STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

VENTURA COUNTY FRUIT GROWERS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 83-CE-109-OX 83-CE-110-OX 83-CE-110-1-OX 10 ALRB NO. 45

DECISION AND ORDER

On November 18, 1983, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions to the ALJ's Decision with a brief in support of exceptions.

Pursuant to the provisions of California Labor Code section 1146,[1/] the 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 brief, and has decided to affirm the ALJ's rulings, findings, and conclusions, as modified herein, and to adopt his proposed Order, as modified.

We agree with the Administrative Law Judge, for the reasons stated by him, that Respondent had a duty to bargain with the UFW, the certified representative of its employees,

---

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

and that its refusal to do so violated Labor Code section 1153(e) and (a).

That issue did not arise here in the context of a "technical" refusal to bargain whereby an employer incurs an adverse final ruling of the Board in an unfair labor practice phase of an elections case in order to perfect a judicial challenge to the underlying representation matter. (See, e.g., J. R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1.) Respondent does not contest the validity of the UFW's certification. Rather, Respondent alleges an actual loss of majority support for the incumbent union or, alternatively, a reasonably based good faith belief in the loss of the Union's majority status, either of which could extinguish all bargaining obligations under the National Labor Relations Act (NLRA). However, as we explained in Nish Noroian Farms (1982) 8 ALRB No. 25 and F & P Growers Association (1983) 9 ALRB No. 22, neither defense is legally cognizable under the Agricultural Labor Relations Act (ALRA or Act).

On June 21, 1978, the United Farm Workers of America, AFL-CIO, (UFW or Union) was certified as the bargaining representative of all agricultural employees of Ventura County Fruit Growers, Inc. For reasons which are not apparent from the record, the Union waited more than two years, until October 1,

1980, before inviting the Company to enter into negotiations.[2/] On November 19, 1980, Respondent declared its intention to refuse to bargain, not for the purpose of asserting a challenge to the validity of the certification, but on the sole grounds that the Union no longer enjoyed majority support. One month later, the UFW filed an unfair labor practice charge in which it alleged that Respondent had unlawfully refused to bargain. That charge was later withdrawn under circumstances which are unclear from the record. Apparently there was no further contact between the UFW and Respondent for more than two years, until February 11, 1983, when the Union again invited Respondent to commence negotiations. Thereafter, the UFW timely filed the refusal to bargain charge which was litigated in the present proceeding.

Respondent correctly asserts that under National Labor Relations Board (NLRB) authority, an employer may successfully defeat a bargaining obligation by demonstrating either an actual loss of majority support or a "reasonably grounded doubt" of the union's continued majority status based on "objective considerations." (Wanda Petroleum (1975) 217 NLRB 376 [89 LRRM 1042].) However, as we explained in Nish Noroian Farms, supra, No. 25, statutory differences between the federal and state labor laws require that bargaining agents certified pursuant to the latter retain their representative status until such time

---

[2/] Certification imposes upon the Employer only an inchoate duty to bargain until such time as the bargaining representative actually communicates a desire to commence negotiations. (Columbian Enameling and Stamping Co., Inc. (1939) 306 U.S. 292 [4. LRRM 524]; NLRB v. Alva Alien Industries, Inc. (8th Cir. 1966) 369 F.2d 310 [63 LRRM 2515].)

as the unit employees either decertify the incumbent union or elect a new bargaining representative. That case concerned unilateral changes in terms and conditions of employment, without notification to or an opportunity to bargain by the certified union, following a decertification election but prior to the Board's certification of the results of that election. The issue was whether the filing of a decertification or rival union petition raised a good faith doubt of majority support. We held that in that as well as "in all other cases, the employer's duty to bargain with the certified union continues uninterrupted." (8 ALRB No. 25, slip opn. at p. 14.) Thus, ". . . agricultural employers are to exercise no discretion regarding whether to recognize a union; that is left exclusively to the election procedures of this Board." (8 ALRB No. 25, slip opn. at p. 13.) We followed the Noroian rule in F & P Growers Association, supra. 9 ALRB No. 22 and Roberts Farms (1983) 9 ALRB No. 27. Even were we to adopt NLRB practices in this instance, but only for purposes of considering and discussing Respondent's position in the best possible light, we would have to conclude that neither of Respondent's dual defenses, i.e., actual loss of majority support or a reasonably based belief thereof, articulates threshold federal standards.

In attempting to demonstrate an actual loss of majority support, pursuant to NLRB precedents, Respondent relies solely on the Regional Director's alleged "dismissal" of the first refusal to bargain charge, contending that the Regional Director dismissed the charge on the basis of an investigation and finding

which revealed that the Union had in fact lost its once-held majority status. Respondent's reliance is misplaced. As explained previously, the charge was withdrawn by the Union. Withdrawal of the charge, for whatever reason, precluded potential issuance of a complaint and a subsequent evidentiary hearing at which time the relative presumptions and burdens of proving actual loss would be allocated. (See NLRB v. Tahoe Nugget, Inc. (9th Cir. 1978) 584 F.2d 243 [99 LRRM 2509], cert. den. (1979) 444 U.S. 887 [101 LRRM 2428]; Bartenders, Hotel, Motel & Restaurant Employers Bargaining Association of Pocatello, Idaho (1974) 213 NLRB 651 [87 LRRM 1194], and cases cited therein.[3/] Moreover, the Regional Director's failure to file a complaint is not a final decision on the merits. (NLRB v. Baltimore Transit Co. (4th Cir. 1944) 140 F.2d 51 [13 LRRM 739], cert. den. (1944) 321 U.S. 795 [14 LRRM 952].)[4/]

The second of the NLRB-based defenses turns on its facts and requires a showing of good faith doubt of majority

---

[3/] We believe that the NLRB would be compelled to find that Respondent had a continuing duty to bargain since certification, consistent with the finding of the ALJ herein, which we affirm.

[4/] Respondent also asserts that it was reasonable to rely on the Regional Director's "finding" and "dismissal" of the initial refusal to bargain charge to assume that its duty to bargain had been extinguished, as of that point in time, and could net be revived. The argument is without any perceptible merit. Majority status may fluctuate, in that a union may lose but later regain the support of a majority of employees in the unit. For that reason, the NLRB requires that an employer who refuses to bargain, on the grounds of either an actual or reasonable belief of loss of majority status, prove that the defense was viable at the time of each refusal to bargain. Terrell Machine Company (1969) 173 NLRB 1480 [70 LRRM 1048], enforced (4th Cir. 1970) 427 F.2d 1088 [73 LRRM 2381].)

status based on objective and concrete factors advanced by the employer. As explained in NLRB v. Tahoe Nugget, Inc., supra, 584 F.2d 243:

> Proving minority status is a straightforward factual question. When the employer seeks to rely on the less exacting standard of reasonable doubt, he must also show the doubt was entertained in good faith [citations omitted] . . . The good faith criterion is unconcerned with the employer's subjective motivation; its focus is empirical and objective. [Citations omitted.] (Id. at 298.)

Respondent asserts here that the UFW, as evidenced only by its delay in requesting bargaining, had abandoned the unit. The implication is that the Union's failure to early assert bargaining rights would naturally lead to employee dissatisfaction which in turn translates into a loss of support.[5/]

That issue, but in a somewhat different context, was considered and decided by the NLRB in Pioneer Inn Associates (1977) 228 NLRB 1263 [95 LRRM 1225], affd. (9th Cir. 1978) 578 F.2d 835 [99 LRRM 2354]. The employer in that case refused to bargain on the grounds that the union neither attempted to monitor compliance with the terms of an expired contract nor negotiate a new contract for nearly three years. The question was whether the union was defunct, in which instance the existing agreement would not constitute a bar to the filing of a representation petition by a rival union. Holding that an existing agreement

---

[5/] Even if there had been a showing of employee dissatisfaction, such dissatisfaction would not be tantamount to opposition to continued representation by the same union. (Crestline Memorial Hospital (1980) 250 NLRB 1439 [105 LRRM 1058].)

will constitute such a bar if the incumbent union demonstrates its willingness and ability to represent the unit employees "at the time its status is called into question," the NLRB found that the union met that test by engaging in contract administration, and thus cured a period of relative inactivity, prior to the time the employer refused to bargain. Similarly, in Road Materials, Inc. (1971) 193 NLRB 990 [78 LRRM 1448], there was no union activity of any kind for 16 months as well as numerous employee dues-checkoff authorization withdrawals and resignations from the union. Nevertheless, the NLRB found:

> . . . no basis for concluding that the [union] had abandoned its administration of the contract. It may be true that the [union] has been negligent in carrying out its responsibilities as the representative of these employees. However, it also appears that unit employees may have failed to avail themselves of opportunities to utilize the services of the [union]. . . (Id. at 991.)

Were we to follow the foregoing NLRB authorities, we would have to conclude that notwithstanding the relative inactivity of the Union during two distinct time periods,[6/] the Union became active by virtue of its initial and renewed requests to commence negotiations before each of Respondent's refusals to bargain. Each time the Union requested bargaining, it thereby affirmatively notified Respondent of its desire and intent to actively represent unit employees in the conduct of negotiations. At the critical

---

[6/] We refer to the period of more than two years between issuance of certification, on June 21, 1978, and the Union's initial request to bargain, on October 1, 1980, and a second period, of eleven months duration, between issuance of our Noroian Decision and the Union's renewed request to negotiate.

times, when Respondent asserted a loss of majority in defense of its refusal to bargain, its abandonment theory was a factual impossibility. Thus, the facts here would not justify a finding that the Union was either unwilling or unable to represent the employees in question. (Pioneer Inn Associates, supra, 228 NLRB 1263.[7/]

Having found that Respondent refused to negotiate with its employees' duly certified bargaining representative, in violation of Labor Code section 1153(e) and (a), we turn now to the matter of an appropriate remedy. Labor Code section 1160.3 empowers the Board to remedy unfair labor practices, including making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain.

In F £ P Growers Association, supra, 9 ALRB No. 22, we considered whether makewhole should be imposed when an employer's refusal to bargain is based not on a challenge to the certification election but on a claim of loss of majority support. We concluded that once the Board had clarified the exclusivity of the decertification process in its related Decisions in Nish Noroian Farms, supra, 8 ALRB No. 25 and Cattle Valley Farms (1982) 8 ALRB No. 24, the employer could claim no public interest in refusing to bargain based on good faith doubt of the Union's majority support, especially while its employees had sought no

---

[7/] We have considered but rejected "waiver" of a duty to bargain in these circumstances since that concept arises more often in the context of unilateral changes in terms and conditions of employment. (See, e.g., United States Lingerie Corp. (1968) 170 NLRB 750 [67 LRRM 148277)

decertification or rival union election. Since litigation of the claim of loss of majority support could not possibly further the policies and purposes of the ALRA, we held that the employer rather than the employees should ultimately bear the financial risk of its choice to litigate rather than bargain and therefore imposed a makewhole remedy. In the instant case, where even a reliance on NLRA precedent would not excuse the refusal to bargain, Respondent's position is a fortiori unreasonable and makewhole is clearly appropriate.[8/]

Consistent with his ruling that Respondent had a duty to bargain with the incumbent Union, the ALJ found that Respondent had a duty to grant the Union post-certification access to its employees and a duty to provide the Union with information which would facilitate the taking of such access.

While vigorously opposing the ALJ's findings in that

[8/] Compare J. R. Norton Co. (1979) 26 Cal.3d 1, in which the California Supreme Court endorsed the makewhole remedy in those cases in which the Board has determined, inter alia, that the employer refuses to honor the Board's Order of Certification solely as a means of delaying its bargaining obligation. Although Norton, arose in the context of technical refusal to bargain cases, the court's language is not unlike that utilized by the NLRB when rejecting defenses which precisely parallel those proffered by Respondent in the present case. In Terrell Machine Company, supra, 173 NLRB 1480, for example, the NLRB found that the reasons submitted by the respondent failed to establish a reasonable basis for doubting the union's majority status and were asserted in bad faith in order to avoid bargaining with the union. We are similarly persuaded that based on all the facts present here, Respondent's refusal to bargain could only "have been advanced for the purpose of gaining time in which to undermine the union and, of necessity, is grounded in bad faith." (Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho, supra, 213 NLRB 651.)

regard, Respondent does not contest the principle of post-certification access, as developed in 0. P. Murphy (1979) 4 ALRB No. 106. Its argument is essentially that since Respondent's duty to bargain has been extinguished by the Union's alleged loss of majority status, so have all bargaining-related obligations, namely the duty to permit post-certification access. In addition, Respondent challenges the ALJ's findings as to the character of information necessary to the taking of effective post-certification access, under the circumstances of this case, as well as the nature and scope of his recommended remedial provisions. Having already determined that Respondent's bargaining obligation was never nullified, we agree with the ALJ that Respondent was obligated to honor the Union's request that it be granted post-certification access to its premises, for the purpose of communicating with unit employees about the status of negotiations.[9/]

In order to facilitate future post-certification access, the ALJ established the mechanics by which such access would be granted and taken. He directed that the parties meet and prepare

---

[9/] Although we held, in 0. P. Murphy, supra, 4 ALRB No. 106, that an unjustified refusal to grant post-certification access could serve as an indication of a bad-faith refusal to bargain in violation of Labor Code section 1153(e), we recognize that such a denial would not be probative where a respondent does not contest the refusal to bargain allegation (e.g., a technical refusal to bargain situation) or where, as in F & P Growers Association (1984) 10 ALRB No. 28, the respondent had previously been adjudged to have violated the duty to bargain in good faith. For that reason, we hold that unlawful denials of post-certification access may constitute independent violations of Labor Code section 1153(a) since an employer's failure to honor valid requests for post-certification access tends to interfere with employees' Labor Code section 1152 rights and in that respect is not unlike a denial of access in a pre-election organizational setting.

a map of Respondent's operations, with Respondent providing the Union with a list of the names of all its grower-members, keyed to the areas on the map where the member's groves are located. The ALJ also ordered Respondent to permit pre-work access to buses it uses to transport workers to its work sites and permit Union representatives to ride on the buses from the point where the first worker is picked up to the point where the workers disembark.

In F & P Growers Association, supra, 10 ALRB No. 28, we acknowledged that certain characteristics which are germane to the citrus industry justify imposing on citrus employers an affirmative obligation to provide certain information to the certified union. Accordingly, we held that the respondent in that case was required to grant post-certification access in conformity with O. P. Murphy, supra, 4 ALRB No. 106, and pre-election access guidelines set forth in California Administrative Code, title 8, section 20900. We also approved the ALJ's requirement that the respondent, upon request, inform the union of the number of crews working for the respondent, directions to the work sites, and the approximate time each crew is expected to take a lunch break. We also endorsed the ALJ's recommendation that the respondent pinpoint on a map the various locations where the crews would be working and/or directions to the work sites. However, we specifically rejected the ALJ's directive that the respondent also provide the union with the names of the owners of the individual groves, finding such information neither relevant to the locations of the groves nor

to the union's ability to communicate with the workers. As Respondent herein has stipulated that its operations are virtually identical to those which are the subject of F £• P Growers Association, supra, 10 ALRB No. 28, we find that case controlling and thus dispositive as to all common post-certification issues. However, as to an issue not present in F & P, we find the ALJ's grant of access to Respondent's buses unnecessary in light of the other opportunities for access in our Order herein.

In the present case, as in F & P Growers Association, supra, 10 ALRB No. 28, the ALJ found that the Union's efforts to locate crews had been hampered by Respondent's refusal to honor the Union's request for information as to crew locations. On that basis, he awarded the Union monetary damages, to be paid by Respondent, to compensate for the failed past efforts to locate workers. In F & P we found such reimbursement inappropriate on the grounds that the unsuccessful efforts to locate workers were due, at least in large part, to the union representatives' lack of familiarity with the general area in which the crews were working. Again, on similar facts, we find F & P dispositive of this issue as well and we therefore strike the ALJ's monetary award.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Ventura County Fruit Growers, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

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

(b) Denying United Farm Workers of America, AFL-CIO, (UFW) representatives access to bargaining unit employees, at reasonable times, on the property or premises where they are working, for purposes related to collective bargaining between Respondent and the UFW.

(c) Failing or refusing to provide, upon request, timely and accurate information to the UFW regarding the sites at which its harvest employees are working, the times when they are taking their lunch break, and the location of each particular grove or plot where it conducts harvesting operations.

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

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees.

(b) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal

to bargain in good faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, the period of said obligation to extend from February 14, 1983, three days from the date of the Union's written request to commence negotiations, until May 5, 1983, the date on which the hearing was held, and continuing thereafter until such time as Respondent commences good faith bargaining with the UFW which results in a contract or a bona fide impasse in negotiations.

(c) Furnish to the UFW, upon request, the following information in conjunction with post-certification access:

(1) The number of crews working for the Company on the day access is to be taken;

(2) The approximate time when each crew would be taking lunch that day; and

(3) Directions to the site(s) at which each crew will be working that day, which, when requested by the UFW, shall be supplemented with a map, to be provided by the UFW, upon which Respondent shall designate routes to, and the location of crews within, the particular ranches where Respondent is then conducting its harvesting operations.

(d) Permit UFW representatives to meet and talk with Respondent's agricultural employees on the property or premises where they are employed at times agreed to by Respondent and the UFW, and in the absence of such an agreement, during the time when said employees take their lunch break and during the periods

one hour prior to the commencement of work and one hour after the completion of work, for purposes related to its responsibilities as exclusive bargaining representative. Two representatives for each crew employed shall be permitted to exercise access rights, provided that if there are more than 30 employees in a crew, there may be one additional representaive for every 15 additional employees. The Union shall, before taking access, provide Respondent with information as to the number and names of the representatives who will be taking access, and the times and locations of the intended access. The right of access shall not include conduct disruptive of Respondent's property or agricultural operations.

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

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between February 14, 1983, and May 5, 1983, and thereafter until such time as Respondent commences good faith bargaining with the UFW which results in a contract or a bona fide impasse in negotiations.

(g) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any

Notice which has been altered, defaced, covered, or removed.

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

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

It is further ordered that the certification of the UFW as the exclusive collective bargaining representative of the agricultural employees of Respondent be, and it hereby is, extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: October 24, 1984

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Oxnard Regional Office, the Regional Director of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Ventura County Fruit Growers, Inc., 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 failing to bargain in good faith with your certified exclusive bargaining representative, United Farm Workers of America, AFL-CIO (UFW), and by failing to give the UFW information as to daily crew locations and locations of all the groves where we harvest, and by failing to permit the UFW to gain access to those groves for the purposes of speaking to you about a collective bargaining contract. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do and also want to tell you that the Agricultural Labor Relations Act (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 about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board; and
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

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

WE WILL, on request of the UFW, meet and bargain in good faith with the UFW about a contract because the UFW is the representative chosen by our employees.

WE WILL allow representatives to enter areas where we harvest citrus so that they may talk to you about a collective bargaining agreement.

WE WILL provide information to the UFW, if they request it, about where we harvest and where our crews are working each day.

Dated: VENTURA COUNTY FRUIT GROWERS, 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 527 South A Street, Oxnard, California, 93030. The telephone number is (805) 486-4475.

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

VENTURA COUNTY FRUIT GROWERS, INC.

10 ALRB No. 45
Case Nos. 83-CE-109-OX
83-CE-110-OX
83-CE-110-1-OX

Background

The complaint alleged that Respondent had engaged in three violations of the Agricultural Labor Relations Act (ALRA or Act) by (1) refusing to commence bargaining negotiations at the request of the United Farm Workers of America, AFL-CIO, (UFW or Union), the certified bargaining representative of its citrus workers; (2) refusing to permit the Union to take post-certification access to citrus groves in order to communicate with employees working there; (3) refusing to provide the Union with access-related information such as the locations where its citrus harvest employees were working. Respondent asserted a single defense to all charges, contending that the Union had lost the support of a majority of employees in the bargaining unit and therefore Respondent was relieved of all bargaining-related obligations including the duty to grant post-certification access.

ALJ's Decision

The ALJ rejected Respondent's defense on the basis of prior Board Decisions holding that an employer's obligation to bargain with a certified representative continues uninterrupted until such time as employees themselves either decertify the incumbent union or choose a rival union by means of a representation election. He remedied the failure to bargain by ordering Respondent to commence bargaining in good faith with the UFW and to make its employees whole by compensating them on the basis of what they would have received in wages and fringe benefits had Respondent bargained in good faith to contract. The ALJ also directed Respondent to grant the Union post-certification access, to keep the Union apprised of the various locations where its employees will be working, and to reimburse the Union for expenses incurred in past attempts to locate Respondent's employees without success.

Board Decision

The Board upheld the findings and conclusions of the ALJ but modified his rulings and remedies with respect to the post-certification access matters. Specifically, the Board affirmed its finding in F &• P Growers Association (1984.) 10 ALRB No. 28 that certain characteristics which are germane to the citrus industry justify imposing on citrus employers an affirmative obligation to provide information to the certified representative which will facilitate the taking of access and further found that Respondent herein fell within the ambit of F & P. Accordingly, the Board agreed with the ALJ and ordered

that Respondent, upon request, advise the Union regarding the number of crews working for the Company, directions to the sites where they will be working, and" the approximate time each of the crews expect to take a lunch break. Unlike the ALJ, however, the Board was not of the view that Respondent need inform the Union as to the names of the owners of the various groves where its employees will be working as it is the location of the groves rather than the ownership of such groves which will facilitate the taking of access. the Board also rejected the ALJ's award of compensatory damages to the Union for past attempts to exercise post-certification access.

* * *

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

Case Nos. 83-CE-109-OX
83-CE-11D-OX
83-CE-110-1-OX

In the Matter of:

VENTURA COUNTY FRUIT GROWERS, INC.,

Respondent

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

Erasmo Elias, Esq.
for the General Counsel

William S. Marrs, Esq.
of Gordon, Glade & Marrs
for the Respondent

Before: Matthew Goldberg
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF THE CASE

On February 23, 1983,[1/] the United Farm Workers of America, AFL-CIO (hereafter referred to as the "UFW" or "Union") filed charges alleging that Ventura County Fruit Growers, Inc. (hereafter referred to as "respondent" or "the company") violated sections 1153(a) and (e) of the Act by failing and refusing to meet and bargain in good faith with it as the certified representative of their employees, and by refusing to allow the Union post-certification access to its work sites. The General Counsel for the Agricultural Labor Relations Board, on March 14, issued a complaint based on these charges. Copies of the charges, the complaint and notice of hearing were all duly served on respondent.

On March 23, respondent filed an answer to the complaint in which it basically denied the commission of any unfair labor practices.

An amendment to charge 83-CE-110-OX was filed by the Union on April 13. This amendment essentially alleged that respondent, in addition to refusing to allow the Union access, also refused to furnish information to the Union which would facilitate the taking of said access. The amendment was incorporated into an amended complaint which was issued on April 15.

In Oxnard, California, on May 5, a hearing in the matter was held before me. The General Counsel and the respondent each appeared through their respective representatives. All parties were given full opportunity to adduce evidence, both documentary and

---

1. All dates refer to 1983 unless otherwise noted.

testimonial, to examine and cross-examine witnesses, and to submit oral arguments and briefs. Based upon the entire record in the case, and, having read and considered the briefs submitted to me since the close of the hearing, I make the following:

II. FINDINGS OF FACT

A. jurisdiction

1. Respondent is, and at all times material has been, an agricultural employer within the meaning of section 1140.4(c) of the Act.

2. The Union is, and at all times material has been, a labor organization within the meaning of section 1140.4(f) of the Act.[2/]

B. The Unfair Labor Practices Alleged

1. Introduction

As noted in the charges filed by the Union which ripened into allegations in the complaint herein, respondent was alleged to have failed and refused to bargain collectively with the Union from February 11 forward, to have refused to permit the Union to take access to its premises,[3/] and to have refused to furnish information regarding daily crew whereabouts and locations of company operations.

---

2. Respondent admitted the jurisdictional facts in its answer.

3. As will later be developed, respondent does not own or lease those groves where it conducts harvesting operations. The Board stated in Robert H. Hickam (1982) 8 ALRB No. 102 that it does not utilize the term "employer's premises" in its narrowest sense, but rather includes within the meaning of that phrase any property on which agricultural services are being performed by agricultural employees of a particular agricultural employer, regardless of who is the particular owner, lessor, lessee, or licensee.

By way of defense, respondent in its answer asserts that as of November 19,1980, it has refused to meet and bargain with the Union because the Union "had lost its majority status and was no longer the exclusive bargaining representative" of its employees. Further, respondent asserted that the same loss of majority status was the basis of the most recent refusal to meet and bargain, as well as its refusal to confer access privileges and furnish information to the Union.

2. The Collective Bargaining History

Pursuant to a representation election held among respondent's agricultural employees, the Union was certified on June 21, 1978 as the exclusive bargaining representative of those workers. By letter dated October 1, 1980,[4/] the Union requested a negotiations meeting with the company. On November 19, 1980, the company, through its legal representative, Leon L. Gordon, "decline[d]" the request for negotiations "because of the fact that the [Union] no longer represents a majority of the employees in the bargaining unit." On December 19, 1980, the Union filed charge number 80-CE-53-OX alleging a violation of section 1153(e) of the Act based on the Company's refusal to bargain. Subsequently, the Union withdrew this charge.

On February 11, 1983, the Union, acting through Jose M. Rodriguez, citrus manager for Ventura County, wrote to the company reviewing the Union's request that negotiations commence. He also suggested possible meeting dates. By letter dated February 16,

---

4. The gap between certification and request for bargaining was not explained.

Rodriguez stated that the Union would like to take access to company premises, and suggested that a meeting be scheduled in order that the parties might discuss the matter. On April 13, Union representatives requested that the company provide information regarding the number of crews working, the locations of the crews, directions to where the crews were working, and if labor contractors were being utilized, the names of those contractors.

The respondent refused to comply with any of the foregoing requests. As a consequence, no negotiating sessions have taken place. However, on May 13, 1983, the Ventura County Superior Court issued a preliminary injunction by whose terms respondent was ordered to permit representatives of the Union to take access to its premises during the employee lunch period. Further, respondent was ordered to provide each day to the Union, when requested before 10:00 a.m., the following information.

1. The number of crews working for respondent;

2. The approximate number of employees working in each crew;

3. The location of each crew working for respondent;

4. The approximate time of lunch for each crew working for respondent; and

5. Directions to the location of each crew working for respondent.

3. Stipulations of the Parties

At the hearing, the parties agreed to stipulate to most, if not all, of the facts with which this proceeding is concerned. In addition, the parties agreed that certain similarities existed

between this respondent and F & P Growers Association, the respondent in case numbers 83-CE-108-OX and 83-CE-108-1-OX, also heard and decided by this Administrative law Judge. Consequently, as per stipulation, certain findings made in that case shall be applicable to the instant case. A copy of the decision issued in that case is attached as Exhibit A to this decision, and pertinent portions therein are incorporated here by reference.

Following is a recitation of those factual matters to which the parties agreed:

1. The operations of Ventura County Fruit Growers are similar to those of F & P Growers Association in that VCFG harvests the citrus, principally Valencia oranges, produced by its grower members.

2. "The groves that [respondent] harvests are so similar to those of F & P that the observations and conclusions of the ALJ in reference to F & P's operations would be the same [as] in the case of [respondent's]. Therefore, if the ALJ finds that F & P has an obligation to provide information to the UFW, [respondent] will also be required to provide similar, if not the same, information . . . . [t]he ALJ will apply the same or similar type of order as he does in F & P [in the instant case] with the understanding that there is an additional fact . . . concerning the location of [respondent's] buses," which may or may not be determinative, but which will be considered by the ALJ in his decision. The ALJ in the Ventura County Fruit Growers case is the same as the ALJ in the F & P case.

3. As set forth in the bargaining history, the respondent

since February 16 has refused to provide access to the UFW, and since April 13, respondent has refused to provide information requested by the Union regarding the location(s) of company operations.

4. During the pre-election organizing drive in 1978, the Union took access to the respondent's property, although respondent did not provide it with any information. Neither Jose Manuel Rodriguez nor Chole Trevino, who attempted to take access in the current year, took access during the organizational drive in 1978.

5. The parties stipulated as to the content of the testimony of Jose Manuel Rodriguez as follows:

a. Jose Manuel Rodriguez is the UFW citrus division manager for Ventura County, having held that position since August, 1982.

b. Jose Rodriguez is the UFW negotiator in charge of collective bargaining negotiations between the UFW and Ventura County Fruit Growers, Inc.

c. Mr. Rodriguez' duties as the citrus division manager are to organize, administer contracts, and negotiate contracts in the citrus industry in Ventura County.

d. Mr. Rodriguez has been an organizer with the UFW since August of 1975.

6. If the ALJ determines that respondent has a duty to bargain with the UFW, then Respondent will not contest that post-certification access is appropriate in this case.

7. The parties stipulate as follows concerning the testimony of a Mr. Steven Smith:

a. Mr. Smith has been the manager of respondent since

April of 1982.

b. Respondent's offices are located in Fillmore at 9 63rd Street. There exists only one company office.

c. The company packing house is also located at 9 63rd Street.

d. Mr. Smith's responsibilities regarding the citrus harvest are that he attempts to get the best possible product off of the trees.

e. Mr. Bill Dorman supervises the harvest itself and is the assistant general manager of the respondent.

f. Mr. Smith is in charge of the packing house.

g. The crops that respondent harvests and packs include the following: oranges, which include navel and valencias, and some grapefruit. Eighty-five percent of the crops harvested and packed are Valencia oranges. Ten percent of the crops harvested and packed are navel oranges, while the remainder of that harvested and packed is grapefruit.

h. In 1983 and 1982 the company harvested approximately 2,000 acres of oranges and grapefruit for about 100 growers.

i. Mr. Dorman decides where crews will work each day. Mr. Smith may also be involved in that decision. Those decisions are made the day previous to the work itself. Mr. Dorman will decide if the crews are to move between groves on a particular day.

j. The citrus harvest in 1983 began on February 22nd in the navel crop, while the Valencia harvest began in early April. Grapefruit is anticipated to be harvested sometime between June and

August and the harvest will end, it is estimated, around mid-November.

k. The company presently utilizes two crews. At peak, it anticipates that it will have in its employ four to five crews. There are, on the average, twenty-five employees per crew.

l. Of the two crews presently employed, one crew is supplied by a labor contractor named Rivas. The second crew is hired directly by respondent.

m. It is anticipated that respondent will need additional crews in June. It has not, as of the hearing date, been determined whether such crews will be hired directly by the respondent or whether the Respondent will engage the services of a labor contractor in this regard.

n. The crews are under the direct supervision of the foreman or labor contractor who is, in turn, supervised by Mr. Dorman, who, as noted above, is in charge of harvesting.

o. Regarding those groves which are harvested by the respondent, the northern-most location of such groves is two miles north of Fillmore "as the crow flies." However, from Fillmore traveling by road to reach these groves, one would need to cover a distance of four to five miles. These groves are located at the top of Grand Avenue. The grove farthest south which respondent harvests is located ten miles south of Fillmore on Santa Rosa Valley Road. The grove furthest west harvested by respondent is located in Santa Paula, nine miles west of the respondent's offices. The eastern-most groves harvested by respondent are located in Piru on

Torrey Road. These groves are 20 miles from the company's western-most field. There is, in addition, a small grove of three acres located in Canoga Park which respondent harvests. Respondent also harvests a grove in Meiners Oaks, near Ojai, consisting of eight acres. That grove is located approximately 23 miles from Santa Paula.

p. Respondent does not operate any labor camps. Most of its employees live in the vicinity of Fillmore in individual houses. At the present time the company has 52 employees and anticipates a peak harvest crew of approximately 100-125 individuals.

q. One of the foremen employed by the respondent at the time of the hearing has had 13 years of experience with the company and with the groves in which it operates. The labor contractor employed at that time by the respondent who supervises the other crew has been with the company for 25 years.

r. It is Mr. Dorman who actually communicates with the foremen each day before three o'clock to instruct them where they will be working the following day.

s. Fifty to sixty percent of those individuals employed by respondent in the current year were employed by the respondent in the year previous.

8. The parties also stipulated as to the contents of the testimony of Bill Dorman, as follows:

a. Bill Dorman supervises the harvesting operations of the company and visits each harvesting crew at least twice a day.

b. It is company policy that crew buses do not park

within the groves where respondent's crews are working. Rather, they park on the county road next to the grove or on a private road going into the grove. These buses are visible from the county road the vast majority of the time.

c. Crews are transported to the fields in the following manner: some are picked up at the packing house by the bus in the morning, while others are picked up near their homes in Fillmore as the bus travels along the route to the groves. Some workers drive their own vehicles to the groves and do not follow the buses. Workers are dropped off at the end of the workday in the reverse order from which they were picked up.

d. The buses themselves, colored bright yellow, are two in number. One bus belongs to the labor contractor and the other belongs to the respondent itself.

III. CONCLUSIONS OF LAW

A. Respondent's Duty to Bargain

1. The "Certified-until-Decertified" Rule

Respondent argues initially that it is not under a duty to bargain with the Union because the Union had lost its majority status. That defense was squarely rejected in Nish Noroian Farms (1982) 8 ALRB No. 25, whose holding was reaffirmed in F & P Growers Association (1983) 9 ALRB No. 22, and Roberts Farms (1983) 9 ALRB No. 27; see also Jack or Marion Radovich (1983) 9 ALRB No. 45. As noted in the Nish Noroian case, supra at p. 13:

> . . . it is unlawful, under our Act, for an employer to recognize the bargaining representative, or for the union to attempt to force recognition through any means other than the election process. Majority support and/or good faith belief of majority support do not control. Under our Act, the only means by which a union can be recognized is

> through winning a secret ballot election and being certified by the Board . . . . Likewise, whether or not recognition should be withdrawn or terminated must be left to the election process.
>
> . . . . Once a union has been certified, it remains the exclusive bargaining representative of the employees in the unit until it is decertified or a rival union is certified. . . . . The duty to bargain to contract or a bona fide impasse will not hinge on the percentage of support among employees in the work force, which could fluctuate widely in a short time period, or on whether someone's belief in a loss of majority support is held in good faith or bad faith. The duty to bargain, which springs from certification, will be terminated only with the certification of the results of a decertification or rival-union election where the incumbent has lost.

Respondent attempts to attack the underlying basis for the rule in Nish Noroian by resurrecting arguments raised in conjunction with the Board's interpretation of sections 1156.3 and 1156.7 of the Act, as enunciated in Cattle Valley Farms (1982) 8 ALRB No. 24. Briefly stated, the Board held[5/] in that case that the Regional Director is authorized to conduct a decertification election under section 1156.3 where a union which previously prevailed in a representation election has been unable to secure the execution of a collective bargaining agreement with the employer. In so doing, the Board disposed of an apparent anomaly which existed under the A.L.R.A., to wit, that a decertification petition might only be filed where a certified bargaining representative had

/

/

/

5. Respondent argues that the Board's interpretation of the statute was "dicta," not the holding of the case. That contention is treated below.

obtained a collective bargaining agreement for the unit certified.[6/]

The underlying rationale for the Board's holding in Cattle Valley first appeared five years earlier in Kaplan's Fruit and Produce (1977) 3 ALRB No. 28. It was adopted and approved by the Fifth District Court of Appeals in Montebello Rose v. A.L.R.B. (1981) 119 Cal.App.3d 1, which stated at p. 29: "[W]e recognize the Board's decision in Kaplan's can be characterized as a somewhat strained interpretation of the literal wording of the Act. Nevertheless, the Board's interpretation does appear to be true to the underlying purpose of the Act as a whole -- to promote stability in the agricultural fields through collective bargaining . . . . Because of these policy considerations, we believe it is appropriate for this court to give deference to the Board's interpretation of the Act."

That rationale, as explained by the Court of Appeals, was that "certification is not a single, all-purpose concept but rather is a concept with two separate functions: (1) it creates a duty to bargain; and (2) it creates an election bar. While the code section implying the duty to bargain contains no express time limit

---

6. The word "decertified" appears solely in section 1156.7(c) of the statute. That section sets forth the procedure whereby an incumbent union may be decertified by a unit employee or group "during the year preceding the expiration of a collective bargaining agreement which would otherwise bar the holding of an election." In section 1156.7(d), authority appears for the filing of a petition by a rival labor organization during the year preceding the expiration of a collective bargaining agreement. Thus, the wording of both subsections gives rise to the implication that an incumbent, certified union might only be displaced if a collective bargaining agreement exists, especially when read in conjunction with section 1156.3, which permits an election petition to be filed only when there is no union "currently certified."

(§1153(e)), the section creating the election bar does contain a one-year time limit (§ 1156.6)." (119 Cal.App.3d 24.) Thus, the phrase "currently certified," as used in section 1156.3, refers to the one year bar to representation elections following the certification of a bargaining representative, and does not foreclose in perpetuity an attempt to unseat or replace that representative when no collective bargaining agreement has been reached. Accordingly, the Board reached the conclusion in Cattle Valley, supra, that section 1156.3, as well as section 1156.7, authorized and established procedures for the holding of decertification elections.

Respondent contends that "the Board rule enunciated in Cattle Valley permitting rival union and decertification elections to be filed under section 1156.3, was essential to and an integral part of the Board's action in establishing the 'certified until decertified' rule in Nish Noroian." Since the rule in Cattle Valley was "non-germane dicta," it argues, then the underpinnings for Nish Noroian have inadequate legal and precedential support. Thus, recognition should be accorded the defense, in a refusal to bargain case, of an employer's good-faith belief in a union's loss of majority support.

The "dicta" argument was also raised in the F & p case, supra, which is not surprising given the fact that both F & p and respondent are represented by the same law firm. In F & P the Board disposed of that argument as follows:

> Respondent argues that the Nish Noroian rule is non-germane dicta which should not control because Nish Noroian Farms, having been cleared of wrongdoing in that case, had no standing to appeal the decision. Regardless of whether

> Nish Noroian Farms had standing to appeal, the certified-until-decertified rule was indeed germane to issues decided in Nish Noroian. In determining whether the filing of a decertification petition followed by a majority vote to reject the incumbent union affects the employer's duty to bargain, the Board confronted from Nish Noroian the same argument as Respondent presents herein: that NLRA precedent permits an employer to withdraw recognition from, and to refuse to bargain with, a union where the union has lost majority support, or where the employer has a good faith and reasonable belief that the union no longer supports a majority of the employees in the bargaining unit. [Citing cases.] In Nish Noroian, the employer made unilateral changes in terms and conditions of employment, claiming the majority vote for no union evidenced a loss of majority support for the union.

Thus, the Board's enunciation and explication of the "certified-until-decertified" rule was essential to its determination that the employer in Nish Noroian had not violated section 1153(e) by making unilateral changes following a no-union majority vote in a decertification election. The rule was a central issue presented by the case, without which the Board could not reach its ultimate conclusion on the refusal-to-bargain claim.

Similarly, in Cattle Valley Farms, supra, the Board's determination that section 1156.3 could be utilized as a mechanism for holding a decertification election was essential to its ultimate finding regarding the disposition of unfair labor practice charges which might "block" the holding of that election. Obviously, if the holding of the election was not authorized by statute, then the election petition might be dismissed and the processing of the unfair labor practice case could continue unabated.

Respondent's brief quotes of length from Black's Law Dictionary, Revised Fourth Edition, in order to define "dictum." One such example should suffice. "Statement and comments in an opinion concerning some rule of law or legal proposition not

necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication." (Citing Wheeler v. Wilkin, 98 Colo. 568, 58 P.2d 1223, 1226.) Thus even as respondent defines the term, the principle established in Cattle Valley Farms, utilizing ALRA section 1156.3 as a statutory basis for decertification elections, was clearly "essential to determination of the case in hand."

The argument was advanced in Cattle Valley that unfair labor practice charges should not be used to "block" a decertification election due to the abbreviated period, under sections 1156.7(c) and (d) of the Act, where such petitions could be filed. The Board stated "the particular manner in which [the NLRB's blocking charge practice] would impinge upon the decertification process under the ALRA requires that it be adopted with certain modifications and that our statute be interpreted so as to afford a somewhat broader avenue for decertification than we have heretofore provided." In order to avoid the undesirable result of having "only one chance in perpetuity" (during the last year before a contract expires) to depose a certified union, and in order to give effect and a rational basis to a blocking charge policy, the Board's interpretation of section 1156.3 became "necessarily involved" in its ultimate determination. Thus, its remarks in this regard could not be termed gratuitous, surplusage or collateral to the case at bar. Accordingly, it is determined that the Board's holding with regard to ALRA section 1156.3 in Cattle Valley Farms, supra, was not dicta, and provided a sufficient precedential foundation for its subsequent holdings in Nish Noroian and F & P

Growers Association, supra.

2. Respondent's Remaining Arguments

Respondent raised a series of additional arguments which appear to be more the work of a rhetoretician than an advocate. These arguments will be summarized where possible, and treated seriatum.

Respondent contends that the Board "acted beyond the scope of its statutory authority" when, in Cattle valley Farms, supra, it "amended the entire legislative scheme" for holding decertification elections. This contention is more or less another perspective of its "dicta" argument vis-a-vis the Board's interpretation of section 1156.3 in Cattle Valley Farms, discussed infra. Similar to that argument, respondent maintains that since the Cattle Valley rule was essential to the holding in Nish Noroian and the Cattle Valley rule was the result of the Board's acting in excess of its authority, the entire edifice should topple for want of an adequate foundation.

The answer to this proposition lies within the language of the Fifth Circuit's opinion in Montebello Rose v. A.L.R.B., supra.[7/] There, the Court of Appeals noted that "[a] guiding principle for evaluating the Board's decision in Kaplan's [where the notion of dichotomizing the certification concept initially arose] is that an administrative agency is entitled to strong deference when interpreting policy in its field of expertise. Since the ALRB is the agency entrusted with enforcement of the ALRA 'its

---

7. Notably, respondent's counsel did not question the logic of that decision, attack its findings, nor attempt to distinguish the matters raised within the boundaries of that case.

interpretation of the Act [is] to be accorded "great respect by the courts and will be followed if not clearly erroneous. [citing cases]"'" (119 Cal.App.3d at p. 24.) The language from the appellate court's opinion quoted in the preceding subsection demonstrates that while the court was aware that the Board's view of the "certification" concept in the statute could be construed as a "strained interpretation of the literal wording of the Act," that view was nonetheless entitled to deference, and clearly did not amount to the Board exceeding the bounds of its statutory authority. Respondent's position to the contrary is therefore unavailing.

Respondent additionally contends that certain language in Nish Noroian pertaining to recognizing a bargaining representative (only by "winning a secret ballot election and being certified by the Board") is "in conflict" with its ruling in Harry Carian (1980) 6 ALRB No. 55, which announced the Board's power to issue bargaining orders in situations where numerous employer unfair labor practices have precluded employees from exercising free choice in a secret ballot election. The Board's response in that case, as well as in Patterson Farms (1982) 8 ALRB No. 57, was that the Board's remedial authority enabled it to issue a certification and order an employee to bargain with a hitherto unrecognized union. Assuming, arguendo, that the Carian and Nish Noroian cases were not reconciled to respondent's satisfaction, the fact that certain language in one case might not comport with respondent's understanding of that decision does not detract from its force and legal effect.

In essence, respondent's argument is largely irrelevant. The fact that a Union is "certified until decertified" has little to

do with the fact that the certification may be achieved via a Board order. When the Board employed the language quoted above, it was speaking in terms of employer recognition of a bargaining representative, not of the means by which certification is achieved. What is of consequence is the wording in Nish Noroian, supra, at p. 13, that "majority support and/or good faith belief of majority support do not control" either the recognition of, or the removal of recognition from, the certified bargaining representative.

Respondent argues that the Board failed to follow the dictates of ALRA section 1148 to follow "applicable precedent" of the NLRA in abolishing the rule whereby recognition of a bargaining representative might be withdrawn where an employer has a good faith doubt of a union's majority status. Respondent's reasoning on this point is convoluted, and generally lacking in merit.

Respondent asserts that the reasons given by the Board for not following the NLRA "loss of majority rule" were the divergence in the election procedures in the language of each statute and the differences between agriculture and industry. Its brief states: "[w]hile it is true that the ALRA forbids direct recognition of a union outside the certification process, it does not follow from this that a union should be 'certified until decertified' . . . . " Once again, respondent confuses the concepts of "recognition" and "certification". It is altogether logical and consistent that since (unlike under the NLRA) a union may not be recognized merely on the basis of a demonstration of majority support for it, recognition may not be withdrawn on the basis of evidence of a lack of majority support. Recognition may only be attained after certification;

recognition may only be withdrawn, following certification, by the decertification process.

Respondent also raises a series of arguments under the heading of what might be termed "policy considerations." Respondent maintains that the "certified until decertified" rule would force employers "to deal with unions which do not represent the employees in question," that the rule would "be in derogation of the section 1152 rights of employees" by permitting a union "to neglect its responsibilites to the employees without ever being called to account by an employer's refusal to bargain," and that the rule "would have detrimental effects on the collective bargaining process," since the union, "knowing that an employer could never question its majority status, could take hard . . . uncompromising positions."

The Board was previously spoken to these issues, and determined them contrary to respondent's positions. While respondent is obviously dissatisfied with the Board's points of view in these particulars, merely rehashing and in effect attempting to re-argue such issues can only lend support to the conclusion that respondent's litigation posture was not undertaken in good faith.[8/] In F & P Growers Association, supra, respondent therein also claimed to be protecting "the 'free choice' of its employees by refusing to bargain with the UFW," which, it asserted, had lost its majority status. The Board clearly stated that it is agricultural employees, not their employers, that, "except for post-election objection

---

8. A discussion of the applicability of this phraseology, and of the make-whole relief to which it generally pertains, is contained in the succeeding section.

proceedings . . . have the exclusive responsibility for exercising and protecting their own free choice." (9 ALRB No. 22 at pp. 8 & 9.) In that case, as well as in Cattle Valley Farms, supra, and Nish Noroian, the Board noted that "there are sufficient avenues for rival union and decertification elections under section 1156.3 and 1156.7." (8 ALRB No. 25, p. 15.) Hence, employee "free choice" is adequately safeguarded.

Additionally, in Nish Noroian, supra, the Board expressed the notion that a "certified until decertified" rule would further a stated goal under the ALRA, the encouragement of stability in collective bargaining relationships, as bargaining would proceed "unhindered by real or imagined fluctuations in the percentage of support among employees in the bargining unit." {8 ALRB No. 25 at p. 15). Thus the Board determined that the rule, rather than having a detrimental effect on collective bargining, would have a positive impact on the process. The assertion by respondent that if the Nish Noroian rule were applied "the employer could never question [a union's] majority status" ignores the fundamental tenet that "[a]n employer under the ALRA does not have the same statutory rights regarding employee representation and election as employers have under the NLRA Under the ALRA, employers cannot petition for an election, nor can they decide to voluntarily recognize or bargain with an uncertified union." Therefore, the statutory scheme of the ALRA did not at any time contemplate that an employer's actions could lead to the recognition, or the withdrawal of recognition, of a bargaining representative.

Respondent argues that Nish Noroian should not be given

"retroactive effect" and the union should not be permitted, "by the mere filing of an unfair labor practice charge, . . . to reassume its representative status which the Regional Director determined it had lost." This contention smacks of the spurious. Initially, it should be noted that the charge alleging the company's initial refusal to bargain (80-CE-53-OX) was withdrawn by the Union, not dismissed. There is no evidence in the record that the Regional Director, as respondent asserts, "investigated the charge, found that the union had lost its representative status," or made any determination on the merits whatsoever.[9/]

Secondly, the issue of the so called "retroactive"[10/] affect of Nish Noroian was specifically determined adverse to respondent's position in F & P Growers Association, surpa. Once again, respondent is attempting to re-argue issues which have been previously determined in a manner which is unsatisfactory to it. In F & P, the Board held that while "before issuance of [Cattle Valley and Nish Noroian] . . . , Respondent's asserted attempt to protect its employees' free choice rights by refusing to bargain with their previously chosen union . . . may have been in keeping with the policies and purposes of the Act, since its employees' right to decertify was in question." Following their issuance, however,

---

9. Respondent further avers that "the union could have, but did not, request a review of the Regional Director's decision." The Regional Director merely "decided" to allow the union to withdraw the charge, as per regulation section 20212. It would be strange indeed for the Union to seek review of an act which was granted as the result of its own request.

10. Strictly speaking, the Nish Noroian rule is not being applied retroactively, but only from the date of that decision forward, or prospectively.

decertification was determined "as a matter of law [to be the] exclusive approach" whereby recognition of a certified union might be withdrawn. The Nish Noroian rule was not therefore applied "retroactively" vis-a-vis F & P's make-whole liability. It did not operate to re-establish a certification which had been "lost," but merely remedied conduct which became recognized as unlawful as applicable law evolved.

The final point raised by respondent warranting discussion involves its assertion that the Union "abandoned" its claim to represent unit employees. As reflected in the stipulation between the parties, following its certification on June 21, 1978, the Union did not request that the company bargain collectively until October 1, 1980. The company responded on November 19, 1980, that it would not bargain because of what it claimed to be a loss of majority support. The Union subsequently filed an unfair labor practice charge based on the company's refusal to bargain, but then withdrew the charge. The Union, prior to the institution of the charges which form the basis of this case, again requested that the respondent bargain, and the company again refused. In sum, the respondent has, since the date of certification, never negotiated with the Union despite separate requests to do so.

The Board has recognized that a union may become defunct or it may "disclaim interest" in continuing to represent unit workers. (Lu-Ette Farms (1982) 8 ALRB No. 91.) A union's "abandonment" of a bargaining unit may be viewed as carrying the "waiver" doctrine to its ultimate extreme. Under the "waiver" principle, an employer is generally relieved of its obligation to bargain over a specific

issue where the bargaining representative is notified of a proposed change in unit terms and conditions of employment and makes no protest or effort to bargain concerning it. (O. P. Murphy Produce Co., Inc. (1981) 7 ALRB No. 37; see also Claey's Luck, S.A., Inc., et al. (1983) 9 ALRB No. 52.) As a broad proposition, the union must exercise a degree of diligence in seeking to enforce its representational rights; otherwise, it may be deemed to have waived them. (American Bus Lines, Inc. (1966) 164 NLRB 1055; Citizens National Bank of Willmar (1979) 245 NLRB No. 47; O. P. Murphy Produce Co., Inc., supra.) Thus, it might be argued, where a union has not exercised such diligence regarding the full range of collective bargaining rights, it has "waived" the right to exercise them at all.

However, it is equally vital to consider that under current Board law, a waiver must be "clear and unequivocal," and will not be lightly inferred. (Masaji Eto (1980) 6 ALRB No. 20; Mario Saikhon (1982) 8 ALRB No. 88.) Here, the Union, after several years of inaction, determined to reassert its representational status, and requested bargaining. The company resisted these efforts. Rather than a "clear and unequivocal" disclaimer by the Union of any interest in representing respondent's employees, the Union demonstrated its willingness to assume that responsibility. Yet, the company did not afford them the opportunity. It is ultimately for the Union, and not the company, to manifest, by a clear and unequivocal act, that it no longer has any interest in representing

unit workers. This it simply did not do.[11/]

In sum, therefore, respondent has remained under an obligation, since the date of the certification, to bargain in good faith with the Union as the certified representative of its employees. Its failure to do so constitutes a per se violation of section 1153(e) and (a). (See, e.g., J.R. Norton (1978) 4 ALRB No. 39; John Elmore Farms (1982) 8 ALRB No. 20; F & p Growers, supra.)

B. The Applicability of the Make-Whole Remedy

Respondent asserts that the imposition of the make-whole remedy is "inappropriate" in this case. As announced in F & P Growers (1983) 9 ALRB No. 22, the Board employs a different test for the application of the remedy than that formulated in J.R. Norton v. A.L.R.B. (1979) 26 Cal 3d 1, where, as here, "an employer refuses to bargain but neither the conduct of the election nor the agency's decision to certify the union is at issue." Unlike a Norton, "technical refusal to bargain" type of case, "the 'reasonableness' of the employer's litigation posture and the employer's 'good faith' do not control [the] decision as to whether to impose make whole." Rather, the Board considers, "on a case-by-case basis, the extent to which the public interest in the employer's position weighs against the harm done to the employees by

---

11. Analogizing a union's "abandoning" a unit to certain aspects of the "waiver" doctrine, while instructive, is not totally dispositive. Generally, where a waiver has been held to exist, the union has been repeatedly notified of an anticipated change in working terms or conditions, and has done nothing, either by way of protest or request for bargaining. (0. P. Murphy Produce Co., supra.) Here, respondent did not "notify" the Union that it would refuse to bargain with it absent a clear manifestation of the Union's willingness to assert its rights.

its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the Act, the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain."

Respondent disputes the utilization of the above standard. It maintains that a determination of its "good faith" herein is the appropriate test for imposing the remedy, asserting that its reliance on NLRB precedent (i.e., its loss of majority status defense) and the Union's delays in requesting negotiations demonstrate that the company was not acting in bad faith in not negotiating with the Union.

Such contentions fly in the face of the Board's ruling in F & P. The Board explicitly noted therein, as detailed above, that an employer's good or bad faith was not the determinative issue in cases of this type. As in F & P, respondent asserted that the Union had lost majority support among its employees, and, on that basis, it refused to bargain with the Union. The appropriateness of imposing the make-whole remedy should not therefore be viewed in any different manner than the issue was viewed in F & P, respondent's claim of the Union's "abandonment" of the unit employees notwithstanding.[12/]

---

12. The Union's inaction following certification over a more than two year period may have operated as as a waiver of certain bargaining rights it might have enjoyed (see discussion infra), but did not operate to totally obliterate such rights. Rather, it was respondent's continued refusal to meet and bargain with the Union following the Board's pronouncement of the "certified-until-decertified" rule that was at the root cause of the absence of collective bargaining.

In F & P, supra at p. 10, the Board stated:

> Before issuance of the [Cattle Valley Farms, supra, and Nish Noroian Farms, supra] decisions, the Respondent's asserted attempt to protect its employees' free choice rights by refusing to bargain with their previously chosen union -- assuming that objective considerations did support a good faith belief that the union had lost its majority support --may have been in keeping with the policies and purposes of the Act, since its employees' right to decertify was in question. Once Cattle Valley and Nish Noroian issued, however, there could be no public benefit derived from Respondent's refusal, as decertification by the employees is less disruptive and, as a matter of law, the exclusive approach and Respondent's employees did not seek to decertify.

Since no public benefit, as in F & P, can be discerned from respondent's assertion of a defense previously announced as unavailing in a refusal to bargain case, it is recommended that the make-whole remedy for such refusal be imposed herein for the period from February 11, 1983, forward until respondent commences to bargain in good faith.[13/]

C. The Union's Right of Access and its Right to Information Pertinent There To

Pursuant to stipulation of the parties, it has been agreed that should it be determined that Respondent has a duty to bargain with the Union, respondent will not contest the appropriateness of

---

13. Even if one were to examine Respondent's conduct according to a "good faith" standard in deciding whether to impose make-whole relief, the remedy would still be imposed. The Board has held, on several occassions, that the failure to present a "close case" presenting "novel" legal theories or issues, or an attempt to overturn or rebut "well-established [legal] precedent," is indicative of a respondent's lack of good faith in litigating its duty to bargain. (See, e.g., Thomas S. Castle Farms (1983) 9 ALRB No. 14; Ranch No. 1 (1980) 6 ALRB No. 37.) Here, respondent has sought to re-argue and relitigate points of law which have been previously established and which are contrary to its contentions. Such actions have been held as not consonant with a good faith litigation posture.

post-certification access. As it has been decided that respondent is in fact obligated to bargain with the Union, it is likewise determined that the Union has the right to obtain access to Respondent's premises.

The parties to this case further agreed that should this Administrative Law Judge determine that the imparting to the Union of certain requested information regarding crew locations was necessary in his decision in F & P Growers Association, 83-CE-105-l-OXf then the dissemination to the Union of such information would likewise be warranted in this case. The pertinent portions of the decision in that case, as noted previously, are incorporated herein by reference.[14/] In essence, it was found therein that respondent was under an obligation to provide daily crew location information to the Union. Here, it is asserted that crew buses, as a result of company policy, are parked outside the groves themselves, and are visible from the public highway. This factor, it is contended, distinguishes the need for information in the instant case from that found to be necessary in the F & P case, op Cit.

However, it is determined that the visibility of respondent's buses has little or no impact on the necessity for providing information to the Union regarding crew whereabouts. While this respondent operates over an area which is less than half

14. Specifically, reference is made to the recitation regarding the testimony of Jose M. Rodriguez on pages 10-17, the Factual Analysis and Conclusions contained on pages 17-20, and the discussion of the legal principles applicable to the crew location information request, appearing on pages 23-30.

that of F & P (2,000, as opposed to 5,000 acres), the locations of the groves themselves are spread out over a more extensive area. Hence, Union representatives seeking access would need to travel over this area in order to simply spot a bus parked by the road side. This problem is easily averted by informing them in advance of where they are to go.

Secondly, as reflected in Rodriguez' testimony in the F & P case, the mere presence of a company bus or truck would not indicate which particular crew was working in a particular area. Thus, if he, or any Union representative, wished to speak with a specific crew, the presence of a company bus, in and of itself, would not signal which crew was working at that location. That information could easily be furnished by the company, thus rendering effective the Union's exercise of its access rights.

IV. THE REMEDY

Considerations which were held to appertain in F & P Growers Association, 83-CE-108-1-OX, are likewise so viewed in the instant case. Portions of that decision regarding the remedy to be imposed (ALJ decision, pp. 30 and 31) are incorporated herein by reference. Particularly, it is recommended in this case, as it was there, that the parties meet and confer so that a map of company operational sites be devised, and that respondent furnish to the Union a list of the names of all its grower-members, keyed in some manner to the particular areas where their properties are located.

Additionally, as previously noted, respondent shall be ordered to make its employees whole as a result of its refusal to bargain in good faith.

RECOMMENDED ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent venture County Fruit Growers, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

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

b. Failing or refusing to provide, upon request, timely and accurate information to the UFW regarding the daily whereabouts of its work crews, and the locations and/or designations of each particular grove or plot where it conducts harvesting operations;

c. Denying UFW representatives access to bargaining unit employees, at reasonable times, on the property or premises where they are employed, for purposes related to collective bargaining between respondent and the UFW;

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

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

a. Upon request, meet and bargain collectively in good faith with the UFW as the certified collective bargaining

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

b. Make whole all agricultural employees employed by respondent at any time during the periods from February 11, 1983, until the date on which respondent commences good faith bargaining with the UFW which leads to a contract or bona fide impasse, 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 the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

c. 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 makewhole and interest due its employees under the terms of this order.

d. Furnish relevant information to the UFW, upon request, for the purposes of obtaining access and bargaining, including, but not limited to, personnel, crop and production information, the names of the owners of each specific area where it harvests citrus, and information about daily work assignments and work locations of Respondent's agricultural employees.

e. Meet and confer with representatives of the UFW, upon request, for the purposes of designing and devising a map to be

provided to the UFW which includes and designates all of the areas or groves were respondent carries on harvesting operations. The UFW shall furnish a blank of said map to be filled in during the course of this joint conference. Designations of particular areas noted on the map shall be in the same manner (e.g., block numbers, owner's name, etc.) as the company utilizes when it assigns foremen and crews to work in those areas.

f. Permit UFW representatives to meet and talk with respondent's agricultural employees on the property or premises where they are employed, at times agreed to by Respondent, or in the absence of such an agreement, during the time when said employees take their lunch break, and at other reasonable times, for purposes related to collective bargaining between Respondent and the UFW. Two representatives for each crew employed shall be permitted to exercise access rights. Further, respondent is to permit UFW representatives pre-work access to the buses it utilizes to transport workers to harvest sites, and permit the representatives to ride on said buses from the point where the first worker or group of workers is picked up, until the bus reaches the harvest site and the work day commences.[15/]

---

15. Bus access has been sanctioned by the organizational access regulation, section 20900(e)(5)(a). Customarily, however, organizers leave the buses before they depart. Here there is no central embarcation point from which all crew members are picked up. Rather, they are picked up at several points en route to the groves. It is felt that this type of access is particularly appropriate here where Union representatives may utilize it not only for purposes of speaking with workers, but also for the purpose of familiarizing themselves with the areas where respondent operates.

g. Reimburse the UFW for expenses incurred by its representatives in attempting to locate respondent's work crews for each day that access was attempted or achieved from March 28, 1983 forward until compliance with this Order is achieved. Said reimbursement shall include compensation for automobile mileage expenses, less those expenses normally incurred on trips directly from the Oxnard UFW office to the respondent's groves where access was attained, and also shall include reasonable compensation for the time spent, less one and one-half hours, by UFW representatives in searching for the crews. Reimbursement for mileage and/or time shall not be paid on any day when representatives were able to locate respondent's crews within one and one-half hours after leaving the Oxnard UFW office, assuming that they went directly from that office to respondent's groves.[16/]

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

i. Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from January 13, 1983 until the date on which the said Notice is mailed.

---

16. Representative Rodriguez testified that it normally took forty-five minutes to travel this distance. Additional time is included for what might be the result of a lack of familiarity with the specific area. Anything beyond one and one-half hours needed to located a crew, it is determined, is the direct result of inadequate information supplied by the respondent.

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

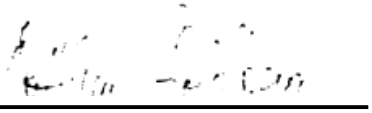
k. Arrange for a representative of respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board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

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

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

faith with the UFW.

DATED: November 18, 1983



MATTHEW GOLDBERG
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Oxnard Regional Office, the General Counsel of the Agricultural Labor Relations Board issed 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 failing and refusing to bargain with your certified exclusive bargaining representative, United Farm Workers of America, AFL-CIO (UFW), by failing to give the UFW information as to daily crew locations and locations of all the groves where respondent harvests, and by failing to permit the UFW to gain access to those groves for the purposes of speaking to you about a collective bargaining contract. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do and 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 about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

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

WE WILL NOT hereafter fail or refuse to meet and bargain collectively, on request, with your certified exclusive bargaining representative, the UFW.

WE WILL NOT hereafter fail or refuse to give the UFW, upon request, daily information regarding where our crews are working, or information about where we harvest citrus.

WE WILL NOT refuse to permit representatives from gaining access to areas where we harvest citrus so that they may talk to you about a collective bargaining agreement.

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

WE WILL provide information to the UFW, if they request it, about where we harvest and where our crews are working each day.

WE WILL allow UFW representatives to come on to the property where we are working so that they may speak with you about a contract.

WE WILL reimburse the UFW for the expenses they had trying to find our work crews.

DATED:

VENTURA COUNTY FRUIT GROWERS, 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 528 South A Street, Oxnard, California 93030, the telephone number is (805) 486-4475.

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

DO NOT REMOVE OR MUTILATE.

EXHIBIT A

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

F & P GROWERS ASSOCIATION, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 83-CE-108-OX 83-CE-108-1-OX

Appearances:

Judy Weissberg, Esq. and
Erasmo Elias, Esq.
for the General Counsel

William S. Marrs, Esq. of
Gordon, Glade & Marrs for the
Respondent

Before: Matthew Goldberg
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF THE CASE

On February 23, 1983,[1/] the United Farm Workers of America, AFL-CIO (hereafter referred to as the "Union"), filed a charge alleging a violation of sections 1153(a) and (e) of the Act. The charge was served on F & P Growers Association (hereafter referred to as "respondent" or the "company") on the same date. The alleged violation itself was grounded upon a claim that respondent had denied "post-certification access" to representatives of the Union. On March 14, the General Counsel for the Agricultural Labor Relations Board caused to be issued a complaint based on this charge. Respondent timely filed an answer, which essentially denied the commission of any unfair labor practices.[2/] Subsequently, on April 12, the Union issued an amendment to the charge, which was duly served on Respondent. The amendment, alleging a further violation of section 1153(a) and 1153(e), involved a denial to furnish certain information to the Union. The information was claimed to be necessary to facilitate the taking of access by the Union.

On May 3, 4 and 5 a hearing in the matter was held before me in Oxnard, California. Respondent and General Counsel appeared through their respective representatives. The parties were given full opportunity to present testimonial and documentary evidence, to examine and cross-examine witnesses, and to submit oral arguments and post-hearing briefs. Having read and considered these briefs,

---

1. All dates refer to 1983 unless otherwise noted.

2. The original complaint and notice of hearing, as well as the amendments thereto, were duly served on Respondent.

based upon the entire record in the case, including my observations both of the witnesses who testified and of the work site(s) with which this proceedings is concerned,[3/] I make the following:

II. FINDINGS OF FACT

A. Jurisdiction

1. Respondent, at all times material, is an agricultural employer within the meaning of section 1140.4(c) of the Act.

2. The Union was and is, at all times material, a labor organization within the meaning of section 1140.4(f) of the Act.[4/]

B. The Unfair Labor Practices Alleged

This case is concerned with the "denial" by respondent of post-certification access as, requested by the Union, to areas where it harvests citrus, and the further refusal by respondent to furnish certain information principally regarding the location of work crews which, General Counsel contends, was necessary to make said access "effective" and "reasonable."[5/]

---

3. As will be detailed below, General Counsel filed a motion that the ALJ tour the areas where respondent carries out its operations. Pursuant to that motion, an on-site inspection was conducted. Following the inspection, the ALJ issued a statement on the record summarizing his observations, and afforded the parties an opportunity to augment or refute them.

4. In its answer to the complaint, the jurisdictional facts were admitted by respondent.

5. The denial of access and the refusal to furnish information were the subjects of an injunction proceeding, detailed below, in the Ventura County Superior Court. The injunctive relief obtained provided a temporary means by which the Union could obtain access. However, as will be more fully detailed below, the informational aspect of the injunction, General Counsel maintained, was not completely adequate.

Respondent did not contest the bulk of the factual assertions which General Counsel sought to utilize as a basis for establishing violations of the Act. Some were admitted in its answer; some were the subject of stipulations between the parties; while others respondent determined not to offer any evidence to contradict or refute.

1. Respondent's Operations

Respondent is an unincorporated association which harvests navel and Valencia oranges and a small amount of grapefruit[6/] in Venture County. Its operations are carried out in groves principally located between the towns of Fillmore and Piru. The major portion of the groves are located in the so-called "Bardsdale" area, south of Fillmore, Highway 126, and the Santa Clara River, and east of Santa Paula. Two other principal harvesting areas are denominated as the "Goodenough Ranch" area, located along Goodenough Road which runs north from Fillmore, and the "Newhall Ranch" area, which is about three or four miles east of Piru. From the easternmost area in which respondent operates to the area farthest west is a distance of about twenty miles. Eight or nine miles separate the northernmost area from the southernmost. Respondent's operations are performed over a total of approximately 5,000 acres.

Respondent itself does not own the land on which it harvests citrus. Rather, the citrus is harvested in groves owned by approximately 250 different growers. The bulk of those groves carry

---

6. Less than ten percent of the citrus respondent harvests are grapefruit. Of the oranges respondent picks, about four percent of these are navels, with the remainder being Valencias.

no identifying marker as to who owns them.

During its peak, Respondent employs about 350 persons, organized into five separate crews. The harvesting season begins in January and runs for about ten months. Peak is reached in late May or June.

The employees do not live in any company-owned housing, but reside in a number of nearby towns such as Rancho Sespe, Santa Paula, Fillmore and San Fernando. There is a private labor camp in Fillmore in which a number of respondent's workers live. While there are company buses which transport the workers to the particular groves, 'few workers gather in a central location to be picked up to be taken to the work site. Rather, some workers are picked up at or near their homes, while others drive their own cars to the work sites. At the conclusion of the work day, employees are customarily dropped off where they were picked up in the morning.

2. The Collective Bargaining History and Events Leading to the Instant Controversy

In Case Number 78-RC-9-V, the Union filed a petition in order that a representation election be conducted among respondent's employees. The Union availed itself of access to the respondent's premises[7/] during the course of the organizational campaign. No

---

7. As noted above, respondent does not own the land over which it operates and thus, technically, the areas on which access was sought are not "respondent's premises." Such phrase is used as a short-form means of referring to the areas where respondent engages in harvesting operations. As noted in Robert H. Hickam (1982) 8 ALRB No. 102, the Board itself does not utilize "employer's premises" as a narrowily-defined concept, but rather includes within its meaning any property on which the agricultural employees of the employer are performing agricultural services, regardless of who is the holder of the fee or leasehold interest.

information was provided to the Union at that time of the type which the Union presently seeks, i.e., the location(s) where crews were working, directions on how to find them, etc.

The election held on June 13, 1978 resulted in the certification of the Union, which took place on July 10, 1978. Beginning in May, 1979,[8/] the Union and respondent engaged in collective bargaining negotiations. Negotiations continued up to and including February 17, 1981. After a five-month hiatus, the Union sent a letter to respondent requesting that it resume the negotiations. The company, through its representative, replied that it refused to meet and bargain with the Union, maintaining that it was no longer under any obligation to do so since the company held a "good faith"[9/] doubt that the Union, as of that date, continued to enjoy the support of a majority of its employees. During the time period in question, there had been no decertification election nor rival union election conducted among respondent's employees.

On January 25, 1982, in case number 82-CE-7-OX, the Union filed a charge asserting that Respondent had refused to bargain with it in contravention of section 1153(e) of the Act, from July 31, 1981, forward. Based on this charge, a complaint was issued on April 9, 1982, alleging in substance that Respondent failed and refused to meet and bargain with the Union.

---

8. The gap between the certification and the commencement of negotiations was not explained in the record.

9. The issue of respondent's "good faith" was not actually litigated. A charge had been filed which alleged that Respondent engaged in surface bargaining prior to July 31, 1981. The Regional Director found no merit in this charge, and dismissed it.

On September 7, 1982, at the hearing conducted for the purposes of deciding this issue, General Counsel moved for summary judgment. The motion was granted by the Administrative Law Judge, whose decision was affirmed, in pertinent part,[10/] by the Board in F & P Growers' Association (April 29, 1983) 9 ALRB No. 22. The basis for upholding the General Counsel's position on the issue, and finding that Respondent violated section 1153(e), was that under the decisions announced in Cattle Valley Farms/Nick J. Canata (1982) 8 ALRB No. 24, and Nish Noroian Farms (1982) 8 ALRB No. 25, Respondent was foreclosed from raising, as a defense to a refusal to bargain, and consonant with certain NLRB precedent (see, e.g., Dayton Motels (1974) 212 NLRB 553), that it entertained a "good faith" and "reasonable" belief that the Union no longer enjoyed majority support among members of the bargaining unit.

Essentially, the Board declared in Nish Noroian that a union's certification, and the concomitant obligation of an employer to bargain in good faith with it, continued until that union was, pursuant to a representation election, either decertified or deposed

---

10. The case was remanded to determine the issue of the applicability of make-whole relief by examining respondent's "good faith belief" in the loss of the Union's majority from July 31, 1981, to April 15, 1982, and whether "the public interest in the litigation of Respondent's refusal to bargain outweighed the harm that such refusal caused to Respondent's agricultural employees." 9 ALRB No. 22 did not contain a "final order" from which an appeal might be taken (see Act section 1160.8). Subsequently, in 9 ALRB No. 22, the Board granted General Counsel's unopposed motion to delete from its request for relief the portion which sought make-whole for this July 31, 1981 to April 15, 1982 period. The Board stated that "the delay and uncertainty imposed upon this and related cases by limiting the applicability of the make-whole remedy for the period . . . would not effectuate the purposes of the Act."

by the certification of a rival union.[11/] As there had been neither such proceeding involving respondent's employees, respondent's obligation to bargain with the Union was held not to have been extinguished, its "good faith" doubt of the Union's majority notwithstanding.

On or about January 13, 1983, after General Counsel's motion had been granted by the ALJ,[12/] but before the Board had issued its affirmance, the Union again requested by letter that respondent resume negotiations with it. Approximately one month later, on February 11, having received no response from the company in the interim, the Union again wrote respondent to request the resumption of collective bargaining. On February 16, the Union negotiator, by letter, reiterated its request for bargaining and, in addition, requested that it be permitted to exercise access rights to respondent's premises. As admitted by respondent in its answer, the purpose for the taking of access, as set forth (presumably)[13/] in the letter, was to "discuss [. . .] negotiations and working conditions with the company's agricultural employees."

On February 18, the Union's negotiator was informed in a telephone conversation with Leon Gordon, attorney for the

---

11. At one point during the course of this hearing, as well as during the prior case, respondent argued the "certified until decertified" rule in Nish Noroian was "dicta," not germane to the issues therein. The Board specifically disposed of this contention on pp. 4 and 5 of 9 ALRB No. 22.

12. The ALJ therein rendered his decision on October 6, 1982.

13. The allegation admitted by respondent was ambiguous in this regard.

respondent, that the company would decline to negotiate with the Union. As stated in respondent's answer to the instant complaint, the reasons for not negotiating with the Union at that time were that "the UFW had lost its majority status and was no longer the collective bargaining representative of respondent's employees" and "that the whole issue was [then currently] before the Board awaiting decision."[14/]

Respondent further admitted that as of February 16, it has refused to permit representatives of the Union to avail themselves of access to the premises where it conducts its harvesting operations. After the charge was filed and the complaint issued in the instant matter on the dates noted above, General Counsel sought injunctive relief in the Ventura County Superior Court. A Temporary Restraining Order was entered by the Court on March 25, 1983, under the terms of which respondent was ordered to show cause why it should not be enjoined from denying "reasonable post-certification access" to representatives of the Union. The Court further delineated the terms for the taking of access which were to be observed in the absence of an agreement between the Union and respondent for same: the Union was to be permitted access, on a daily basis, "to not less than two representatives of the UFW for each crew . . . employed, and not less than one hour of access per crew per day." Access was to be permitted during the employees' lunch period.

On April 6, the Ventura County Superior Court issued a

---

14. As indicated above, case number 82-CE-7-OX had not, as of that time, been ruled upon by the Board.

Preliminary Injunction in the matter enjoining respondent from denying to the Union reasonable post-certification access to its premises. The Preliminary Injunction, in addition to ordering that reasonable access be granted to the Union, also ordered respondent to provide the following information, ostensibly to facilitate the taking of such access:

1. The number of crews working for respondent on the day access was to be taken;

2. The location of each crew on that day;

3. The approximate time when the crew would be taking lunch that day;

4. Directions to the location of each crew.

3. Attempts at, and the Actual Taking of, Access to Respondent's Premises

Jose Manuel Rodriguez, Administrator of the Union's citrus division for Ventura County, telephoned Bill Winters, respondent's manager, on March 28 to inform him that he would be taking access to respondent's premises pursuant to the court order. He further requested that Winters supply him with information regarding the number of crews that were working, where they were working, and the time when they would be taking their lunch break. Winters declined to furnish the information, saying he needed to speak to his attorney.

Nonetheless, following the above conversation, Rodriguez set out about 8:30 a.m. in an attempt to find the citrus crews. His testimony, which was uncontroverted, reflects that he spent nearly five hours in locating one of respondent's crews. His travels took him from the Union's office in Oxnard through Fillmore to east of

Piru, back to Fillmore, then along the road north of the town, Goodenough Road, and through streets in the Moorpark area. As Rodriguez drove, he simultaneously attempted to spot evidence of the crews' presence. Finally, travelling back to Fillmore and crossing a bridge south of the area, he saw a yellow bus leave a grove. Taking the road from where he noticed the bus leave, he saw a crew working. Rodriguez was not sure whether it was working for the respondent. He approached the foreman to verify whether it was. The foreman answered affirmatively, it was an F & P crew. However, the administator had spent all his time trying to locate the crew. It was then about 1:00 or 1:30 p.m., the crew had taken their lunch, and there remained no time for him to speak with its members.

On March 30, Rodriguez, assisted by Union organizer Chole Trevino, again attempted to locate respondent's crews, avail themselves of access, and speak with the workers. The two initially went directly to respondent's offices, where they inquired of Bill Winters if they might take access, and if so, whether he might furnish them with information which would assist them in finding the crews. While Winters "approved"[15/] the taking of access, he again declined to provide the information they sought, saying that the court order did not oblige him to do so. The organizers left the office about 11:45 a.m., drove east along Highway 126 past Piru, then back to Fillmore along the same highway, Rodriguez driving while Trevino searched along both sides of the roadway for signs of one of respondent's crews.

---

15. Respondent was by then acting under the compulsion of a court order.

In the course of driving around the Union representatives happened upon a company bus, which indicated the presence of a crew in the vicinity. At the site they announced to foreman Cruz Molina who they were, and proceeded to speak to crew members, who were by then, at 12:10 p.m., already eating lunch. Twenty minutes later, the foreman gave the order to resume work, and discussions between crew members and organizers ended. Rodriguez asked the foreman whether the crew would be in the same location the following day. The foreman replied that he did not know.

The next day Trevino and Rodriguez again attempted to locate respondent's crews. Since their request for information regarding crew location was denied the previous day, they did not ask for any that morning. Leaving the Oxnard Union office about 9:45 a.m., they drove along Highway 126 to the eastern side of Piru, looking for indications of crews working in groves on either side of the highway. Not finding any, they drove back to the Fillmore area, then took the Goodenough road north from the town. From there they traveled south back through Fillmore towards the Moorpark area. Periodically they would stop the car and attempt, from an elevated vantage point, to espy a crew. They were unsuccessful.

Finally, they spotted a crew pruning lemons [16/] where they inquired of some workers whether they had seen any F & P crews. After one worker told them that he knew where their orchards were and had seen one of respondent's yellow buses go by, the organizers then drove to the Bardsdale area, criss-crossing through the streets

---

16. Respondent does not perform any opertions in conduction with lemon crops.

until Trevino spotted a bus and a crew. The crew was working under the supervision of foreman R. Mesa. As they had spent so much time looking for the crew, they only had about fifteen (15) minutes to actually speak with the workers. When the workers were asked where they would be the next day, none seemed to know.

The following day, Rodriguez and Trevino again attempted to locate respondent's crews. Leaving Oxnard between 8:30 and 9:00 a.m., they followed a route similar to that of prior days: east past Piru along 126, then back to Fillmore. Once in Fillmore itself, at a supermarket parking lot, they asked a man they met who appeared as if he were a citrus harvester, whether that man was familiar with F & P. Professing to know the company, the man told the representatives that he thought that company picked in Fillmore, Santa Paula, and Ojai. The organizers then drove from 126 to the vicinity of Ojai, looking for orange orchards. After locating some, they found out they were under the aegis of another concern. By that time, the lunch hour had passed. Thus, Trevino and Rodriguez spent the entire morning looking for respondent's crews, to no avail, and were not able to speak with any workers that day.

On the next day that the crew worked, Monday, April 4, after again being refused information regarding crew whereabouts, Rodriguez spotted two company buses in the course of his meanderings around and though company premises. At that location the crews of foremen Mesa and Enriquez were working. After speaking with crew members over a span of forty-five minutes, Rodriguez returned to his Oxnard office.

For the next three days, Rodriguez was occupied with other

matters. On April 8, the first opportunity Rodriguez had to attempt access after the entry of the Preliminary Injunction, the organizer telephoned Bill Winters between 7:30 and 8:00 a.m. When asked to furnish information to assist in locating the crews, Winters this time complied, giving Rodriguez the name of each foreman supervising crews that day, and the name of the particular ranch and street where each crew would be working.[17/] Winters asked the organizer who would be taking access, and which crew or crews would be visited. Rodriguez supplied these particulars.

Rodriguez testified, however, that the information he received from Winters was not totally adequate. He still experienced difficulty in locating the Esquivel crew, which he had chosen to visit that morning. Rodriguez had been informed that the crew was at the Old Mountain ranch by the Goodenough Road, located to the north of Fillmore. After an initial search of the area failed to yield results, Rodriguez again telephoned Winters and asked him to spell the name of the place where the crew would be found. Winters obliged.

Rodriguez had left his office about 10:30 that morning. It took him nearly one hour of searching before he happened upon Esquivel's crew.[18/] Driving along Goodenough Road, he looked on

---

17. Rodriguez also asked what time the crews would be eating, and according to the strict letter of his testimony, Winters did not relate this information. However, subsequent testimony bore out that crews ate at the same time each day, or 12:00 noon.

18. The groves are about a forty-five minute drive from Oxnard. Rodriguez testified that he began speaking with crew members about 12:05 p.m.

both sides of it for evidence of the crew. In that area there are several groves, none of which have signs indicating the ranch name[19/] On one side the land is elevated above the roadway, making it impossible to peer into the groves on that side. By chance Rodriguez spotted a truck emerging from a particular grove. Once he went inside, he saw a bus and a crew, neither of which were visible from the road. After speaking with the crew for about one-half hour, Rodriguez asked the foreman whether he knew where the crew would be the next day. The foreman replied in the negative, adding that "they tell us not to speak to you."

The following Monday, Rodriguez followed a similar procedure, telephoning Winters in the morning, and obtaining the names of each foreman and the ranch and street where they would be working that day. Rodriguez decided to visit a crew which he was told would be at Bardsdale and Ojai Streets in the Bardsdale area south of Fillmore. After travelling around this location without success, he telephoned the respondent's office again to obtain more exact instructions. Subsequently, Rodriguez located the entrance to the grove in question, and found the crew, which could not be seen from the street.[20/] He was able to speak to the crew for about

---

19. This is the case with all of respondent's orchards save Newhall Ranch, the entrance to which is marked by a sign. However, there are problems in locating crews within that site. These will be discussed below.

20. Rodriguez testified that he found the crew about 10 a.m. having left his office about 8:00. Taking into account the forty-five minutes driving time from Oxnard, it must have taken about one hour to find the crew.

one-half hour while they took their lunch. None of the crew members was able to tell him where they would be working the following day.

The next day, April 12, Rodriguez obtained crew location information from Winters, as in days previous. That day Rodriguez chose to visit the Cruz Molina crew, working at the Newhall Ranch. As previously noted, the entrance to the ranch is clearly marked. However, once on the property, the dirt road through it twists and turns and contains many offshoots. The terrain is a succession of hills and gullys, the roads within the orchards like those without, winding through the groves so as to make it impossible to look through the grove for signs of activity. The height and fullness of the trees compounds the problems in locating work crews. Rodriguez thought he arrived at his destination upon seeing a company bus, only to find that the crew and the bus were that of foreman Esquivel. Esquivel could not provide any assistance in locating Molina and his crew. Finally, at around 12.10 a.m., Rodriguez found Molina's crew about one mile from where Esquivel's was working. He was able to speak to the Molina crew for approximately twenty minutes.

On April 13, due to weather conditions, work did not begin until after the lunch period. Thus, under the terms of the court order, Rodriguez was unable to speak to the crews during their break. However, he did avail himself of the opportunity that day to speak with some employees who gathered near the company offices to board the buses to be taken to the work sites.

Between April 13 and April 29, Rodriguez did not attempt to gain access to respondent’s premises. Some days in this interval it rained, and crews did not work; others Rodriguez was occupied in

different capacities. At some point Rodriguez spoke to Winters and asked that the manager meet with him and provide him with a list of all the ranches harvested by the respondent as well as a map which would assist in locating them. Winters, according to Rodriguez[1] testimony, told him that a map could be obtained from the county offices, and referred him to respondent's attorney for the remaining information.

Rodriguez spoke to Winters again on the morning of May 7, and obtained information similar to that which he had previously obtained regarding crew locations. However, he did not take access that day.

Rodriguez stated that what he required was the cooperation of the company in meeting with him and designating those areas where it harvested citrus. Once he obtained this information, it would enable him to understand the company's directions. Rodriguez admitted that following the entry of the preliminary injunction, he was never refused information by company personnel.

By way of defense, respondent introduced testimony to the effect that when the Union originally organized F & P in 1978, it took access without any information or assistance from the company. Furthermore, Rodriguez, who assumed his current responsibilities in 1982, admitted that he did not communicate or obtain any information from his predecessors regarding the location of company operations.

4. Factual Analysis and Conclusions

As with any particular geographical location, once one develops a certain familiarity with the area, pinpointing a specific place becomes that much easier. From Rodriguez' testimony it

appears that his lack, of familiarity with the region contributed to some extent to the problems he experienced in attempting to locate respondent's crews. Nevertheless, a thorough-going acquaintance with the area would not, in and of itself, suffice to solve all of those problems.

The three principle areas in which Respondent operates -- the Bardsdale area, the Goodenough Road area, and the Newhall Ranch -- each contain certain topographical peculiarities. If one were trying to find someone or something, perhaps the easiest area to do so would be in Bardsdale. There, as if in a small town, the orchards are demarcated by roads which criss-cross through them. The groves are rectangular, their borders marked off by street signs. The roads through the grove are straight, enabling one to look within the grove from one end and see the other.

By contrast, in both the Goodenough Road and the Newhall Ranch areas, in order to locate crews, the need for a thorough familiarity is much more acute. In these locations it is nearly impossible to spot evidence of the crews' presence from the roadway. One must walk inside the groves. The terrain is greatly varied, the groves located on a succession of gullys and hills. The roads in and around the groves follow no particular pattern, and apart from Goodenough Road itself, contain no identifying markers.

There are no signs in any of the three basic areas where respondent operates which indicate either who the owner of the particular grove is, or that it is respondent who is harvesting the citrus growing there.

Once all of the evidence -- Rodriguez' narrative of his

experiences in attempting to locate the crews and the physical characteristics, obtained through visual inspection, of the land on which the groves are found -- is considered, it is abundantly clear that without any foreknowledge of where to go, locating respondent's crews would be a time-consuming, arduous, if not impossible task. Efforts of Union personnel to communicate with the workers that they represent would result in frustration and a needless waste of resources. The Union's responsibilities as collective bargaining representative would be thwarted by the simple dilemma posed by the physical location of the work force, i.e., that they cannot be found.

As previously noted, familiarization with a given area would not, in and of itself, serve to totally obviate the Union's difficulties in this regard. A circuit in excess of fifty miles would have to be covered in order to pass by the greater part of respondent's groves. Given the fact that most of the workers do not assemble in a central location to be transported to the work site, and similarly, are not dropped off at one location at the conclusion of the work day, the pre-work and post-work access which is commonly in usage in a variety of agricultural settings under the access regulations would be ineffectual in allowing the Union to communicate with the bulk of respondent's workers. Access during the course of the work-day--i.e., at lunch time so as not to disrupt the work[21/] -- is the only reasonable means of attaining

---

21. This is not to imply that the Union may not avail itself of access at other times during the course of the work day

(Footnote continued----)

this goal. Given these time constraints, the conclusion is virtually inescapable that the respondent must provide assistance in locating the work crews in order that Union personnel do not expend all of their energies driving around an extensive area trying to find them, and, as Rodriguez occasionally experienced, use the time allocated for access in his search.

Likewise, requiring a certain degree of familiarity with the region imposes on the Union the necessity of utilizing particular personnel to perform tasks in connection with representing respondent's work force. Should the Union desire to or need to send someone to respondent's work sites other than the person most familiar with the region, the problems faced in locating the crews would be experienced anew. Thus, a system should be derived, if legally required, whereby any individual might be capable of finding one of respondent's crews in any given place at any given time.

5. Applicable Legal Principles and Conclusions of Law

a. General Standards

Respondent does not dispute that if it is required to bargain in good faith with the Union, it is required to allow the Union to take "post-certification" access. However, respondent maintains that it will not be "required" to meet and bargain with

---

(Footnote 21 continued----)

when the object is other than communication with workers for purposes related to collective bargaining, such as grievance resolution with supervisors or on-site observation of working conditions. The times when such access is achieved is best left to the collective bargaining process. (See, generally, P.P. Murphy Produce Co., Inc. (1977) 4 ALRB No. 106.)

the Union, and hence grant access to its representatives, unless and until the underlying case (9 ALRB No. 22) becomes judicially resolved, i.e., that the case has reached the stage that appellate processes have been exhausted, and the Board's order is fully enforceable.[22/]

Respondent cites no authority for this contention that the duty to bargain is suspended while a Board determination which announces the existence of the duty is being challenged in the appellate courts. The great weight of precedent is decidedly to the contrary. (Superior Fanning Co., Inc. (1978) 4 ALRB No. 44; Adam Farms (1978) 4 ALRB No. 76; George Arakelian Farms (1982) 8 ALRB No. 36; Ruline Nurseries (1982) 8 ALRB No. 105; N.L.R.B. v. Winn-Dixie Stores, Inc. (1974) 211 NLRB 24. While these cases have principally dealt with the duty to bargain during a certification challenge grounded upon objections to the underlying election,[23/] the nature

---

22. Respondent conceded these points at the hearing. Mr. Marrs stipulated as follows in regard to the company's litigation stance:

> The UFW is no longer the exclusive collective bargaining representative of the employees of F & P Growers Association because the UFW has lost the support of the majority of the employees. Therefore, F & P Growers Association has no duty to bargain with the UFW and no duty to permit UFW representatives to take post-certification access. The company's position is that until the courts uphold the Board's decision in 9 ALRB No. 22 or until the Board's decision becomes final, the company has no legal obligation to bargain with the UFW or to permit UFW representatives to take post-certification access. If the courts uphold 9 ALRB No. 22 or the Board's decision becomes final, F & P will permit UFW representiatives to take post-certification access.

23. Adam Farms involved an appeal of a Board decision in an unfair labor practice proceeding wherein it was determined that the employer had hired persons for the purposes of voting in a representation election in contravention of section 1154.6 of the Act.

of the challenge is not a significant distinction. What matters is the continued vitality of the obligation to bargain during the appellate process, once that obligation has been initially established by the Board. As noted in Montgomery Ward & Co. (1977) 228 NLRB No. 166, collateral litigation does not suspend the duty to bargain under section 8(a)(5), the NLRA counterpart to section 1153(e). Therefore, it is clear that respondent's obligation to bargain with the Union is a continuing one extant until the Union is decertified or deposed. (Nish Noroian, supra; Jack or Marion Radovich (1983) 9 ALRB No. 45.)

Since respondent has a continuing obligation to bargain with the Union, it has, co-extensively, a continuing duty to permit the Union to take access to areas where it is conducting operations. As noted in Sunnyside Nurseries (1980) 6 ALRB No. 52, p. 7, f n. 4:

> . . . the pendency of court proceedings [in which the Board's certification is being tested] does not, in and of itself, excuse Respondent's refusal to grant the union access. The duty to bargain in good faith, which is the well-spring of post-certification access, is not held in abeyance by the pendency of Respondent's testing of certification [citing cases]. Moreover, even though negotiations may not be currently in progress due to Respondent's appeal, post-certification access may still be necessary for the union to obtain current information about working conditions and to keep the employees advised of developments in the court litigation challenging the Board's certification . . . .

Accordingly, it is determined that respondent violated sections 1153(a) and (e) of the Act in refusing to allow the certified Union to take access to its premises.[24/]

---

24. In 0. P. Murphy Produce Co., Inc., supra, the Board stated at p. 8 that where an employer refused to allow

(Footnote continued----)

b. The Informational Aspect of the Access Issue

Having determined that respondent is under an obligation to permit the Union to avail itself of access to areas in which it is

---

(Footnote 24 continued----)

post-certification access such conduct will be considered as "evidence of a refusal to bargain in good faith." The NLRB cases cited by the Board in that decision have basically found violations of the NLRA counterpart to section 1153(e) when access to company premises was denied to union representatives. (See generally, Fafnir Bearing v. N.L.R.B. (2d Cir. 1966) 362 F.2d 716; Wilson Athletic Goods (1968) 169 NLRB 621; Winn-Dixie Stores, Inc. (1976) 224 NLRB No. 190, and other cases cited on page 8 of the Murphy decision.) Undoubtedly, the Board relied on such "applicable" NLRB precedent as the basis for the above-quoted language in 0. P. Murphy.

Curiously, however, subsequent cases treating the issue of post-certification access have found that a refusal to permit same merely constitutes a violation of section 1153(a), omitting any reference to section 1153(e) of the Act. Those cases under consideration include the strike access cases (Bruce Church, Inc. (1981) 7 ALRB No. 20; Growers Exchange, Inc. (1982) 8 ALRB No. 7; Bertuccio Farms (1982) 8 ALRB No. 70) as well as the cases arising under non-strike, post-certification circumstances. (Sunnyside Nurseries (1980) 6 ALRB No. 52; Patterson Farms (1982) 8 ALRB No. 57; Robert H. Hickam (1982) 8 ALRB No. 102.)

"The need for post-certification access is based on the right and duty of the exclusive representative to bargain collectively on behalf of all the employees it represents." (Sunnyside Nurseries, supra, p. 7.) The Sunnyside case interpreted the "refusal to bargain" language in O. P. Murphy as creating a rebuttable presumption that worksite access is necessary. The burden of proof shifts to the employer to overcome evidence of a "refusal to bargain" by demonstrating that "alternate means of communication exist." (Sunnyside Nurseries, supra.)

Thus, the Board's holding in O. P. Murphy is construed to mean that the denial of a request for post-certification access constitutes a prima facie section 1153(e) violation.

Respondent offered no proof of any "alternative means of communciation." Its refusal to permit access was inextricably intertwined with its outright refusal to recognize and bargain with the Union, already found violative of section 1153(e) in 9 ALRB No. 22. No rationale appears for viewing respondent's denial of access to be anything less than a separate violation of section 1153(e), and derivatively, a violation of section 1153(a).

conducting operations, the question remains as to whether the respondent is under a concomitant duty, given the peculiarities of the citrus industry, to provide information to the Union which would, in effect, assist in its efforts to communicate with workers on the job site by enabling Union personnel to physically locate these workers. Any analysis of this question must begin with the central premise developed through General Counsel's proof herein, that it is difficult, if not impossible, to determine where the employees are working on a given day without any foreknowledge of their location. Simply stated, the workers cannot be found, except by pure happenstance, unless someone reveals where they are.[25/]

Since the initial promulgation of the organizational access regulations, communication between agricultural workers and Union personnel has consistently been couched in terms of its "effectiveness:" effectiveness not necessarily in the sense of the Union's ability to persuade, but in the sense of the actual physical ability of people to meet and talk with one another face-to-face.

The prologue to the access regulation itself (Regulations

---

25. The thrust of respondent's defense that during the original organizational drive, without advance knowledge of crew whereabouts, Union personnel took access and spoke with workers, has minimal probative impact to counter this conclusion. No proof was adduced as to the number of Union people so engaged at the time. It would obviously take less time to locate crews if, say, ten people were involved in searching for them than it would if there were only one. Further, there was no evidence that the Union was receiving assistance from workers at that time which, assuming that it was, could have done much to expedite the task. Respondent's basic assertion that since the giving of information was unnecessary before, it should not be necessary now, thus fails as a defense in the instant matter owing to the absence of proof that the circumstances which existed during the organizational campaign are still prevalent and applicable to the taking of post-certification access.

section 20900(a) - (e)) contains repeated references to the concept of "effective" communication:

> (b) . . . When alternative channels of effective communciation are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer .... (c) . . . [u]nions seeking to organize agricultural employees do not have available alternative channels of effective communcation. Alternative channels of effective communcation which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor. (Emphasis supplied.)

The California Supreme Court, in its decision upholding the validity of the organizational access regulation (A.L.R.B. v. Superior Court (1976) 16 Cal.Sd 392), struck a similar note' in its opinion. The Court stated the "interest asserted [by the access regulation] is the right of workers to have effective access to information . . . . (16 Cal.Sd at 402, emphasis supplied.) It later quoted with approval (16 Cal.Sd at 409) from language contained in Republic Aviation Corp. v. N. L. R. B. (1945) 324 U.S. 793, 802, wherein the U.S. Supreme Court stated that "the employer's right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining . . . " (emphasis supplied).

As the above reference makes clear, at the cornerstone of the organizational access regulation is the notion that presumptively, no "alternative channels of communciation" between Union and worker exist. Any means other than direct verbal exchange, such as leafletting, radio broadcasts, mailings, newspaper advertising, and home visits, have been proven "ineffective" in

attaining the goal of informing workers about, and involving them in, the collective bargaining process. A similar rationale is found in the Board decision upholding the Union's right to take post-certification access to an employer's premises. (O. P. Murphy Produce Co., Inc., supra, at p. 7.)

To paraphrase the access regulation prologue, access rights, like organizational rights, "are not viable in a vacuum." In order that the right of access itselt be rendered "effective," the simple truth is that the right should be exercised to allow Union personnel the opportunity to speak with workers, rather than wander aimlessly through citrus groves or on public highways. Merely permitting persons from the Union to enter property without speaking to workers does not fulfill the purpose of the grant of the right of post-certification access. As noted in 0. P. Murphy Produce Co., Inc., supra, p. 10, the duty to represent employees in the certified unit "cannot be discharged fully without access to, and the opportunity to communicate directly with, all the employees" (emphasis supplied). Given the physical characteristics prevalent in the areas where respondent operates, the company must provide information regarding the daily location of work crews so as to impart real meaning to the Union's right of access. Failing to furnish such information is tantamount to a refusal to permit access, and thus provides an independent basis for finding a violation of section 1153(e) of the Act herein. The nature and extent of this information will be discussed below in the succeeding section.

c. The Duty to Furnish Information Independent of the Right of Access

It is axiomatic that the Union is entitled to receive information, upon request, -that is relevant and necessary for collective bargaining. (See, generally, As-H-Ne Farms (1980) 6 ALRB No. 9; see also 0. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63.) Stated in another fashion, respondent may not refuse to supply the' Union with information where that refusal will deprive the Union of the "opportunity to bargain intelligently" regarding the mandatory subjects of wages, hours, and other terms and conditions of employment. (Cattle Valley Farms (1982) 8 ALRB No. 59.)

The record reflects that Union representative Rodriguez requested that the company supply him with information on a giver, day regarding the number of crews working, their whereabouts, and the time at which they would be taking their lunch break. Such requests were denied until mandated by court injunction.[26/] In the foregoing section, it was concluded that access rights are an integral part of the collective bargaining process. Information regarding crew whereabouts is necessary to make such access "effective." It therefore follows that the providing of such information is "relevant and necessary" for collective bargaining.

However, apart from these considerations, an independent ground exists for the company to furnish crew location information. Assuming, arguendo, that the information was not requested so as to

---

26. The unfair labor practice aspects of this case, are, of course, not vitiated by compliance with an injunction. (See, generally, Chefs, Cooks, Pastry Cooks & Assistants, Local 89 (Stork Restaurant, Inc.) (1961) 130 NLRB 543.)

facilitate access, would the respondent still be required to furnish it to the Union as part of the collective bargaining process? That question must be answered in the affirmative.

The Board has held in prior cases that employers are obligated to supply similar information where requests for same by the certified union have been refused. As previously noted, respondent does not own the land on which it harvests citrus. In Robert H. Hickam, supra, the employer was ordered to furnish to the Union, upon request, "personnel, crop and production information and information about work assignments and work locations" of its agricultural employees. (Id. at p. 20.) The respondent had provided information regarding land it alone owned or leased, but did not relinquish information regarding property which it did not solely own or lease. The Board held that such information was relevant to the collective bargaining process, as it related to the status of employees as unit employees. In the instant case, "information about work assignments and work locations" would also have a direct bearing on working conditions, a mandatory bargaining subject. Thus, the Union would be entitled to receive such information when requested.

Similarly, in As-H-Ne Farms, supra, the employer was held to be obligated to supply information to the Union concerning its relationship with other agricultural interests. The Board noted that the information concerned the scope of the bargaining unit, and was considered "fundamental to the union's full knowledge of which employees it represented." (Id. at 10.) Although that case sought the information to determine the extent of interchange between unit

employees with other agricultural entities, thus rendering such information relevant to the collective bargaining process, the situation is analogous to the instant case in that the Union here is requesting information regarding the relationship of respondent, a harvesting association, to other agricultural entities, or growers, with whom it may or may not do business.[27/] Again, such information is relevant to the Union's understanding of the full range of working conditions for respondent's employees, as well as the "scope" of the bargaining unit, as the size of the unit may increase or decrease depending on whether the number of growers for whom respondent harvests is augmented or diminished.

In Cattle Valley Farms, supra, respondent failed to provide information regarding land it had recently acquired, and the effects the acquisition would have on the bargaining unit. The Board held that "respondent's total acreage, cropping patterns, and labor needs are clearly relevant to mandatory subjects of bargaining. (Id., p. 2.) The locations of company operations herein provide similar input to the Union in facilitating collective bargaining.

Lastly, the Board held in O. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63, that the employer failed to provide the Union with yield information, and that such failure violated section 1153(e) of the Act, as it inhibited the Union's ability to intelligently discuss and calcultate piecerate proposals. While there is no evidence of any request in the instant case for yield

---

27. The evidence demonstrated that there was no visual evidence as to who owned the properties themselves, and no actual knowledge by the Union as to which groves were under respondent's charge to harvest.

information, locations of company operations could logically result in calculations of particular yield data for particular areas, as well as determinations that work was being assigned equitably (i.e., that certain crews are not consistently given areas with high or low productivity).

Therefore, respondent, in failing to provide the Union with information which is relevant and necessary to collective bargaining, violated sections 1153(a) and (e) of the Act.

THE REMEDY

General Counsel requested as part of the remedy herein that respondent be ordered to provide extensive information regarding the location of crews on any given work day:

> This information shall include, but not be limited to, the following:
>
> 1) A map of Ventura County on which is drawn the groves of each grower member of F & P that are harvested by F & P, marked with the name of each grower member, any ranch name, any grove name, and any block designations. The map shall also include the names of all towns and roads necessary to locate the groves harvested by F & P.
>
> 2) Specific directional information, including distances, compass directions, directions on roads inside ranches or groves, and directions to locations inside ranches or groves.

While it is felt that much of this information would facilitate the taking of access, as well as furnish data that is relevant and necessary to collective bargaining, a good portion of that which General Counsel seeks is redundant and places an undue burden on respondent, while at the same time requires no initiative from the Union in collating, then utilizing the information the company has provided.

Obviously, if one had a map, one would not need "specific

directional information, etc." Further, while the company should assist the Union in the preparation of such a map, a joint effort, rather than employing the sole energies of the company, would seem to foster a more abiding collective bargaining relationship. Toward that end, I shall recommend that the company meet and confer with the Union for the purposes of preparing a map[28/] of the areas where it operates, designating specific groves by the same system (i.e., ranch name, block number, etc.) that it utilizes to identify them for its foremen when it orders them to report to a specific area on a specific day.

Additionally, I shall recommend that a list be furnished to the Union of the names of each of the owners of the groves where respondent harvests, keyed in some fashion to the nap jointly devised by the Union and the respondent. This list may not only facilitate access but will also provide the Union with information "relevant and necessary for collective bargaining," as it will indicate the scope of respondent's operations.[29/]

/

/

/

/

---

28. The blank map of the general area is to be furnished by the Union.

29. General Counsel moved for summary judgment in the instant case, based on its assessment that there existed no triable issues of material fact. I informed the parties that I would take the motion under submission. This decision on the merits of the case obviously renders the summary judgment motion moot.