unit work under the UFW proposal on supervisors, and Schroeder said he would take a look at it and get back to her.

Union Security

Here, Noblat objected to being responsible for signing up workers on Union forms but stated that the Company would make the forms available to the workers.

Other Articles

The Union proposed a grievance and arbitration section (G.C. Ex 22) and a health and safety clause. (G.C. Ex 23)

(4) October 14, 1980 Meeting

Schroeder testified that he asked Peck if she had any proposals, and she responded she had not had a chance to prepare any.

Recognition

Schroeder testified that Noblat, referring to this clause of the contract, said he wanted to insure that only the Wasco ranch was included and suggested that a map of the current ranch be attached to the final labor agreement.

Union Security

Schroeder testified that Noblat again objected to being responsible for signing up workers on union provided forms. Peck raised the union's initiation fee as a problem she had.

Hiring

Schroeder testified Peck said she needed more time to study this article.

Seniority

Schroeder testified that Noblat continued to object to two seniority lists because of the paper work involved and that Peck objected that the Union was ruining their "spirit of cooperation" because it wanted everything in writing. According to Schroeder, he was not clear on exactly what SPR's objections were to this provision as he had thought what he was proposing was similar to the system already functioning there in which some workers did only pruning while others worked exclusively with the gondola.

Schroeder testified that during a phone conversation subsequent to this meeting, Peck told him she wanted a wage proposal 55/ and that he replied he would provide one but that the grape piece rate would be incomplete until he received the previously requested information on this subject from Company representatives. (See section on UFW's informational requests, infra.) Schroeder mailed his one year economic proposal on November 21, 1980 56/ (G.C. Ex 23) and a revised one on December 7, 1980 (G.C. Ex 29), 57/ which included rates to become effective on May 11, 1981.58/

Peck testified that she was "shocked" when she received the wage offer. Although the general labor figure was in the ballpark, the other rates, particularly for the grape harvest, were not; and Peck testified she could not live with the offer:

> \- - - We could no longer even talk to these guys because there - there was nothing left for us to talk about.
>
> \- --
> \- - so I called up Ben Maddock and said 'Ben, there is absolutely no way for those - no use for us to talk any further because it's - we can't do this.'
>
> \- -
> I told him that I didn't want to spend hour after hour with this young man going over rules and regulations and rules and regulations; that I felt that we were losing the spirit of friendship that we had started out with. (TR. 7, pp. 89-90.)

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55. Peck testified she placed her request for a wage proposal a little earlier and that she had made the request because the negotiating sessions were already beginning to take longer than she thought they should, and she wanted to get down to basics. Peck also testified that Schroeder indicated he wanted to deal with the language items first and would get to wages later.

56. A typographical error on the cover sheet incorrectly states the date of the transmittal letter as November 11, 1980.

57. As later events were to show, these were the only two wage proposals offered by anyone during the 1½ years of negotiating.

58. May 11, 1981, was used as an effective date for a wage increase because that was the date of the Radovich reopener, and Schroeder testified he wanted SPR to raise its wages at the same time as other area grape companies raised theirs.

Schroeder also testified that he specifically asked Peck to look over his seniority proposal and to express whatever problems she had in a counterproposal.

Discipline and Discharge

There was no change in the Company's position. Schroeder testified that Peck explained that to her, the Company was like having a family and sometimes, when there was a problem with one of the children, the child had to be disciplined immediately, else the problem never would be taken care of.

Supervisors

The Union modified its proposal on supervisors to allow members of the Peck family to perform work (G.C. Ex 24); but Peck, according to Schroeder, continued to object because other non-bargaining unit employees were still excluded, and she said it was her ranch, she wanted to be free to run it her own way, and that the Union should just trust her that bargaining unit work would not be taken away.

Mechanization

Mechanization was discussed for the first time. Schroeder testified that Peck's position was that she didn't want to be restricted in any way by the contract but that her personal preference was to use fewer grape harvesting machines than RF had, thereby providing more work for the bargaining unit.

Successorship

Peck opposed the successorship provision on the grounds that so long as the UFW performed its part of the contract, there would be no need for such a clause as any likely successor would be glad to purchase the property and recognize the Union.

Other Articles

The Union made proposals on holidays (G.C. Ex 26) and vacations (G.C. Ex 27).

Schroeder testified that bereavement pay and jury duty were discussed and that Peck feared that workers would take advantage of the article's leave provisions. As a result, Peck made it clear she did not want these clauses in the contract and would make no counterproposal on them.

At the end of the meeting Schroeder testified he told Peck and Noblat that if they had any disagreements with what he had proposed or what was contained in the Radovich agreement, they should make written proposals to that effect. Up to this point, Respondent had yet to make a written proposal of any kind.

Maddock confirmed that Peck had called him irate over what she considered to be "outlandish" wage proposals, particularly for the harvest, that Schroeder had presented at their last meeting. Maddock testified that Peck told him she found it "hard for her to deal with a snot-nosed kid from Connecticut"59/ (TR. 3, p. 97), and that she did not want to meet anymore because "the spirit that we were into- was no longer there." (TR. 3, p. 88.)

In the meantime, Schroeder had been trying to reach Peck in order to set up another meeting but was told she was unavailable. He then, on December 15, 1980, wrote her a letter requesting such a meeting and also formally asked her to submit a counterproposal. (G.C. Ex 30.) There was no reply so on January 28, 1981, Schroeder again wrote Peck making the same requests. (G.C. Ex 31.)

On February 9, 1981, Schroeder finally heard from Respondent. Noblat wrote him that "(f)or three years now we have lost money at McFarland and your latest economic proposal would render our positions there disastrous. As indicated by Mrs. Peck to Mr. Maddock on the telephone, your proposal has annihilated our efforts and we do not see any need for further meetings." (G.C. Ex 17.)

Not to be deterred, Schroeder again contacted Peck, in April of 1981, in the hopes of arranging for another negotiating session. Despite Noblat's correspondence, one such meeting was scheduled for April 28, 1981.

e. The 1981 Bargaining

(1) April 28, 1981 Meeting

Schroeder testified that neither Peck nor Noblat dwelled on the Noblat letter but instead, indicated a willingness to keep negotiating. Schroeder introduced David Burciaga and explained he would be taking over negotiations on behalf of the UFW.

Peck again complained that the UFW's wage offers were outrageous and that the Company could not afford *to* pay such rates. Schroeder testified he explained to Peck that this was just intended to be an opening proposal and that he was still expecting to receive a counter to it from Respondent. According to Schroeder, Noblat stated that the Company would give the Union a written proposal 60/ of what it would pay and would not waste a lot of time negotiating over it. Burciaga testified he took this to mean SPR representatives intended to make an offer; and if not accepted, they would no longer meet with the Union. Schroeder testified that he

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59. Peck denied making this statement.

60. Peck's testimony confirmed that Noblat indeed indicated the Company would make a written proposal.

told Noblat and Peck that the Union might need some information to back up any claim that it could only afford to pay certain wages.61/

Two days following this meeting, Burciaga, now officially in charge of UFW negotiations, wrote Peck a letter which, inter alia, summarized the parties' collective bargaining history up to that point, requested a counterproposal, and asked for another meeting date to negotiate (G.C. Ex 39). In addition, Burciaga, referring to Peck's representations at the April 28 session that the business had lost money and could not pay the proposed Union wage rates, also requested that Peck make her financial records available to the Union for examination.

No reply was received to this letter, and on May 13 Burciaga sent Peck a mailgram (G.C. Ex 40) reminding her that he had not heard from her and that no new negotiating session had been arranged. He further stated: "Please respond immediately or I will assume your position remains the same; you do not want to meet."

On the same day of the mailgram, Noblat responded: "Our attorney, Mr. Kendall L. Manock, is due to return from vacation at the end of the month. As soon as feasible we will meet with him to review your letter. Then we will get in touch with you." (G.C. Ex 45.) Burciaga testified he never heard from the Company again. Peck gave an explanation for this. On May 21, 1981, the UFW filed an unfair labor practice charge alleging bad faith bargaining (G.C. Ex 1-A) .62/ When that happened, Peck testified that her interest in making a contract proposal lessened considerably:

> Q: (by General Counsel) Neither you nor Michel Noblat submitted the wage proposal that you talked about at that last meeting63/ to the union, correct?
>
> A: I did not, and I don't believe Michel did because shortly -- I think it was even shortly before Mr. Manock got back from his trip, came the charge.
>
> Q: Is that the reason you didn't submit a proposal?
>
> A: Yeah. I thought the whole spirit of the thing was gone then; the whole concept was gone." (TR. 7, pp. 168-169.)

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61. This remark provoked a very hostile reaction from Peck. Peck testified that she became "furious" at the request for tax records, and that Noblat was also upset. She also testified that Burciaga had begun to antagonize her earlier after she had failed to convince him of how ridiculous his wage offer was.

62. It is this charge which forms the basis for the allegation in the present Complaint.

63. General Counsel was referring to the meeting of April 28, 1981.

In fact, Peck admitted in her testimony that she never did make a wage proposal and never gave Schroeder any idea of what rates would be acceptable to her.

f. The 1982 Bargaining

Between April 28, 1981 and March 30, 1982 there was no contact between these parties. Then on March 30, one day after the prehearing conference in this case and less than two weeks before the scheduled commencement of the hearing (April 12), Peck and Noblat met once again with Maddock and Schroeder in a negotiating session.64/

(1) March 30, 1982 Meeting

Noblat gave Schroeder a map of the Sumner Peck property in Wasco (G.C. Ex 36).

Schroeder testified that Peck was still upset with the Union's original wage proposal of December, 1980 (G.C. Ex 29) and stated that it was the reason negotiations had stopped; but she still gave no indication of what rates would be acceptable to the Company and did not submit any written proposals. In fact, Maddock testified that there was no indication that Respondent intended to submit any proposal of its own in the near future.

Schroeder also testified that Peck was unprepared for the session as she did not have all the proposed articles, her notes, and other materials with her. (Peck had complained that her car had been stolen which had contained these items.) Schroeder and Maddock gave her some of their copies. Schroeder testified Peck replied that she would look them over and get back to him.

There were no agreements.

(2) Second Meeting of 1982

Maddock and Peck met shortly after their March 30 meeting. This meeting only lasted 30 minutes. Maddock testified that Peck indicated she wanted to get the wages straightened out and leave the language articles for last. Peck still made no wage proposal but requested one from the Union.

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64. Respondent prefers to refer to the 1982 meetings as "settlement discussions."

B. Analysis and Conclusions of Law

The Agricultural Labor Relations Act defines bargaining in good faith in section 1155.2(a), as follows:

> For purposes of this part, to bargain collectively in good faith is 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, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

This language is the same as section 8(d) of the National Labor Relations Act. It is, of course, proper to refer to decisions of the National Labor Relations Board as a guide to deciding the present case.

It has been held that the statutory duty to "bargain collectively in good faith" imposes the obligation to "meet - - -and confer in good faith" with a view towards the ultimate negotiation and execution of an agreement. To be sure, the Act "does not require either party to agree to a proposal or require the making of a concession." N.L.R.B. v. National Shoes, Inc. (2nd Cir. 1953) 208 F.2d 688, 691. On the other hand, an employer's failure to do little more than reject a union's demands is "indicative of a failure to comply with the statutory requirement to bargain in good faith." N.L.R.B. v. Century Cement Mfg. Co., Inc. (2nd Cir. 1953) 208 F.2d 84, 86. Thus, it is clear that "the employer is obliged to make some reasonable effort in some direction to compose his differences with the union." N.L.R.B. v. Reed & Prince Mfg Co. (1st Cir. 1953) 205 F.2d 131, 135, 32 LRRM 22257~cert. denied, 346 U.S. 887, cited in O. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63, rev. den. by Ct. App., 1st Dist., Div. 4, November 10, 1980, hg. den., December 10, 1980. In other words, what is required is:

> . . . something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground - - - -Collective bargaining then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract - - - - (citations omitted). N.L.R.B. v. Insurance Agents' International (1960) 361 U.S. 477, 4 L.Ed. 2d 454, 462, 80 S.Ct. 419.

And Mr. Justice Frankfurter, concurring in part in N.L.R.B. v. Truitt Mfg. Co. (1956) 351 U.S. 149, 100 L.Ed. 1029, 1033, 38 LRRM 2042 stated:

> These sections obligate" the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith. 'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necesarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination.

Unfortunately, direct evidence of an intent to frustrate the bargaining process will rarely be found. As a result, a party's intent can only be discerned by reviewing the totality of its content. N.L.R.B. v. Reed & Prince Mfg. Co., supra; B. F. Diamond Construction Company (1967) 163 NLRB 161, 64 LRRM 1333, enf'd (5th Cir. 1969) 410 F.2d 462, cert, denied, (1969) 396 U.S. 835; 0. P. Murphy Produce Co., Inc., supra; As-H-Ne Farms (1980) 6 ALRB No. 9, rev. den. by C t. App., 5~th Dist., October 16, 1980, hg. den., November 12, 1980.

> - - - the question is whether it is to be inferred from the totality of the employer's conduct that it went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union. N.L.R.B. v. Reed & Prince Mfg. Co., supra, 32 LRRM at 2227.

Of course, the totality of conduct may include specific acts away from the bargaining table such as unilateral changes in wages or a refusal to furnish information necessary to the fulfillment of the union's duty to bargain. Such violations of the Act raise a presumption of bad faith bargaining. Montebello Rose Co., Inc. (1979) 5 ALRB No. 64, enf'd in relevant part in Montebello Rose Co. v. A.L.R.B., 119 Cal.App. 3d 1 (Ct. App., 5th Dist., 1981).

Respondent here met few, if any, of the standard criteria for good faith bargaining.65/

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65. Respondent as much as admitted its lack of good faith by arguing, citing no authority, that it was excused from the normal collective bargaining good faith standards other negotations are

(Footnote continued- - - -)

1. Respondent's Unwillingness to Offer Counterproposals

SPR made no attempt to reconcile the differences it had with the UFW. This is not *a* question of its proposals falling unreasonably short of the mark; Respondent simply made no proposals.66/ *It* agreed to use the Radovich contract as a basis for negotiations (bearing in mind that it contained no grape harvesting rates) and represented that there was a large part of Radovich it could agree to. But when it got down to actual bargaining, it discovered there was much about the contract it could not accept; yet, it made no alternative suggestions. Time and time again Schroeder and Burciaga requested orally and in writing counterproposals from Respondent; e.g. at the October 14, 1980 meeting, on December 15, 1980 (G.C. Ex 30), on January 28, 1981 (G.C. Ex. 31), and on April 30, 1981 (G.C. Ex 31). Often, Peck and Noblat responded that they were not prepared to make an offer but would get back to the Union. Finally, at the April 28, 1981 meeting, Noblat made a definite commitment to submit a proposal; none came. Meanwhile, Respondent was objecting to the UFW's wage proposal but at no time gave any indication of what would be acceptable. Peck testified that the Union's initial general labor rate was not unreasonable, but there is no evidence she ever communicated this to Union negotiators either. Respondent was likewise busy objecting to the Union's proposals on seniority,

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(Footnote continued----)

bound by because it voluntarily entered into negotiations with a union whose majority support it doubted. Therefore, its argument continues, because of this "unique bargaining relationship," the parties thereby established, "their own ground rules for what constitutes bargaining in 'good faith.'" (Resp.'s Brief, p. 145.)

66. Again, Respondent simply believes that the normal give and take which always characterizes any bargaining relationship in which the parties intend to consummate an agreement does not apply to it. Thus, Respondent argues that the UFW wage proposal was so far out of line (though Peck admitted the general labor rates were not) that it was not even required to make a counterproposal because to do so would be making "meaningless gestures." (Resp's Brief, pp. 159-160.) In effect, Respondent's argument means that as soon as hard bargaining became the rule, displacing Peck's "era of cooperation and friendship," Respondent was actually relieved of any further bargaining. This approach was suggested in Respondent's Brief: "... The original basis for the negotiations has been one of working out the individual contract problems over the bargaining table; not an adversarial approach of submitting excessive proposals to the other party and hoping to work out *a* compromise ----." (Resp's Brief, p. 160.)

hiring, discipline and discharge, supervisors, mechanization, successorship, housing and union security, but again, never at any time made any proposals of its own. Outright rejections without any real attempt to explain or minimize the differences are inconsistent with a bona fide desire to reach an agreement. As-H-Ne Farms, supra, citing Akron Novelty Mfg. Co. (1976) 224 NLRB 998, 93 LRRM 1106; Martori Brothers (1982) 8 ALRB No. 23, rev. den. by Ct.App., 4th Dist., Div. 1, September 3, 1982, hg. den., September 29, 1982. Equally inconsistent with an intent to reach a contract are unreasonable delays in submitting counterproposals. As-H-Ne Farms, supra, citing Lawrence Textile Shrinking Co., Inc. (1978) 235 NLRB No. 163, 98 LRRM 1129.

2. The Inability to Accept the Role of the Union in Negotiations

No doubt Carolan Peck, honest, hard working, and conscientious, spoke from the heart about her concern for her workers, her philosophy of runing the farm as a family, and her disdain for rules and regulations, formal agreements, and legal technicalities. She really believed that all she had to do was offer to bargain, and she could almost effortlessly reach an early agreement (to her complete satisfaction, of course). She must not have known what hit her when she got down to the nitty/gritty of actual face to face negotiations. Unschooled and unfamiliar with the complexities of a modern and comprehensive labor agreement, naively 67/ assuming a contract could be reached the first couple of sessions, Peck simply gave up the project when the first obstacles were encountered.68/ One of those "obstacles" was the Union's attempt to place restrictions upon what she perceived as her freedom to operate her business pretty much as she pleased; i.e. as if the Union never existed on her property in the first place. This unwillingness to compromise on any "management rights" issue only serves to highlight Peck's basic philosophical problem as a negotiator which was present throughout and which destroyed any chance, if there ever were one, for the successful concluding of a labor agreement. Simply stated, the problem was Peck's inability to

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67. Respondent admits that Peck's conduct as a labor negotiator could very well be construed as "naive". (Resp's Brief, p. 152.)

68. Peck initially entered negotiations expecting to make a quick deal in which she would negotiate a contract at Wasco while hoping that the Union would withdraw any interest at DiGiorgio so she could sell that property. However, negotiations took longer than she thought; and, according to her own testimony, she was already getting impatient that there was no agreement on the language articles by the time of the first few meetings and wanted to start discussing wages.

accept the Union as the representative of her workers and her feeling that it stood between any honest communications she wished to foster between those workers and herself. In short, the Union was destroying what she considered to be her "family" and her answer to the remedies sought by its proposals was – trust me to take care of my own workers. There were several examples of how this attitude succeeded in bringing negotiations to a standstill:

(a) Discipline and Discharge – Peck could not accept the idea that a union would have any interest in protecting workers against unfair disciplinary actions. She thus opposed the idea of having to notify union representatives and affording them the right to be present during times when discipline could result. Instead, Peck insisted on the sole right to discharge or discipline on the spot. Why? Because to her, this was a family matter which needed no interference from outside parties. This was the reason she told Schroeder on October 14 that to discipline one of her employees was like an adult disciplining a child, presumably, who had been naughty. In effect, she was telling Schroeder that outsiders weren't necessary for this process, and he should trust her;

(b) Supervisors – The Union had hoped to obtain contractual protection for the bargaining unit by limiting the amount of work supervisory personnel could perform. Peck accused Schroeder of taking the fun out of farming because Noblat, foremen, members of her family and she liked to farm too. Schroeder accommodated her and modified his proposal so as to specifically exclude members of her family from coverage (G.C. Ex 24). This was not good enough; Peck wanted to be free to run the farm in her own way. When Schroeder told her he was worried about the loss of bargaining unit jobs, she told him to trust her that this would not happen;

(c) Housing – Here Peck felt insulted that the Union should have to have something concerning this subject in writing when her family had provided housing for farmworkers for years – trust Peck that it would continue;

(d) Successorship – This again was said to be an unnecessary clause because as long as the Union did its part under the contract, it could trust any purchaser to recognize the Union and bargain with it;

(e) Mechanization – Peck opposed this clause because it restricted her freedom to operate, but she assured the Union not to worry because her plans were to use less grape harvesting machines than her predecessor, thereby preserving more unit jobs. Thus, she again asked the Union to trust her; and finally,

(f) Income Tax Returns —- The mere suggestion that income tax records might have to be provided to substantiate Peck's claims of financially poor seasons and inability to pay the UFW's wage proposals evoked a strong reaction from Peck because it obviously showed a lack of trust on the part of Union representatives.69/

3. The Lack of Communciations on a Personal Level Between Peck and Schroeder

Peck's attitude toward UFW negotiator, Ken Schroeder, was another roadblock to successful negotiations. This was because Schroeder's young age, parallelling that of Peck's own children, made serious bargaining with him problematical. Peck as much as admitted this in her own testimony:

> But I want to say one thing that Mr. Schroeder is about the same age as my own kids, and sometimes during these talks, you know, you'd be worried about things going on, way beyond what's happening with the UFW meetings. We had a billion other things going on all the time, and he would just act as if there is just only one way to do every single thing, and I felt that it was on the record, our position and our affection for farm labor, and we didn't need Mr. Schroeder to tell us how to treat people. (TR. 7, p. 96.)

Peck's inability to consider Schroeder an equal was also one of the reasons she, upon receiving Schroeder's initial wage offer, went over his head to Haddock, an older man with whom she, an older woman, obviously felt more comfortable.

4. Infrequency of Meetings and Lack of Diligence in Arranging Them

Starting on September 29, 1980, the parties met regularly thereafter on October 7, 9, and 14 and discussed language items with little progress on the major areas. Then, on November 21 and December 7, Respondent received the Union's initial wage offer (G.C. Exhs. 29 and 30). *At* that point Respondent virtually ceased negotiating. Schroeder attempted to reach Peck on December 15, 1980, and January 28, 1981 to set up additional meetings but was unable to reach her (G.C. Exhs. 30 and 31). Respondent finally agreed to a negotiating session for April 28, 1981, despite Noblat's earlier correspondence that Respondent saw no need for further meetings. (G.C. Ex 17.) But following this session, it became difficult again for the UFW to reschedule. Burciaga wrote

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69. Peck also testified that she refused to turn over to the UFW copies of her income taxes, infra, because such a request showed the negotiations had lost the friendly spirit that had earlier characterized them.

Respondent on April 30, 1981 and May 13, 1981 (G.C. Exhs 39 and 40) requesting an agreement on another negotiating session, only to be told that he would be contacted when Respondent's attorney returned from vacation at the end of May (G.C. Ex 45.) Respondent declined to contact Burciaga again to set up another meeting, and no further sessions were held until March 30, 1982.

It is not necessary to dwell upon the point that this conduct does not demonstrate that Respondent was engaged in negotiations with a "sincere desire to reach an agreement, if possible." N.L.R.B. v. Reed & Prince Mfg. Co., supra. Certainly, Respondent had an affirmative duty to make prompt and expeditious arrangements to meet and confer. J.H. Rutter Manufacturing Co., Inc. (1949) 86 NLRB 470. "Parties are obligated to apply as great a degree of diligence and promptness in arranging and conducitng their collective bargaining negotiations as they display in other business affairs of importance." A. H. Belo Corporation (WFAA-TV) (1968) 170 NLRB 1558, 1565, 69 LRRM 1239, enf'd in relevant part in A. H. Belo Corp. v. N.L.R.B. (5th Cir. 1969) 411 F.2d 959, 71 LRRM 2441, 2444, cert, denied, 396 U.S. 1007, cited in 0. P. Murphy Produce Co., Inc., supra. This duty is not met by delaying arrangements for meeting and by failing to advise soon thereafter when another meeting can be scheduled. Id., citing Exchange Parts Co. (1962) 139 NLRB 710, 51 LRRM 1366, enf'd, N.L.R.B. v. Exchange Parts Co., (5th Cir. 1965) 339 F.2d 829, 58 LRRM 2097, reh. den. (1965) 341 F.2d 584 and Coronet Casuals, Inc. (1973) 207 NLRB 304, 84 LRRM 1441. When an employer does not make itself available for negotiations at reasonable times, it may be inferred that it is attempting to delay agreement. O. P. Murphy Co., Inc., supra. This is evidence of surface bargaining. Coronet Casuals, Inc., supra.

Moreover, "(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 suface bargaining." McFarland Rose Production (1980) 6 ALRB No. 18, at p. 12, rev. den. by Ct. App., 5th Dist., April 26, 1982, hg. den., June 16, 1982, citing Radiator Speciality Co. (1963) 143 NLRB 350, 53 LRRM 1319, enf'd, in relevant part, (4th Cir. 1964) 336 F.2d 495, 57 LRRM 2097.

5. The False Impasse

Having found the Union's wage proposal not to her liking, Peck called Maddock in December of 1980 and told him that there was no sense in meeting anymore. This position was confirmed by Noblat on February 9, 1981. (G.C. Ex. 17.) In refusing to bargain, neither Peck nor Noblat actually claimed the parties were at impasse; yet, realistically this is what they were saying. In effect, beginning in December, 1980, Respondent declared itself to be at "impasse"; and this impasse lasted until negotiations resumed on April 28, 1981, only to be declared once again when the unfair labor practice charge was filed on May 21, 1981. At that point, as Peck made clear in her testimony, she was through negotiating: "- - - I thought the whole spirit of the thing was gone then; the

whole concept was gone." (TR 7, p. 169.) This second "impasse" then continued until the day after the prehearing conference, March 30, 1982.

Of course, a lawful impasse must be genuine; i.e., the deadlock was the result of good faith bargaining of the employer and the union. A common reason for not accepting a claim of impasse is the failure of the party so claiming to have in fact bargained in good faith. The difficulty, of course, as always, is in determining whether good faith bargaining has occurred.

The National Labor Relations Board has established the general framework:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. (Taft Broadcasting Co., Inc. (1967) 163 NLRB 475, 478, aff'd sub nom, American Federation of Television and Radio Artists, AFL-CIO v. N.L.R.B. (D.C. Cir. 1968) 395 F.2d 622.)

The NLRB has held that a genuine impasse in negotiations is synonymous with deadlock and exists where, despite the parties' best efforts to achieve an agreement, they are unable to do so. Hi-Way Billboards, Inc. (1973) 206 NLRB 22, 23; Dust-Tex Service Inc. (1974) 214 NLRB 398, 88 LRRM 292; Bill Cook Buick (1976) 224 NLRB 1094, 92 LRRM 1582.

The supposed impasse and Respondent's subsequent wage increase, infra,70/ were not based on a good faith belief that impasse had in fact been reached and is therefore, evidence of Respondent's overall bad faith bargaining. McFarland Rose Production, supra; Montebello Rose Co., Inc., supra.

6. The Loss of Majority Defense

Under the ALRA, the essential requirement for initial recognition is certification, and the only means by which a union can be recognized is through winning a secret ballot election and being certified by the Board. Nish Noroian Farms (1982) 8 ALRB no. 25. Once certified, the union remains the exclusive collective

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70. "A deadlock caused by a party who refuses to bargain in good faith is not a legally cognizable impasse justifying unilateral conduct." Northland Camps, Inc.. (1969) 179 NLRB 36, 72 LRRM 1280, cited in McFarland Rose Production, supra. See also, Industrial Union of Marine and Shipbuilding Workers (Bethlehem Steel Co., Shipbuilding Division) v. N.L.R.B. (3d Cir. 1963) 320 F.2d 615.

bargaining representative of the employees in the unit until it is decertified or a rival union is certified. Id. After arguing throughout its Brief that the ALRA does not sanction voluntary recognition and after admitting to having violated section 1153(f) of the Act by negotiating with an uncertified union, Respondent now urges me not to follow Nish Noroian if it means employers are prohibited from withdrawing recognition from a union that no longer represents the workers. (Resp's Brief, p. 122, 130.) I reject the offer. The Board's decision in Nish Noroian "defeats Respondent's loss of a majority defense to the refusal-to-bargain allegations." Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

Under the totality of circumstances, I find Repsondent to have engaged in bad faith bargaining and shall recommend to the Board that it be found in violation of sections 1153(e) and (a) of the Act.

The UFW's Alleged Refusal to Bargain in Good Faith

A labor organization's bad faith bargaining may be an affirmative defense to a refusal to bargain allegation against an employer. (McFarland Rose Production, supra; Montebello Rose Co., supra, citing Continental Nat Co.. (1972) 195 NLRB 841, 79 LRRM 1575 and Times Publishing Company (1947) 72 NLRB 676, 19 LRRM 1199.

Although Respondent plead bad faith on the part of the UFW as an affirmative defense, it does not argue it extensively in its Brief. When it does allude to it, it basically makes two arguments: 1) that the possibility of reaching an agreement was "stymied by the UFW's change in attitude regarding cooperation and trust between the parties" (Resp's Brief, p. 153); and 2) the UFW, through Schroeder, delayed the submission of an economic proposal and once presented, sought to delay discussion of economics until after the language items were agreed to. (Resp's Brief, p. 152, 159.)

There is no validity to these arguments. Respondent's view of the "UFW's change in attitude" has already been discussed and apparently consisted of its following the normal course of hard give and take bargaining in which one side makes an initial proposal anticipating *a* counter and hopes for some kind of compromise along the way which could result in an agreement.

As to Respondent's second argument, the facts belie the claim that the UFW delayed in making a proposal. Although there is a conflict in testimony as to when Peck first requested a wage offer, it is clear that a proposal was presented on November 21, 1980, at least within the first two months of the bargaining.

Moreover, the negotiating history reveals that Schroeder was eager to discuss and reach agreement on any subject and did not limit his negotiations to language items only or did not refuse to bargain over economic matters unless Respondent agreed to negotiate over the Union's language proposals first. There was also no evidence that Schroeder presented any language proposal as a final

offer or that because negotiations became stymied on language, Schroeder was unwilling to make further concessions either in the economic area or on other unresolved issues. In fact, what happened here was that Respondent refused to negotiate on all subjects, language and economic, as soon as the Union's wage proposal was presented.

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IX. THE UNILATERAL WAGE INCREASE

A. Findings of Fact

Peck testified that she took over the Wasco Ranch on January 13/ 1978 and that within the first month of her ownership, she made some adjustments to the wage rates for all workers because she felt the wage scale was too low. She testified she determined on her own the timing, amount, and reasons for the increase:

Q: What factors were taken into consideration in determining how much to pay the workers?

A: None

Q: How did you decide to raise the wages?

A: Well, it's just based on being in farming before - - - - - - - - - - - -

- -

Q: Did you have the discretion to make the decision on the amount of the increase?

A: Do you mean did *I* have the right?

Q: Yes.

A: I had the right.

Q: - - - (W)ho determined when the wages would be effective?

A: Me

Q: And what factors were taken into consideration in determining the timing of the raise of the wages?

A: I have no idea.

(TR. 2, pp. 44-45)

Peck testified that she thought raises were given in 1979 because she had the feeling that the people needed them. Asked how she decided on the amount of the increase, Peck answered that she "just made it right up." (TR. 2, p. 46.) As to the timing, Peck testified that it depended on the economy and that she usually raised raises when she had "an instinct around my own family where things are tight." Id.

Peck raised wages in 1980 and in 1981 [71/] (G.C. Exhs 41A-41D) and testified that the same factors were considered as in the prior years. Peck again stated that the condition of the economy played a role: "- - - if it looks like a lousy market, you may or may not give an increase, depending on a million other circumstances." (TR. 2, p. 50.)

Though raises were given each year,[72/] Peck specifically denied these raises were automatic or that the workers were ever told to expect an automatic raise.

Noblat testfied that Respondent raised the general labor— rate from $2.70 to $3.25 on the very day that title passed, January 13, 1978, and later that same year (in May) to $3.55 per hour. The wages of tractor drivers, irrigators, and shop employees were also raised. Noblat further testified that wages were raised in May of 1979 to $3.75, in May of 1980 to $4.10 and in May of 1981 to $4.45. (G.C. Ex 41D.)

But Noblat testified that the increase was automatic in that it was based on the inflation rate according to what he heard on the radio or read in the newspaper. Yet, Noblat testified he never represented to the employees that they should expect a cost of living increase every year and further testified that Peck and he had absolute discretion whether or not to give an increase.

Both Schroeder and Burciaga testified, and Peck confirmed, that though the 1981 raise was granted during the period Respondent was negotiating with the UFW over a contract, no notice was given to the union of any intent to increase wage rates or even that same had been effectuated. Both Schroeder and Burciaga only learned of it through Respondent's workers in May of 1981, after the raise had been put into effect.

B. Analysis and Conclusions of Law

It has long been established under federal labor law that an employer commits a violation of section 8(a)(5) of the National Labor Relations Act by making unilateral changes in wages or working conditions. This is because such conduct circumvents the duty to negotiate, thereby frustrating the objectives of labor policy just

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71. Only the 1981 increase is alleged to be a violation in the Complaint herein. Respondent admitted in its Answer to Paragraph 7c of the Complaint that it instituted a wage increase on May 18, 1981. (G.C. Ex 1-D.)

72. Peck testified that these wage increases did not include piece rates which were paid for harvest work and occasionally for pruning.

73. Newhouse testified that general labor included ore-harvest types of job functions such as pruning, tipping, hoeing and thinning.

as much as a flat refusal to bargain would (N.L.R.B. v. Katz (1962) 369 U.S. 736, [82 S.Ct. 1107, 8 L.Ed.2d 230, 50 LRRM 2177].) In fact, a unilateral grant of a wage increase is so inimical to the collective bargaining process that it constitutes an independent violation of the National Labor Relations Act, regardless of whether any showing of subjective bad faith is made. (Id.; N.L.R.B. v. Consolidated Rendering Co. (2d Cir. 1967) 386 F.2d 699.) Such conduct clearly tends to bypass, undermine, and discredit the union as the exclusive bargaining representative of the employer's employees. (Continental Insurance Co. v. N.L.R.B. (2d Cir. 1974) 495 F.2d 44.)

It is a violation of the Agricultural Labor Relations Act, as well. Unilateral changes, in addition to constituting an independent violation of the Act, also serve to support an inference of bad faith and again, subjective bad faith need not even be established to prove such a violation. (O.P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63, review den. by Ct.App., 1st Dist., Div. 4, November 10, 1980, hg. den., December 10, 1980.) Thus, where an employer institutes unilateral changes in working conditions during the course of negotiations, it violates its duty to bargain, Id., citing N.L.R.B. v. Katz, supra;

> Unilateral implementation of a wage increase constitutes a change in a significant term of employment without regard to the union's role as representative of the employees, and has been considered "by far the most important unilateral act." O. P. Murphy, supra, citing N.L.R.B. v. Fitzgerald Mills Corp. (2d Cir. 1963) 313 F.2d 260, 267-268, 52 LRRM 2174, cert, denied (1963) 375 U.S. 834.

Such unilateral changes are per se violations and evince a bad faith bargaining attitude because said conduct eliminates even the possibility of meaningful union input of ideas and alternative suggestions. (Kaplan's Fruit and Produce Co. (1980) 6 ALRB No. 36.)

However, there are limited exceptions to the general rule which permit unilateral changes despite the existence of a duty to bargain where: 1) the parties have bargained to impasse; 2) the union has consented to the change and thereby waived its right to demand bargaining over the subject; or 3) the employer's change is consistent with a long-standing past practice to the extent that the failure to effectuate same could result in a charge that respondent failed to bargain in good faith. This latter situation is known as maintaining the "dynamic status quo." (N.L.R.B. v. Katz, supra; N.L.R.B. v. Landis Tool Co. (3rd Cir. 1952) 193 F.2d 279 [29 LRRM 2255].) In Katz, the Court indicated that a unilateral wage change that in effect was merely a continuation of the status quo would not be an unfair labor practice. However, the wage increase must be an automatic one and not involve any measure of discretion. Where an employer has absolute discretion regarding the amount and timing of a wage increase – or whether to grant one at all – and there has been no previous commitment to automatically grant an increase in an objectively-fixed amount, then it is an unfair labor practice to

implement such a raise without first giving notice to and bargaining with the union over it. N.A. Pricola Produce (1981) 7 ALRB No. 49; George Arakelian Farms (1982) 8 ALRB No. 36.

Thus, the case law makes clear that to prevail the employer must substantiate its claim of past practice or other proper business purpose for the implementation of any unilateral change. However, the employer "carries a heavy burden of proving that such adjustments of wages - - - are purely automatic and pursuant to definite guidelines." (N.L.R.B. v. Allis Chalmers Corp. (5th Cir. 1979) 601 F.2d 870, 875 [102 LRRM 2194].)

Here Respondent concedes, as cannot be denied on this record, that wages were raised in 1981, that they were not automatic raises, that the amount of raise was not always the same, and that they involved discretion on the part of Peck. (Resp's Brief, pp. 167-168). Respondent argues instead, without citing any controlling authority, that what matters in this case is, "the expectations of the workers involved." (Resp's Brief, p. 168.) Of course, even if this were the law, it was not proved here as both Peck and Noblat testified that they never made any commitments to the workers to the effect that they could expect a yearly automatic increase.

Respondent also argues that the 1981 increase should not be considered as evidence of bad faith since it was merely an extension of a prior "established policy" to which the UFW had previously not objected. (Resp's Brief, p. 169.) This argument suggests that the UFW's objection came too late, the policy having already been established. But this argument presupposes the existence of an established policy which, as pointed out above, I have found not to be the case. In any event, even if there were such a policy, the UFW's failure to object to pre-1981 raises, assuming arguendo it had knowledge of this conduct, does not mean it waived any objection it might have to the 1981 raise or to any future raises.

I recommend to the Board that Respondent be found in violation of sections 1153(e) and (a) of the Act.

X. THE INFORMATIONAL REQUESTS

A. Findings of Fact

Maddock testified that at the September 29, 1980 meeting Schroeder spoke to Ken Harrison and Manock about certain information he needed relating to the Wasco property, including a list of workers, acreage, maps of the property, and harvest data. Schroeder testified that he remembered pointing out that the wages mentioned in the Radovich contract, being table grapes, were paid on an hourly basis instead of a piece rate for tonnage, as one would ordinarily be paid in the juice harvest; and that he therefore, emphasized the importance of receiving the wine grape harvest production information. Specifically, this information included tonnage, acreage, rates paid, varieties grown, and hours worked (meaning how many hours were put into harvesting a certain variety of grape).

Following this session, Schroeder and Harrison met privately to discuss the UFW's informational requests. Schroeder testified that several requests were satisfied verbally at that time; e.g. hourly pay rates for several classifications, benefit program information, seniority practices, housing, leaves of absence, rest periods. Other information was provided later; e.g. a list of current employees and their addresses.

Information requested that was not turned over at that time or immediately thereafter was the wine grape production information by variety of grape.

Schroeder testified he repeated his request for this information at the October 7 meeting but that either Peck or Noblat claimed that no records were kept on hours worked. According to Schroeder, he questioned this since it was his understanding that the Company based its eligibility for medical and pension plans on the number of hours worked.

Schroeder testified that by the end of the October 14, 1980 meeting, he still had not received all the production information he had requested and that he needed it to determine, particularly with respect to the piece rate, how much an average worker made per hour per day in order to formulate a wage proposal.

This information was formally requested on November 11, 1980 (G.C. Ex 28).

According to Schroeder, around December 8, 1980, Peck gave Maddock some of the rates paid, tonnage, and acreage figures but that he still lacked information on the hours worked for the 1978, 1979 and 1980 grape harvest as well as a list of names and hours of all employees who had worked 500 hours or more in 1979 and 1980. He formally requested this information on December 15, 1980 (G.C. Ex 30) and again on January 28, 1981 (G.C. Ex 31).

On February 9, 1981, Noblat submitted much of the information that had been previously sought (as far back as the September 29, 1980 meeting) on the grape varieties, acreage, yield and tonnage. (G.C. Ex 17.) Noblat also submitted the number of hourly employees working over 500 hours for 1979 but declared that a list of these employees' names was "not available at this time." Id. Prior to the receipt of the February 9 letter, Noblat had again informed Schroeder that Respondent did not keep records of the hours worked for piece rate workers.

At the April 28, 1981 meeting, Schroeder testified he again requested the hourly information pointing out that he had to have some basis for making further wage proposals because the raw figures could not tell him how much the piece rate workers were earning in take home pay.74/

The soon to be UFW negotiator, David Burciaga, also had discussions with Noblat and Peck concerning this information. Burciaga testified without contradiction that at the April 28 meeting he explained to both of them his need for the hours worked material and that Noblat replied that piece rate workers averaged about the same as hourly workers. Burciaga also testified that Peck indicated to him that she would not sign a contract if it meant there would be a fight at the ranch between the piece rate workers and the hourly workers.

On April 30, 1981, Burciaga wrote Peck formally requesting the information; e.g. a list of names of all workers who worked for the Company in 1980 and their hours worked. (G.C. Ex 39.) He also asked for other Company records for the 1978, 1979 and 1980 grape harvest. In his letter Burciaga emphasized:

> During our meeting of April 28, 1981, the Company stated several times that the harvest rates proposed by the Union were way out, ridiculous and etc. (sic) This is one of the reasons we need the above information. Without it, the Union has no way of knowing what rates could be considered fair and acceptable to both the workers and the Company.

In addition to these requests, in view of Noblat's statement in his February 9 letter that the Company had lost money the last three years and could not afford to pay the Union's wage proposals, Burciaga requested that the Company make its financial records available for the UFW's inspection.75/

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74. Schroeder testified he had made a piece rate proposal by looking at other wine grape contracts for similar varieties in the San Joaquin and Napa Valleys, including the Paul Masson and Almaden wineries.

75. Respondent argues that Burciaga's request was a "contributing factor in the breakdown of the negotiations because it demonstrated a lack of trust on the part of the UFW." (Resp's Brief, pp. 156-157.)

In fact, none of this information was provided until the parties resumed "negotiating" on March 30, 1982, at which time Noblat turned over a list of workers' names and the hours worked but only for one week in August of 1981. Schroeder testified he told both Peck and Noblat that he would like to see the rest of the weeks of the 1981 harvest and that they responded they would get the information together for him.

B. Analysis and Conclusions of Law

The principles of law underlying this issue are well settled. The duty to bargain in good faith may be violated by an employer's refusal to furnish information relevant and reasonably necessary to the union's ability to carry out the negotiation or administration of a collective bargaining agreement. (Detroit Edison Co. v. N.L.R.B. (1979) 440 U.S. 301, 303 [99 S.Ct. 1123, 1125, 59 L.Ed.2d 333]; N.L.R.B. v. Acme Industrial Co. (1967) 385 U.S. 432, 435-36 [87 S.Ct. 565, 567-68, 17 L.Ed.2d 495]; N.L.R.B. v. Truitt Manufacturing Co. (1956) 351 U.S. 149, 152 [76 S.Ct. 753, 755, 100 L.Ed.1027]; N.L.R.B. v. Associated General Contractors (9th Cir. 1980) 633 F.2d 766 [105 LRRM 2912], cert, denied, (1981) 107 LRRM 2631; Kawano, Inc. (1981) 7 ALRB No. 16.)

Satisfaction of Respondent's obligation requires not only that the information be provided but that it be supplied with reasonable promptness. (B. F. Diamond Construction Company (1967) 163 NLRB 161, enf'd (5th Cir. 1968) 410 F.2d 462, cert, denied (1969) 396 U.S. 835; Kawano, Inc., supra.) Late submission is not sufficient where diligent efforts to furnish the information in a timely fashion have not been made. (General Electric Company (1964) 150 NLRB 192, 261.)

Certainly the information pertaining to the hours worked of piece rate workers in the harvest was relevant to the negotiations. In O. P. Murphy Produce Co., Inc., supra, the Board found that the respondent had violated section 1153(e) by refusing to provide the UFW with the information it requested concerning the company's production and yield. "Respondent's yield and production figures are closely related to the income of the employees .... Respondent did not fulfill its duty by providing only gross numbers of employees and acreage, or by offering to allow the union to look through its general office records."

On the other hand, an employer will not be required to furnish information which is not available to it. (Korn Industries, Inc. v. N.L.R.B. (4th Cir. 1967) 389 F.2d 117.)

However, even though an employer has not expressly refused to furnish the information, his failure to make a diligent effort to obtain the information may be a violation of the obligation to bargain in good faith. N.L.R.B. v. John S. Swift Co. (7th Cir. 1960) 277 F.2d 641, 46 LRRM 2090, *2Q9T.*Even if some of the requested information is not available in the form requested, the employer mast make a reasonable effort to secure the information- or

to explain or document the reason for its unavailability. Borden Inc., Borden Chemical Division (1978) 235 NLRB 982, 98 LRRM 1098.

Of course, the defense of unavailability is, at first glance, appealing, but not where there is a lack of good faith compliance with the request by not furnishing all of the information which was available. N.L.R.B. v. Rockwell-Standard Corp. (6th Cir. 1967) 410 F.2d 953, 59 LRRM 2433. Therefore, it is no excuse to claim that the information did not exist where other data was also obtainable by the respondent, but not made available to the union. Peyton Packing Co., Inc. (1961) 129 NLRB 1358, 1362.

Obviously, where unavailability is a legitimate defense, a respondent is not obliged to furnish the information requested in the exact form called for.

> But if the Company's strict construction of the Union's request was in truth the basis for its refusal, minimum standards of good faith require the Company at least to inform the Union as to the specific reason for unavailability, to disclose the alternate basis on which such information might be made available, and to inquire whether that alternative would be acceptable. (General Electric Company, supra.)

Respondent" herein fell far short of fulfilling its duty to provide accurate, complete, and timely information, upon request, to the UFW. In some cases, it turned over no information at all; e.g. the income tax records.76/ In others, incomplete information was made available only after long and unexplained delays. Respondent defends its failure to provide certain types of information, such as the hours worked data, by claiming that it possessed no such records and that therefore, it was somehow relieved of any further obligation to produce. But it is now clear that such inforamtion actually was available because it was presented, though incompletely, at the March 30, 1982 meeting. No explanation was offered by Respondent why this information could not have been presented earlier or why it was not presented in completed form.

Even if the exact hours worked records were not maintained, there must have been other methods by which the information could have been accumulated. How else (unless he actually had the records) could Noblat have been able to represent at the April 28, 1981 meeting that the piece rate workers made the same as those paid hourly? Respondent was obviously able to determine somehow the number of hours piece rate employees worked in order to make this assertion. In Barney Manufacturing Co., Inc. (1975) 219 NLRB 41, a

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76. Peck testified, not unlike her position on making a wage counterproposal, that once the UFW had filed its unfair labor practice charge, Respondent was relieved of any further duty to comply with the UFW's request for its tax records.

defense to a demand for information regarding the piece rate system was that no such records were in existence and that the piece rates were personally and mentally determined by the company's president. This defense was rejected by the NLRB. The Board explained that the president could have explained to the union the piece rate system. And in Ramona's Mexican Food Products (1973) 203 NLRB 663, enf'd (9th Cir. 1974) 531 F.2d 390, the employer's claim that he kept the formula for drivers' bonuses in his head and did not have to give out that information was likewise rejected.

Finally, it needs to be mentioned that a union which submits wage proposals does not thereby establish a clear and unmistakable waiver of its right to information. As-H-Ne Farms, Inc., supra, citing Sun Oil Company of Pennsylvania (1977) 232 NLRB 7, 96 LRRM 1484. See also, N.L.R.B. v. Fitzgerald Mills Corporation (2d Cir. 1963) 313 F.2d 260, 52 LRRM 2174, enforcing (1961) 133 NLRB 377, 48 LRRM 1745, cert, denied (1963) 375 U.S. 834, 54 LRRM 2312.

Here the Union did the only thing it could -— it made a proposal based on the information it had on hand at the time. But, of course, this placed it at a terrible disadvantage because it was forced to make a wage offer in a state of ignorance on some crucial items, not really knowing whether movement on its part would result in bringing the parties closer to an agreement.

It is ironic that it is Respondent who complains that the UFW's wage proposals, especially on the grape harvest, were "outlandish" and caused the demise of the "spirit of cooperation" when it was really Respondent's lack of compliance with UFW informational requests that prevented the Union from modifying its positions or offering alternative proposals.

I shall recommend to the Board that the Respondent be found in violation of the Act for refusing to or failing to provide in a timely fashion relevant information, pursuant to the Union's request. In some cases, the requested data had not been supplied even by June 10, 1982, the concluding date of the hearing.

Respondent's consistent refusal to provide information on the grounds of unavailability or otherwise, its providing information which was incomplete, and its disinclination to offer alternative information from other sources leads me to conclude that Respondent's real reason for withholding said materials was not unavailability but either an unwillingness to disclose the information in any form, General Electric Company, supra, or was a bargaining device designed to interfere with the UFW's ability to make a sensible proposal. Kawano, Inc., supra.

These acts are all circumstantial evidence of Respondent's desire to confuse and drag out negotiations and support the inference that Respondent was not negotiating in good faith.

XI. THE DISCHARGE AND REFUSAL TO REHIRE ALLEGATIONS

A. The Discharge

1. Findings of Fact

Esteban Chavez worked for Respondent during the first half of 1981 pruning grapes, tying vines,77/ hoeing, and tipping.78_/ His foreman was Benny Vasquez, and he normally worked an 8-hour day.

All this changed in June when all of the men in Vasquez' crew (ten in number) were shifted (before the tipping had ended)79/ to vine planting and required to work 9 hours per day.80/ Chavez testified that Vasquez told him this assignment was necessary because another crew had quit and there was no other available crew to do the work. Chavez testified that his job specifically was to plant small cuttings into the ground but that he had no previous experience in this type of work.

According to Chavez, the new job worked quite a hardship on the crew. First, the temperature was around 100 degrees at the time and, unlike tipping, there was little shade. Second, while tipping was mainly done standing up, planting required stooping down and moving backwards along the vineyards. Finally, the ground was wet during this process because water ran through the rows as the planting went forward. This caused the workers to sink down into the muddy ground.

Chavez testified that on the second day of this assignment, he spoke to his foreman,81/ Victor Ramirez, on behalf of nine (of the ten) of the Vasquez crew transferees, complained about the working conditions, and requested that the work schedule be reduced from 9 to 8 hours. According to Chavez, Ramirez replied that Respondent had to get the planting done and that the workers were required to work the number of hours necessary to accomplish this task. Later that same day, during lunch, Chavez testified he told

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77. This work consisted of tying up the stump of the vine with wire.

78. The tipping process involved the cutting off of the tips of the grapes for packing.

79. The women continued in the tipping.

80. On the same day members of Abundio Lopez' crew and some of the steadies also joined the planting.

81. Though Respondent refers to Ramirez and Gilberto Chavez as "crew bosses," there does not seem to be much dispute that both operated as foremen for the Company. Their supervisory status (along with others) was contested by Respondent during the hearing, but Respondent has apparently abandoned this argument in its Brief.

Ramirez the group wanted to speak to supervisor Mike Armendaris82/ about the problem but was told Armendaris did not have the time to talk to them.

On the third day, the group came up with the suggestion of being paid by piece rate instead of hourly, thus enabling them to work faster to achieve a specific production goal while at the same time allowing them to reduce their hours back to eight. According to Chavez, Ramirez responded again that his orders were that the crew was to work 9 hours per day.

Chavez testified that during the morning of the fourth day, June 4, 1981, he spoke to his father, Gilberto Chavez, also, like Ramirez, a foreman in the vine planting, about the difficulty the group was having working under the present conditions and that they were considering only working 8 hours that day. Chavez testified that his father responded that Ramirez and Armendaris had been talking about getting the group fired. Later that same day, around lunchtime, Chavez testified that the group of nine once again told Ramirez they were interested in talking to Armendaris and that Ramirez again informed them that Armendaris did not have the time to speak to them. The piece rate idea was also mentioned for the second time, but, according to Chavez, Ramirez informed them that Armendaris had no interest.

Chavez testified that after lunch, he told his father, Gilberto, that the group definitely intended to work just 8 hours and to leave but would report back the following morning. Chavez testified that his father again told him that management had been discussing firing them and also replacing all of them if they walked off the job.

Chavez testified that at 3:00 p.m., after completing only 8 of the 9 scheduled hours of work,a_83/ the nine crewmemberse 84/ walked off their jobs after first telling Gilberto Chavez they were doing so but also telling him they would return in the morning. They did not inform Ramirez because he was on the other side of the field at the time.

They then went back to where the remaining members of Vasquez' crew were working and observed Armendaris talking to

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82. Chavez testified that he understood that only Armendaris had the power to change this work schedule.

83. The normal work schedule was 6:30 a.m. to 4:00 p.m. with one-half hour off for lunch.

84. Besides Chavez, the other workers involved in this job 'action, all named discriminatees herein, were Crecensio Rodriguez, Armando Lara, Guadalupe Soriano, Ruben Godinez, Apolinar Hernandez, and three brothers, Jesus, Jose and Socorro Rodriguez.

Vasquez; but, according to Chavez, as the group approached the scene, Armendaris got into his truck and drove off. Chavez, and co-workers Apolinar Hernandez and Jesus Rodriguez, testified that they told Vasquez, their regular foreman, that they had left their jobs early but that it was also made clear to him that they would show up in the morning. Chavez further testified that Vasquez replied that Armendaris had told him to inform the group that they had been fired and replaced and that he had been instructed to fill out personnel forms to that effect. Hernandez also testified that Vasquez was very sympathetic to the group's plight, agreed that it was hot and muddy, and that the group had only been required to work an 8-hour day when they worked with him.

The very next day, June 5, all nine men returned to work between 6:00 a.m. and 6:30 a.m., which was before starting time; but Company foremen informed the group that they had orders not to give them any work and that in any event, they should await the arrival of Armendaris. Armendaris arrived and in a very short discussions85/ told them, according to group members Chavez, Soriano, and Hernandez, that they could not work because they had quit. He also told them they had been replaced, but Chavez testified he didn't see any new workers. There was no discussion at any time of how many hours the group intended to work that day.

Both group members, Jesus Rodriguez and Armando Lara, testified that when- they arrived, though it was before starting time, there were already others — steadies and a group of women — working in the field at their old jobs. These others were all present employees of Respondent's.

That same day the nine workers went to the UFW office and later to the ALRB office where a charge was filed.

Mike Armendaris was ranch foreman in June of 1981 overseeing the transfer of the vine cuttings from the pit to the nursery, a distance of approximately 3 ½ miles, which he acknowledged as tough, heavy work. Armendaris testified that his instructions to the foremen he supervised, Gilberto Chavez and Victor Ramirez, were to get the nursery done as soon as possible because it was late in the season, too late to be planting a nursery,86/ and the weather was very hot.

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85. There is general agreement that Armendaris had made up his mind what he wanted to do and did not afford the workers any opportunity to explain their actions of the day before or their present intentions should they go back to work.

86. John Zaninovich, manager of the Wasco ranch, had testified that June was not the normal time to be planting a nursery and that ordinarily, it should have been done as soon as the planting was over or around the last part of April. As the time was late, Zaninovich testified he was pushing to get the plantings done in a hurry.

According to Armendaris, the first time he heard anything about these workers' complaints_87/ was when Gilberto Chavez told him that nine workers wanted to work only 8 hours because it was too hot and that he (Armendaris) talked to the Ranch Manager, John Zaninovich, about the problem and was informed that the Company needed to finish up by Saturday,_88/ and that if anybody couldn't work the full nine hours, they should be replaced by workers from the current work force.

Armendaris testified that afterwards, he told Chavez and Ramirez to tell these workers that they had to work the 9 hours because they had to finish by that weekend; and that if they walked out, they would have to be replaced. Armendaris further testified that he did not tell his foremen that the group was to be fired.

Armendaris also testified that he was not aware the nine employees had sought a personal meeting with him over the issue nor did he ever speak personally with any of them about the problem. According to Armendaris, Ramirez never told him that one of the workers had suggested a piece rate system as an alternative to the 9 hour day. In fact, Armendaris testified that Ramirez never informed him that any of the group of nine had any complaints.

Gilberto Chavez testified that in June of 1981 he had a crew of 24-26 workers, many of whom had come over from Vasquez[1] crew, and that Armendaris had told him it was necessary to finish up the planting that week. According to Chavez, several workers told him at 2:00 a.m. on June 4 that they wanted to quit at 3:00 p.m. because they were tired and it was hot. 89/ Chavez testified he then conferred with Armendaris who told him the group of disgruntled workers had better continue working the full 9 hours or face the prospect of being replaced. Chavez testified he relayed this information to the group. Specifically, Chavez testified that a few minutes before 3:00 p.m. he told the nine employees:

> Boys, you better stay for the last hours that's remaining, (sic) because the big boss, in other words, Mike Armendaris, says that if you do not work the last hour, he doesn't want you here tomorrow and you will be replaced. (TR 6, p. 113.)

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87. However, Armendaris testified he was aware that some of the women workers had previously complained about the difficulty in doing the planting.

88. In fact, the work was not completed by Saturday, as further planting was done the following Monday.

89. Chavez testified this was the first time he heard any of the men complain to him (although he admitted hearing them grumble among themselves), and he denied that his son, Esteban, had complained to him earlier about conditions.

Chavez also testified that the following day no new people were hired as replacements, only those from other crews that had already been working at the farm.

According to Chavez, that same day he brought to Vasquez, on orders from Armendaris, personnel forms to be filled out by Vasquez, the group's regular foreman, to the effect that the nine workers had been discharged.

Benny Vasquez testified that Armendaris had informed him that owing to the lateness of the year and the hot temperatures, it had become necessary to utilize the men from his crew in the nursery. If not done quickly, the cuttings could dry up and die when transferred from the pits.

Vasquez testified that about 3:20 p.m. on June 4, Armendaris informed him that members of his crew had walked off the job and that they should be replaced because they hadn't worked the required 9 hours.

Vasquez further testified that between 1:00 to 1:30 p.m. the following day he took 10 women from his crew, who had been doing tipping that morning, over to do the planting and that another foreman, Abundio Lopez, already had a crew of women working there. However Vasquez testified that no new workers were fired to replace the workers that had walked off the job.90/

Vasquez also testified that he was handed personnel forms, usually used for dicharged employees, by Gilberto Chavez, that he was reluctant to place "discharge" on them and sign them because he had not fired the employees, but that he checked with John Zaninovich and was told that it was appropriate to indicate on the forms that said employees had, in fact, been fired. That evening he filled out the forms (G.C. Ex 10) and presented them to Armendaris the following morning but was told that the forms should not read "discharge" after all but rather should reflect that the employees had quit. In accordance with Armendaris' instructions, Vasquez rewrote the forms. (G.C. Ex 13.)91/

Finally, Abundio Lopez testified that he was present when the nine workers came up to Vasquez and informed him they had just walked off the job and that these workers, though he could not identify which ones, specifically said that they were quitting. But

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90. Vasquez testified that his crew originally numbered around 22; and that with the departure of the nine workers, that left a reduced crew of approximately 13, all women. The crew was not increased to full size again.

91. The forms contain a space for the employee's signature, but Vasquez testified he made no attempt to have the workers sign the form.

Lopez also testified that these same workers mentioned that they planned to file some kind of a complaint because they had been fired.

Lopez further testified that shortly therafter Armendaris told him that he needed workers from his (Lopez') crew to replace the nine workers that had just walked off the job and that his whole crew, 15 or 16 workers, who had been tipping, were provided by him for planting the next day and a few days afterwards.92/ Lopez testified that members of his crew were already working at the time some of the nine workers reported for work that next morning; but that others of the nine were present in the field looking for work when he arrived. Lopez confirmed that workers from Vasquez' crew also showed up for work between 1:30 to 2:00 p.m. that same afternoon.

2. Analysis and Conclusions of Law

It is well settled by the National Labor Relations Board that to discharge an employee for engaging in concerted activities which are protected under Section 7 of the National Labor Relations Act is an unfair labor practice. N.L.R.B. v. Washington Aluminum Co. (1962) 370 U.S. 9, 8 L.Ed2d 298, 82 S.Ct. 1099, 50 LRRM 2235; N.L.R.B. v. Erie Resistor Corp., et al. (1963) 373 U.S. 221; Shelley & Anderson Furniture Mfg. Co., Inc. v. N.L.R.B. (9th Cir. 1974) 497 F.2d 1200, 86 LRRM 2619.

It is unlawful under the Agricultural Labor Relations Act, as well. Section 1153(a) of the Act provides that it is an unfair labor practice to "interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152." It has been held that discrimination under this part for engaging in concerted activity is proved by establishing the same elements as would be proved in a section 1153(c) discrimination case for engaging in union activity because they are essentially identical violations tried under separate sections of the Act.93/ Accordingly, in order to establish that an employer violated section 1153(a) of the Act by discharging or otherwise discriminating against one or more employees with respect to hire, tenure, or working conditions, the General Counsel must prove by a

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92. Lopez testified that the vacancies created in tipping by the transfer were not filled as the season was winding down.

93. The only real difference between the two sections is that in establishing a violation of section 1153(c), the General Counsel must show that the protected conduct under section 1152 was a form of union activity rather than other types of protected concerted activity, which do not involve union considerations. M. Caratan, Inc. (1982) 8 ALRB No. 41.

preponderance of the evidence that the employer knew, or at least believed, that the employee(s) had engaged in protected concerted activity and discharged or otherwise discriminated against the employee(s) for that reason. Lawrence Scarrone (1981) 7 ALRB No. 13. Once a prima facie case has been established, the burden both of producing evidence and of persuasion to show it would have reached the same decision absent the employee's protected activity shifts to the respondent. (Nishi Greenhouse (1981) 7 ARLB No. 18; Wright Line Inc. (1980) 251 NLRB 150, 105 LRRM 1169; Royal Packing Company (1982) 8 ALRB No. 74; Zurn Industries, Inc. v. N.L.R.B. (9th Cir. 1982) 680 F.2d 683, 110 LRRM 2944 at note 9. The burden on respondent at this point is:

> - - - to rebut the presumption of discrimination by producing evidence that plaintiff was rejected for a legitimate non-discriminatory reason. The defendant need not persuade this court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. (Texas Department of Community Affairs v. Burdine (1981) 450 U.S. 248, 101 S.Ct. 1089, 1094, cited in Martori Brothers Distributors (1982) 8 ALRB No. 15, p. 4.) (Emphasis added) (Citations omitted)

Should the respondent carry this burden, the General Counsel must then prove by a preponderance of the evidence that the reasons advanced by the respondent were not true reasons, but were a pretext for discrimination._94/ Thus, the respondent's burden is the burden of going foward with the evidence, not the burden of proof, which always remains with the General Counsel. (Id. ; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 175 Cal.Rptr. 626; Paul W. Bertuccio (1982) 8 ALRB No. 39.)

Essentially then, the standard approved by the ALRB is that the General Counsel must prove that the employer would not have taken the adverse action against the employee "but for" the employee's protected activities. (Merrill Farms (1982) 8 ALRB No. 4.)

In the present matter, the General Counsel has established a prima facie case that the employer knew about the nine workers' protest, that it discharged the nine workers, that it did so because they were involved in the protest, and that the protest was a protected and concerted activity. Here it is clear that as early as the second day after their arrival to the new assignment, many

94. The General Counsel will succeed in this: "[E]ither directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (Texas Department of Community Affairs v. Burdine, supra, 101 S.Ct. at 1095.)

employees became dissatisfied with their working conditions and sought to reduce the number of hours they were required to work from 9 to 8. Using Esteban Chavez as their spokesman, they first talked with their foreman, Ramirez, about the problem but were unsuccessful. They next requested Ramirez to set up a meeting with supervisor Armendaris but again were unsuccessful, having been told that Armendaris did not have time to see them. Not to be deterred, on the next day the group came up with the idea of being paid piece rate instead of the hourly wage and presented the matter to Ramirez who rejected it, apparently without even bothering to check with higher management first. And finally, on the fourth and last day, Chavez again told Ramirez of the group's desire to meet with Armendaris and mentioned the piece rate concept. But once again, Ramirez said "no" to both ideas. In frustration, Chavez told his father, Gilberto, that the group would leave after 8 hours work; and Gilberto later acknowledged that his son told him this was because he was tired from the work and it was very hot.

Thus, the walkout was designed to protest the employees' working conditions. It was also intended to bring these same problems to upper management's attention. This the workers had been prevented from accomplishing because of Ramirez' 95/ failure to transfer worker complaints and requests to Armendaris. Armendaris testified that Ramirez never discussed any complaints with him, never told him about the piece rate system idea, and never even informed him that the workers sought a meeting with him. Disappointed with the lack of response to their needs and having been denied the opportunity to at least meet with the one individual whom they knew to have the authority to make the necessary adjustments, they banded together to express their protest in an organized, lawful manner. Clearly, the walkout was in protest of working conditions and hourly schedules that this group of nine found to be unbearable. One is at a loss, therefore, to understand what Respondent means when it argues that there is no evidence that the walkout "was for the purpose of bringing the matter to management's attention" or that there is "no evidence to show that the walkout was a protest or other means of attempting to change the working conditions . . . ." (Resp's Brief, p. 18, 22.)

Protected activity has been found to exist in situations very similar to what occurred here. In First National Bank of Omaha (1968) 171 NLRB No. 152, enf'd (8th Cir. 1969) 413 F.2d 921, five bank employees, dissatisfied with the uncertainty of overtime requirements, left work early but all returned the next morning at the regular starting time. None was allowed to work. Respondent argued (as does Respondent here), inter alia, that: (1) the job action was unprotected because it was a refusal to perform work

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95. Ramirez never testified. I credit Esteban Chavez' lucid and logical description of the attempts he made through Ramirez to protest the conditions at work and to gain the opportunity to redress them by meeting with Armendaris.

assignments as required and could lead to the employees' taking the same course whenever they were dissatisfied with their work schedules, and (2) that there was no showing the employees were engaged in a concerted activity for their "mutual aid or protection."

The NLRB held that:

> --- a work stoppage does not lose its presumptive protection merely because it is limited in duration. If employees have not been replaced while they were away from work, they must be reinstated when they offer to return. It is at this point, when the employees want to resume their services, that the employer may legitimately ask them what their intentions for the future are, and to insist that they either remain on strike, or else return to work under the conditions then prevailing, including the schedule of hours which he has set.--- recurrent strikes or threats thereof--- are unprotected, but --- a single strike of limited duration is protected. Id. at p. 1151 (footnote omitted).

And the same result is reached under ALRB case law. In Pappas & Company (1979) 5 ALRB No. 52 eleven employees refused to work overtime for a variety of reasons, including exhaustion, hot weather, a desire not to work more than 8 hours, and dissatisfaction with the water. The Board found that the crew was discharged because of protected concerted activity and did not quit. "While it is true that differing accounts were offered regarding the precise reason for the walkout, . . . the existence of multiple reasons for any job action reflects a 'real world situation' and does not strip the concerted activity of its protected status."_96/ Id. at p. 2, citing McGaw Laboratories (1973) 206 NLRB 602.

Finally, in Guimarra Vineyards (1981) 7 ALRB No. 7, the Board found workers were engaged in concerted activity protected by section 1152 of the Act when they sought a meeting with Alfred Guimarra; and that their concerted refusal to work, as a manifestation of their concern over wages, was clearly protected activity.

A prima facie case having been presented, it was up to Respondent to show that it would have taken the same action against the nine workers absent their protected activities. Nishi Greenhouse, supra. This Respondent did not do.

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96. Respondent admits that Pappas is factually similar to the case at bar (Resp's Brief, p. 19). Its attempt to otherwise distinguish the case is not convincing.

Respondent attempted during the hearing to prove that the nine employees had quit their employment.97/ But there is no credible 98/ evidence of this in the record. On the contrary, it is clear that they had every intention of returning the next day, so informed management personnel, and did in fact return. It is equally clear that these workers were not allowed to work that day because Respondent had discharged them for staging a walkout. In fact, on the day of the walkout, the news of such a protest had spread rapidly to Company officials; and they, early on, apparently, decided that if such an event did occur, all participants would be immediately discharged and replaced by other current employees. It is to be recalled that Estaban Chavez testified that his father had informed him as early as noon that Repsondent's management had been discussing this very course of action should there be a walkout. And as soon as it happened, the group's regular foreman, Vasquez, immediately informed the nine employees that they had, indeed, been fired and replaced.

Respondent also argues that when the nine showed up for work on June 5, they still had not indicated they would work 9 hours, as required by management. But whether they would have accepted the working conditions and worked a 9 hour day, as they had three days prior to the walkout, is not known because no one from Respondent bothered to ask them what their future intentions were.99/ First National Bank of Omaha, supra. Rather than determining whether" individuals among the group of nine intended to undertake further work stoppages, Respondent instead quickly moved to fire the entire group of protesters and to immediately transfer other company personnel (15-16 women from the Lopez crew and another 12-13 from the Vasquez crew later in the day) to their temporarily vacated positions. Respondent's representatives had no basis on which to conclude that the nine employees intended to engage in intermittent or recurrent work stoppages. I find that Respondent discharged the nine workers because of their protected concerted

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97. It appears that Respondent may have abandoned this argument in its Brief.

98. I do not credit Abundio Lopez' representation that he heard some members of the group tell Vasquez they had quit because this testimony was inconsistent with his later testimony that these workers had said they intended to file a complaint because they were fired. In addition, it is in contrast to the testimony of Esteban Chavez, Apolinar Hernandez, and Jesus Rodriguez, whom I credit. I note that the chief witness to the conversation, Benny Vasquez, was not asked any questions about this matter during his testimony. I further note that Lopez was the only witness to suggest that a statement about quitting was ever made by any of the nine workers.

99. From this standpoint, Jose Rodriguez' testimony that it was his intention to only work 8 hours on June 5 is of no significance.

activities in violation of section 1153(a) of the Act and will so recommend to the Board.

But even if there were no discharge here, the nine employees who walked off the job to protest their working conditions would have thereby become economic strikers engaged in protected concerted activity. Royal Packing Company (1982) 8 ALRB No. 16. As such, the refusal to rehire them 100/ the following day, when there were obviously positions available,101/ as Respondent sought to finish its vine planting as quickly as possible, would constitute a penalty assessed against them for their having engaged in protected concerted activity. Martori Brothers (1982) 8 ALRB No. 23, ALJD, p. 30 102/ These workers could not lawfully be refused rehire absent some evidence of cause independent of the fact that they left the job. Id., ALJD, pp. 28-29; Royal Packing Company, supra. Economic strikers retain their status as "employees" and also retain the protections of the law against intentional discrimination by the employer. N.L.R.B. v. Mackay Radio and Tel. Co. (1938) 304 U.S. 333, 2 LRRM 360.

Finally, Respondent argues that the nine protesters were permanent replacements but offers no case support for the proposition that such a characterization would apply to an in-house transfer of approximately 25 employees for 2-3 days to replace 9 strikers. At best, what occurred was a temporary transfer and a temporary replacement entitling the nine employees to immediate reinstatement upon their reapplication for work. It is well settled that economic strikers applying for reinstatement have a right to be reinstated immediately unless they have been permanently replaced. N.L.R.B. v. Fleetwood Trailer Co., Inc. (1967) 389 U.S. 375, 66 LRRM 2737; Laidlaw Corp. (1968) 171 NLRB 1366, 68 LRRM 1252, enf'd (7th Cir. 1969) 414 F.2d 99, 71 LRRM 3054, cert. denied (1970) 397 U.S. 920, 73 LRRM 2537; Seabreeze Berry Farms (1981) 7 ALRB No. 40; Frudden Produce, Inc. (1982) 8 ALRB No. 42.

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100. This would include Armando Lara who, although he did not "report to work" on June 5, was at the field ready to work and only declined to report because fellow workers told him that none of the group of nine were going to be employed. At that point, any work application by Lara would have been a futile gesture. "(W)here an employer has made clear its discriminatory policy not to rehire a particular group of persons -- each member of the group need not undertake the futile gesture of offering in person to return to work." J.R. Norton Company (1982) 8 ALRB No. 89, at p. 10.

101. Not only were there positions available, but there were more than the previous day. Vasquez testified that the combined total of workers doing nursery work on June 5 surpassed the total number that had worked the day of the walkout.

102. In Martori, the one day work stoppage was occasioned, inter alia, by complaints of tiredness, hot weather, and workers' being shifted around.

B. The Refusal to Rehire

1. Findings of Fact

a. The Hiring Procedure

Ranch manager John Zaninovich testified that normally seniority workers 103/ were sent letters which told them to report for work on a certain date and were instructed to bring these letters with them. Zaninovich testified that the Company usually only employed workers with letters the first day but that thereafter, applicants were employed on a "first come, first served" basis, according to the needs of the Company; a previous work history with Respondent made no difference to an applicant's chances at that point.

Zaninovich testified that the pruning season usually began in December and that in December, 1981 numerous workers who had worked during the preceding grape harvest and finished that entire season were considered seniority workers and had received these seniority letters104/ for the upcoming pruning season. (G.C. Ex 45).

b. The Decision Not to Hire Back the Group of Nine

Gloria Hernandez, Benny Vasquez' daughter, worked in her father's crew (as did the group of nine) during 1981. Hernandez testfied that one day at her home her father and she spoke about the nine workers who .had reapplied for pruning work in December of 1981, infra. According to Hernandez, her father mentioned in this conversation that there was a list of persons who had put in a complaint with the State against the Company and that his orders were that no one on the list was to be rehired in pruning, at least until the State complaint had been settled. More specifically, Hernandez testified that her father stated that during the December pruning hirings, Nick Zaninovichloy105/ told him not to hire any of the nine; and when told that one of the group was already working (Crecensio Rodriguez, infra), instructed him to pay Rodriguez off and let him go.

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103. Zaninovich testified that a seniority worker was like a steady in that he worked on the gondola, then pruning, next the tying of the vines, followed by the suckering, tipping, and deleafing process. Such a worker would lose his seniority were he to miss one of those seasons.

104. Zaninovich further testified that the same type of letter was also sent out for other seasons, as well, including grape harvesting and tipping, suckering and deleafing. (G.C. Ex 47.)

105. Nick Zaninovich is John's son and works at respondent's as a supervisor.

Vasquez testified that he could not specifically remember having had this conversation with his daughter, Gloria, but did recall a conversation with another daughter, Rachel Bravo, in which he told her the nine were not to be rehired. Although Vasquez denied that he ever saw a "list" of the nine alleged discriminatees, he testified that it was made clear to him by Nick Zaninovich that the Company did not want to rehire any of the nine workers that had walked out on June 4 because they had been discharged. Vasquez testified that he became aware of this during the December pruning hiring when he was told to discharge Crecensio Rodriguez. According to Vasquez, Zaninovich told him: "No, we can't hire them. We don't want to get in a mess." (TR. 5, p. 80.)

Many of the alleged discriminatees testified that they had applied for work in the 1981 pruning but had been refused rehire:

Crecensio Rodriguezl06/ - Rodriguez was actually hired for pruning on Wednesday, December 9, by Nick Zaninovich and told to join Vasquez'107/ crew. Vasquez presented Rodriguez with the necessary forms which he filled out; he was also issued pruning shears (G.C. Ex 9). Rodriguez worked three hours when Vasquez approached him and told him, according to Rodriguez, that he could no longer prune because he had not previously picked grapes in the gondola. Vasquez paid him $10 in cash for his three hours, approximately representing the then existing rate of $3.45 per hour.108/

Vasquez confirmed that the above-described event occurred but gave a different reason for his asking Rodriguez to leave. Vasquez simply stated that he was told by Nick Zaninovich that no one from the group of nine was to be rehired, that he (Zaninovich) had mistakenly done so, and that the error was to be rectified by discharging Rodriguez.

Armando Lara - Lara testified that he and his brother, Rigoberto, personally visited Vasquez' house in November, 1991 to inquire about work in the forthcoming pruning season and that he was assured there would be a job for him. On Monday, December 7, he reported to Nick Zaninovich and was told, along with many others, that people with letters would be hired first (Lara had no letter) and that there was no work for any others that day but to report back to the shop on Wednesday, December 9. Lara returned but was not hired, though others were.

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106. Rodriguez is also known as "Chencho."

107. Vasquez testified that he recalled seeing Soriano, Godinez, and Lara applying for work the same day that Rodriguez did.

108. Soriano testified that he observed this event and that Rodriguez was the only worker asked to leave.

At that point, Lara approached Vasquez in the fields and asked why he had not been rehired. Lara testfied that Vasquez replied: "Well, I don't think the guy hire you (sic) -- you and the other eight workers — because you filed the charges against Sumner Peck. And I don't think they're going to hire you. And I wish I could hire you but I can't. I got others and I can't hire you." (TR. 2, p. 69.) Nevertheless, Vasquez, according to Lara, also told him to come back on Monday, December 14 and try again.

Lara returned but was, again along with some others, denied employment on the grounds that all the jobs were filled. Once again, Lara sought out Vasquez who, according to Lara, stated: "Well, I told you guys that you wasn't (sic) going to get hired because of this problem last summer ----- and I told you guys I didn't think you was (sic) going to get hired. . . ." (TR. 2, p. 70.) Lara testified that his brother, Rigoberto, was present during this conversation.

Lara also testified that others were hired that day even though they did not have any letters. In fact, Lara testified that in the 1980 pruning season he had shown up for work without a letter on the third day and was hired.

Rigoberto Lara, Armando's brother, who is not a named alleged discriminatee herein, testified that he first applied for pruning work in mid-November by going with his brother to the Vasquez house 109/ to inquire when the season would start. According to Lara, Vasquez told him that both he and his brother, Armando, had jobs and to just show up the first part of December. Lara testified that nothing was said about any seniority letter requirement and that in any event, he had never needed one in four prior seasons of pruning work .110/

Lara testified that the first hirings took place a few days prior to what he mistakenly called the opening day of the season on December 9 111/ and that he and Armando both applied. According to Lara, Nick Zaninovich told them that those with letters would be hired first and the others contacted later, if there were jobs available. Zaninovich asked if the Laras had worked in the pruning before and took down their names.

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109. Lara testified that Vasquez was his father-in-law.

110. Lara testified that he had previously been informed that he needed such a letter but was always able to work without one because he was employed only in pruning and that it was his understanding that only the gondola workers were required to have such a letter in order to obtain work.

111. Lara was actually referring to Monday, December 7.

Lara returned on Wednesday, December 9, around 6:30 a.m. and was hired by Vasquez. His brother, arriving shortly thereafter, was not. According to Rigoberto, several new people were hired that day who, like the Laras, did not have letters but, unlike the Laras, had never worked for the Company before. Lara testified he knew this because Vasquez complained to him that he didn't like to have to train these new people to prune when they had never pruned before.

A few days after he was hired, Lara asked Vasquez why his brother, Armando, was not employed since both of them had worked together the last four seasons. According to Lara, Vasquez replied that: "--he wished he could hire him but he has orders just like any other worker --- that he was on some type of list of nine men that were not supposed to be hired -- that those nine --- they walked off their job the summer before, or were fired -- and -- that because of the charge against the Company, that it will resolve into this type of problem they had this year of getting a job —— it was being circulated through the ranch for them not to be hired. "112/ (sic) (TR. 2, pp. 88-89.)

Ruben Godinez - Godinez reported to Vasquez in the field at 7:00 a.m. on December 7; there were already workers pruning, some of whom, according to Godinez, had never worked for the Company before. Godinez signed the required form to obtain pruning shears, but Vasquez took the form away from him as he was just finishing it and told him he did not have a job and should report to the shop. There he heard Nick Zaninovich tell numerous applicants that they had to have a letter to get a job that day. Godinez testified he didn't see anybody in the shop holding a letter and that he had pruned the year before (but not on the first day) without one.

A few days after December 7, Godinez again returned to seek employment. Arriving at 7:00 a.m., he reported to Vasquez at the field — there were already people working -- but was informed he could not have a job. Godinez testified that while he was there, there were at least 30 others looking for employment, some of whom were hired; others were not. At some point, Vasquez announced to all the assembled applicants that there was no more work for anyone.

Guadalupe Soriano -- On December 7, Soriano applied for work at the shop and heard John Zaninovich give Vasquez an order that whoever did not have a letter from the Company could not work and would have to go to the office. At the office, Soriano asked Nick Zaninovich for work but was told (along with several others, some of whom were new job applicants) to wait for an answer. Zaninovich then left in his truck and did not return. Soriano, who had waited 1^ hours, then also left and did not return to look for work again, as he testified it was obvious no one from the Company

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112. it is not entirely clear but is likely that -this conversation was one of the same ones in time and place described previously by Armando Lara.

had any interst in giving him any. He further testified that some of the new job applicants did get jobs from Vasquez that day, but he did not know whether they had letters from the Company.

Soriano also testified that in the prior four years he pruned, a letter had never been required to work even on the first day of the season, which was when he testified he always started. He further testified, however, that a letter had been required the one year he worked on the gondola.

Jose Rodriguez - On January 10, 1982, he reapplied for pruning work by contacting Vasquez in the field but was informed by him that he couldn't be employed because he had been fired for walking off the job and that in any event, he would not be employed until the pending case was resolved. Rodriguez further testified that he did not observe any new workers being hired at the time he applied for work.

Apolinar Hernandez - In August of 1981 Hernandez applied for work on the first day of the grape harvest, the only one of the nine alleged discriminatees to do so. Hernandez testified that customarily, a job applicant would arrive with his "group", 113/ would get onto a gondola tractor, 114/ and drive over to the field where he/she would then be assigned work.115/ It would only be later during the grape picking, while actually in the fields, that a formal job application form would be filled out 116/

Though Hernandez arrived with his group and was ready to work, he was not hired. The other members of his group, however, all relatives of his117/ and new to the company, were employed. in addition, Hernandez testified that others were hired after that day including one other relative of his. Hernandez did not know if any of these persons had letters but testified that his relatives did not and that the first year he worked in the gondola, 1980, he didn't need one to work; he also never received one in 1981.

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113. The group consists of four workers per gondola.

114. Grapes are harvested in gondolas pulled by tractors. One group member would drive the tractor between two rows while the other members of the group picked the grapes.

115. Hernandez testified this was the same method he used to obtain a job in the 1980 harvest.

116. Hernandez testified that some of the workers, however, did fill out their applications in the shop before going to the field.

117. The other members of the group included Hernandez' wife, brother, and brother-in-law.

Hernandez testified that on the day he drove the tractor to the field to apply for work, foreman Abundio Lopez told him: "Get off of the tractor. You don't have any right to a tractor because you are believing in gossip." (sic) (TR. 1, p. 131.) Hernandez did not reapply for work.

As to the remaining workers that were fired on June 4, the complaint does not allege nor was there any proof produced that Esteban Chavez, Socorro Rodriguez, or Jesus Rodriguez118/ ever reapplied for work at Respondent's place of business subsequent to June 5, 1981.

2. Analysis and Conclusions of Law

To establish a prima facie case of discriminatory discharge or discriminatory refusal or failure to rehire, the General Counsel must show by a preponderance of the evidence that the employee was engaged in protected activity, that Respondent had knowledge of such activity, and that there was some connection or causal relationship between the protected activity and the discharge or failure to rehire. And where the alleged discrimination consists of a refusal to rehire, the General Counsel must ordinarily show that the discriminatee applied for work at a time when work was available and that the employer's policy was to rehire former employees. Verde Produce Company (1981) 7 ALRB No. 27; J.R. Norton Company (1982) 8 ALRB No. 89; Ukegawa Brothers (1982) 8 ALRB No. 90.

If the General Counsel establishes a prima facie case that protected activity was a motivating factor in the employer's decision, the burden then shifts to the employer to prove that it would have reached the same decision in the absence of the protected activity. Verde Produce Company, supra. Martori Brothers Distributors v. Agricultural Labor Relations Board, supra, (1981) 29 Cal.3d 721; Wright Line Inc., supra, (1980) 251 NLRB No. 150, 105 LRRM 1169; Nishi Greenhouse, supra, (1981) 7 ALRB No. 18.

Furthermore, section 1153(d) of the Act makes it unlawful to "discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this

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118. The General Counsel attempted to show that sometime in February, 1982, Jesus' brother, Jose, told him that Vasquez had orders not to hire any of the Rodriguez brothers. But this event, if true, happened after the initial hiring in the pruning in December of 1981 and apparently, after the close of the pruning season. It does not explain why Rodriguez failed to apply for work at the beginning of that season. In addition, the General Counsel tried to show that as early as August of 1981, when the gondola season was starting up, Jesus Rodriguez had heard a rumor that none of the nine workers were to be rehired. But this "rumor" is too inchoate for me to give it any weight. Nor is there evidence that but for this rumor, Rodriguez would have applied for gondola work.

part." This provision is identical (except for the use of the word "agricultural") to section 8(a)(4) of the National Labor Relations Act, and it has been held that the NLRB's broad and liberal interpretation of this provision will be followed by the ALRB. Bacchus Farms (1978) 4 ALRB No. 26. Discharging or disciplining an employee for filing unfair labor practice charges is unlawful. (C. Mondavi & Sons d/b/a/ Charles Krug Winery (1979) 5 ALRB No. 53, rev. den. by Ct.App., First Dist., Div. 2, June 13, 1980; hg. den. July 16, 1980. See also, N.L.R.B. v. Scrivener (AA Electric Co.) (1972) 405 U.S. 117, 31 L.Ed.2d 79.)

A refusal to rehire, if it is in retaliation for the filing of a charge, is also unlawful. A-l Fire Protection, Inc. (1977) 223 NLRB No. 9, 96 LRRM 1440; Glenroy Const. Co., Inc. v. N.L.R.B. (7th Cir. 1975) 527 F.2d 465, 91 LRRM 2074; Sinclair Glass Company v. N.L.R.B. (7th Cir. 1972) 465 F.2d 209. Even if there may be valid reasons for the original discharge, a subsequent refusal to rehire based upon the filing of a charge concerning that discharge is illegal. N.L.R.B. v. Whitfield Pickle Co. (5th Cir. 1967) 374 F.2d 576, 64 LRRM 2656.

The testimony of several credible witnesses established without any doubt that following the June 4 walkout and subsequent unfair labor practice filings, the Respondent decided as a matter of policy not to rehire again any person who participated in those concerted protected-activities. Rigoberto Lara, an employee not alleged to be a discriminatee, testified without contradiction that Vasquez told him he had orders not to rehire his brother, Armando, and the other eight workers because of their walkout and their filing of charges with the ALRB. Armando Lara corroborated this testimony by stating that Vasquez had, indeeed, made these remarks.119/ Vasquez' own daughter, Gloria Hernandez, also corroborated the substance of the Lara testimony — that her father was given orders not to rehire for the pruning any of the group of nine who had filed charges against the Company 120/ Finally,

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119. Vasquez was not asked about and therefore did not deny that the statements were made. I credit both Laras that they were. Rigoberto answered the questions in an honest, forthright, self-assured manner and without hesitation. Armando appeared to me to be truthful, straightforward, and believable.

120. Vasquez testified throughout as honestly as he could. However, here I believe he may just have forgotten about this discussion with Gloria, whose testimony regarding such a conversation was stated clearly and lucidly. I credit her. It is not unreasonable to assume that Gloria would have had such a conversation with her father (a similar one was held between her father and sister, Rachel), given the fact that Gloria also was employed by Respondent, worked in the same crew as the nine discriminnatees, and would have naturally had an interest in the ramifications of the walkout upon her co-workers.

Apolinar Hernandez testified, without contradiction, that he was denied re-employment in the grape harvest by Abundio Lopez who called him a "gossip", a more than likely reference to his having filed an ALRB charge. 121/

In fact, Vasquez himself as much as admitted these facts. Though not remembering if he told his daughter, Gloria, anything about it, he acknowledged that he was instructed not to rehire any of the group and further, that one of his supervisors, Nick Zaninovich, had told him not to rehire them because the Company didn't "want to get in a mess,'122/ another possible reference to not hiring any members of the group while their unfair labor practice claim was still pending.

Thus, the General Counsel established a prima facie case that the nine alleged discriminatees engaged in protected activity, that Respondent had knowledge of such activity and that there was a nexus between that activity and Respondent's refusal to rehire them. The burden then shifted to Respondent to show that none of the nine would have been rehired anyway, regardless of their activity.

Respondent has failed to carry this burden because it is obvious, despite its defenses that the discriminatees lacked seniority letters or applied for work at a time when no work was available, that Respondent was intent upon retaliating against them for the walkout and their filing of charges; and there was simply no way they were ever going to be selected for employment. The first expression of this retaliatory policy was in August of 1981 when Hernandez applied for work in the grape harvest in the same way he had applied in 1980. Respondent claims he lacked the required letter to be hired, but this defense can hardly stand, even assuming arguendo the existence and consistent enforcement of Respondent's seniority program, in view of the fact that the reason he failed to finish the preceding tipping season (and therefore, presumably, did not qualify to receive the required letter) was the discriminatory treatment he received at the hands of Respondent, as the result of his participation in the walkout.

Moreover, even apart from the letter requirement, Respondent is unable to explain why it violated its own "first come/first hired" policy by hiring, as new hires once seniority positions were filled, those in Hernandez' gondola group that he had brought with him while on the same day and at the same time denying

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121. Lopez was not asked and therefore did not deny that this statement was made. I credit it. Though at times confused, possibly occasioned by physical discomfort, Hernandez generally was *a* credible witness.

122. Zaninovich did not testify. I credit Vasquez that the remark was made.

hire to Hernandez himself.

The policy was next expressed at the commencement of the pruning season. On Monday, December 7, 1981, the season's opening day, Respondent hired initially those with seniority letters (as listed in General Counsel's Exhibit 46); but once those persons were hired, non-letter holders began to be hired; e.g. on the first day, Maria G. Mendoza,123/ on the second day, Alejandro Jimenez. (G.C. Ex 11.) Thus, on the first two days of the season, non-seniority employees were already being hired; and on the third day, December 9, large numbers of them were employed; e.g. 20 workers were hired into the Vasquez crew and 26 into the other two crews (Abundio Lopez' and Vicente Montemayor's). In the past, all the members of the group of nine had been hired without letters. Soriano testified he had worked four previous pruning seasons without a letter and had in the past been hired on the first day.124/ The fact that not one of the alleged discriminatees was hired raises a strong inference that discrimination played a role in their treatment.

Four of the group of nine were present and reporting for work on December 9; e.g. Lara, Godinez, Soriano, and Rodriguez (Chencho). The latter was actually hired until it was realized that the Company had mistakenly employed one of the untouchables; he was paid off and quietly let go the same day.125/ The reason he was asked to leave -- that he had never picked grapes with the gondola before -- was obviously, pretextual; it did not conform with Respondent's own first come/first hired policy. Godinez had almost finished filling out the formal job application when it was taken from him, and he was told there was to be no work for him. Likewise, Lara was not employed and was informed by Vasquez that the group of nine was not going to be hired. Soriano waited in vain for Zaninovich to return with a final answer regarding his chances for work; he was not hired.

Respondent argues that Soriano should not be considered as having reapplied for work since he only showed up on the first day of the pruning and did not return again. But, as has been shown, there was some hiring on the first day of persons without letters; and Soriano had a reasonable expectation of being so employed, having been hired the last four pruning seasons on the opening day without such a letter. In addition, Zaninovich's failure to

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123. Maria G. Mendoza, employee #34978, should not be confused with Maria Mendoza, #34977, a seniority employee. (G.C. Ex 46.)

124. Soriano, of course, was not hired. But Rigoberto Lara, who did not participate in the walkout but who had also worked the last four seasons without a letter, was.

125. Rodriguez' name does not even appear on the payroll records as having worked a part of one day. (G.C. Ex. 11.)

personally return to Soriano with a response to his request for a job may have clearly signalled to him that Respondent had no desire to employ him and that any further job application on his part would be a futile gesture. J.R. Norton Company, supra. See also, Ukegawa Brothers, supra.

Respondent also argues that Jose Rodriguez did not apply for work on a day when work was available. This appears to be correct. Rodriguez did not reapply for pruning work until January 10, 1982, more than a month after the start of the season, and no reason was proffered for the delay. Rodriguez testified no one was hired the day he applied, and the records do not reflect that Vasquez hired anyone that day.126/ Although Rodriguez testified Vasquez told him the Company would not hire him, this is irrelevant in view of the fact that there were no subsequent openings in the Vasquez crew after the day he applied.

I recommend that Respondent be found to have violated sections 1153(a) and 1153(d) of the Act.

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126. The last newly hired person appears to be Wilfredo Medrano who was hired by Vasquez on January 8, 1982. Others were also hired by Vasquez during that week but all before January 10 (G.C. Ex 11, week ending January 11, 1982). Amanda Torres was a new hire in Montemayor's crew, but she was apparently hired on January 5, 1982. Lucia Garnica started working on January 12, 1982 in the Lopez crew but had previously worked for Respondent, though a long time before, on December 13, 1981 (G.C. Ex 11).

XII. THE REMEDY

Having found that Respondent, Sumner Peck Ranch, Inc., failed and refused to bargain in good faith in violation of sections 1153(e) and (a) of the Act, I shall, pursuant to the provisions of Section 1160.3, recommend that Respondent be ordered to meet with the UFW, upon request, to bargain in good faith, to refrain from unilaterally changing employees' wages or working conditions and from failing and refusing to furnish information relevant to collective bargaining, as requested by the UFW, and to make whole its agricultural employees for the loss of wages and other economic benefits they incurred as a result of Respondent's unlawful conduct, plus interest thereon computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (August 18, 1982) 8 ALRB No. 55.

I shall recommend that the make-whole remedy commence on September 29, 1980, the date upon which Respondent engaged in conduct which, in view of the totality of the circumstances, first constituted an unlawful failure and refusal to bargain in good faith, O. P. Murphy (1979) 5 ALRB No. 63, and continue until such time as Respondent commences to bargain in good faith with the UFW and thereafter bargains to contract or bona fide impasse.

I shall also recommend that Respondent be found to have violated sections 1153(a) and (d) of the Act for discharging and refusing to rehire its employees for engaging in protected concerted activities.

Upon the entire record, the findings of fact and conclusions of law set forth above, I issue the following:

RECOMMENDED ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent, Sumner Peck Ranch, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW) with respect to wages, hours, and other terms and conditions of employment of its employees, or the negotiation of an agreement covering such employees, or in any other manner failing or refusing to so bargain with the UFW;

(b) Making unilateral changes in its employees' terms or conditions of employment without giving prior notice to and bargaining with the UFW concerning such proposed changes;

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

(d) Discharging or refusing to hire or consider for employment or otherwise discriminating against any of its agricultural employees because of their participation in a protected concerted work stoppage or other protected activities;

(e) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those 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 collectiviely in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to said employees' rates of pay, wages, hours of employment, and other terms and conditions of employement, 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 increase granted in May of 1981 and, thereafter, meet and bargain collectively in good faith with the UFW, at its request, as certified exclusive" bargaining representative of its agricultural employees regarding such changes;

(c) On request provide the UFW with information regarding its employees' hours worked and other data relevant to collective bargaining;

(d) Make whole its 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 amounts, plus interest, to be computed in accordance with the Board's Decision and Order in Lu-Ette Farms (August 18, 1982) 8 ALRB No. 55. The make whole period shall extend from September 29, 1980 until June 10, 1982, and from June 10, 1982 until the date on which Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(e) Make whole the following employees for all losses of pay and other economic losses incurred by them as a result of their discharge by Respondent, together with interest thereon, the backpay awards to be computed in accordance with Board precedents:

Esteban Chavez
Crecensio Rodriguez
Jose Rodriguez
Socorro Rodriguez
Jesus Rodriguez Moreno
Guadalupe Soriano
Ruben God Inez
Apolinar Hernandez
Armando Lara

(f) Make whole the following employees for all losses of pay and other economic losses incurred by them as a result of Respondent's refusal to rehire them, together with interest thereon, to be computed in accordance with Board precedents:

Crecensio Rodriguez
Socorro Rodriguez
Guadalupe Soriano
Ruben Godinez
Apolinar Hernandez
Armando Lara

(g) 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.

(h) 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.

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

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

(k) Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this Order to all agricultural employees employed by Respondent between September 29, 1980, and the date the Notice is mailed.

(1) 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 times and places 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.

(m) Notify the Regional Director in writing, within thirty days after the days 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: April 29, 1983.

MARVTN J. BRENNER
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by bargaining in bad faith with the UFW regarding a collective bargaining agreement and discriminating against employees for their protected concerted activity. 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 farm workers 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 to obtain a contract covering 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 or 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 do anything in the future that forces you to do, or stops you from doing any of the things listed above.

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 September 29, 1980 to the date we begin 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.

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 changes 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 terminate or refuse to hire or consider for employment or otherwise discriminate against any employee, previous employee, or applicant for employment because he or she has exercised any of the above-stated rights.

WE WILL offer Esteban Chavez, Crecensio Rodriguez, Jose Rodriguez, Socorro Rodriguez, Jesus Rodriguez Moreno, Guadalupe Soriano, Ruben Godinez, Apolinar Hernandez, and Armando Lara their jobs back and pay them any money they lost because we terminated them.