Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HOLTVILLE FARMS, INC. GROWERS EXCHANGE, INC., GILBERT CHELL and KAL-ED, INC. Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, and ALFREDO MENDEZ, Charging Parties.	Case Nos . 80-CE-245-EC 81-CE-25-EC 81-CE-26-EC 81-CE-26-1-EC 10 ALRB No. 49

DECISION AND ORDER

On May 9, 1983, Administrative Law Judge (ALJ) Jennie Rhine issued the attached Decision in this proceeding. Thereafter Respondent Holtville Farms, Inc. (Holtville), Respondent Growers Exchange, Inc. (Growers) and the United Farm Workers of America, AFL-CIO (UFW or Union) each timely filed exceptions to the ALJ's Decision and a supporting brief.

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

The Board has considered the record and the ALJ's Decision in light of the parties' exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ only to the extent consistent herewith.

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

The amended complaint in this matter alleged that Respondents, as joint employers, shut down Holtville and terminated its workers because of their union and other protected activities; discriminatorily subcontracted out bargaining unit work formerly performed by Holtville's employees; and refused to bargain in good faith with the Union about the decisions to close and to subcontract, and about the effects of those decisions. The complaint further alleged that Respondents unilaterally and discriminatorily made changes in wages, hours and other working conditions because of employees' union and other protected activities.

Respondents' Joint Employer/Single Employer Status

Respondents Holtville and Growers except to the ALJ's finding that they are a single employer.[2/]

In determining whether a single employer relationship exists, the National Labor Relations Board (NLRB) considers four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management of business operations; and (4) common ownership. (Radio Union v. Broadcast Service of Mobile, Inc. (1965) 380 U.S. 255 [58 LRRM 2545].) All four factors need not be present in order

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[2/] Although General Counsel alleged in the complaint that Respondents were "joint employers," the evidence and arguments presented by all parties herein are in reality directed to whether Respondents constitute a single employer. Joint employers are independent legal entities that have chosen to control jointly, in the capacity of employer, the labor relations of a given group of workers; a single employer relationship exists where two nominally separate entities actually constitute a single integrated enterprise. (NLRB v. Browning-Ferris Industries (3rd Cir. 1982) 691 F.2d 1117, 1122-1123 [111 LRRM 2748].)

to find single employer status. Rather, the status depends on all the circumstances of the case and is characterized as an absence of the arm's length relationship found among independent, unintegrated companies. (Local 627, International Union of Operating Engineers v. NLRB (D.C. Cir. 1975) 518 F.2d 1040, 1045-1046 [90 LRRM 2321], affd. on this issue sub nom. South Prairie Construction Co. v. Operating Engineers, Local 627 (1976) 425 U.S. 800 [92 LRRM 2507].)

The elements of common ownership and common financial control between Holtville and Growers are indisputable. Lael Lee, Halbert Moller and Bennett Brown owned all the shares of Holtville and most of the shares of Growers. As principal shareholders and officers of the two corporations, the same three persons made the major financial decisions for both companies. Acting as the Growers Exchange board of directors, they decided to create Holtville Farms, and acting as Holtville's board, they decided to close down its farming operations. They controlled the terms of the farming contracts between the two companies, and for the 1980-1981 growing season, shifted the major financial responsibility for Holtville's crops from Growers to Holtville, thus exercising their power to risk the welfare of the farming company for the sake of the well-being of the larger enterprise. They used assets of both companies to secure Growers' line of credit, as well as a loan for Holtville's lettuce crop. Finally, they authorized Growers to advance money to Holtville as needed, without any specific repayment schedule. Holtville was created entirely from assets of Growers, and Growers' employees were

transferred to the new company without loss of seniority. The operations of the two companies were integrated to a large extent. All of Holtville's crops were grown under contract with Growers, and the major crop, lettuce, was harvested, marketed and shipped in accordance with Growers' needs.

Day-to-day management of the two companies also overlapped to a considerable degree. Halbert Moller was involved in Holtville's growing operations but also represented Growers in negotiating contracts with other farmers and supervising the cultivation of their lettuce. Don Mitchell supervised 'the financial affairs of both companies. The labor relations managers at the two companies were different, but the three principals had final control over all labor matters. The basic employment terms for Holtville's nonunion field workers were drawn from the same master UFW contract that set terms for Growers' field workers. The seniority systems for the two companies were basically identical, and Holtville field workers participated in the same pension and medical plans as the nonunion employees at Growers.

Holtville and Growers shared many facilities, office personnel, and the use of Growers' computer. In the Imperial Valley, Holtville had a rent free office on property owned by Growers. Holtville's accounting was done at the Growers office in Salinas by Growers' staff. Holtville's payroll checks, bill payments, financial reports and tax returns were prepared at the same Growers office.

Legal representation for the two companies overlapped,

with the same attorneys or law firms often representing both companies simultaneously. Although the companies are separately represented in the instant proceeding, their exceptions and supporting briefs are identical.

We conclude that the evidence of common ownership, joint financial managment, shared facilities, centralized control over labor relations, and overlapping legal representation provides more than adequate support for the ALJ's finding that Holtville and Growers did not operate at arm's length as unintegrated enterprises, and we affirm her conclusion that Holtville and Growers are a single employer.

We also affirm the ALJ's conclusion that Gilbert Chell and Kal-Ed, Inc., are not a joint or single employer with Holtville and Growers. There were no elements of common ownership or common financial control between Chell's companies and those that made up the Holtville-Growers entity. Chell was not a shareholder, officer or director of Holtville-Growers, and the letter's principals had no proprietary interest in Chell's businesses. Although Chell was general manager of Holtville, his authority was subject to Moller's supervision and the veto power of the three principals of Holtville and Growers. Further, Chell had sole authority over his own businesses.

We also affirm the ALJ's conclusion that, for the times when Chell's enterprises "borrowed" employees from Holtville, Holtville-Growers should still be considered the primary employer of those employees even though Chell or Kal-Ed, Inc. was their nominal employer. Most of the time, the employees remained on

Holtville's payroll, and were assigned and supervised by Holtville foremen, who also kept their time and distributed their paychecks.

Procedural Contentions

Respondents have asserted several procedural reasons in support of the argument that they should not be found a single employer.[3/]

Growers contends that it would be denied due process of law if found to have committed unfair labor practices herein, because until the present proceeding it had no notice of any claimed bargaining obligation regarding Holtville employees.[4/] To support its due process argument, Growers cited Alaska Roughnecks & Drillers Association v. NLRB (9th Cir. 1977) 555 F.2d 732 [95 LRRM 2965] in which the Ninth Circuit held that Mobil Oil Corporation could not be required to bargain with the certified union representing a subcontractor's employees, since Mobil had no notice or opportunity to participate in the representation process and was entitled to rely on the certification naming only the subcontractor as the employer. The ALJ found Alaska Roughnecks distinguishable on its facts from the instant case. In Alaska Roughnecks the union had not claimed any bargaining obligation until it filed its

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[3/] The procedural contentions of Gilbert Chell and Kal-Ed, Inc. are moot, since they have not been found to be part of the employing entity.

[4/] Growers was first named as a party in this proceeding in the third charge as amended (Case No. 81-CE-26-1-EC). In the initial complaint Growers and Holtville were alleged to be joint employers and/or alter egos. The UFW never formally demanded that Growers bargain with it about Holtville employees.

refusal to bargain charge, while here the Union has repeatedly asserted that the companies have a duty to bargain about the employees of both Holtville and Growers.[5/] In Alaska Roughnecks, the court conceded that it might have reached a different result if the union had approached the company earlier about bargaining. (Alaska Roughnecks, supra, 95 LRRM at 2969.)

Alaska Roughnecks *is* further distinguishable, as the ALJ found, because it involved a joint, not a single, employer. Notice given to one independent entity involved in a joint enterprise might not be adequate notice to the others, but notice given to one part of a single employer constitutes constructive notice to the other. To hold otherwise would reward a successful concealment of common ownership and management by a single employer.

Relying on A-1 Fire Protection, Inc. (1980) 280 NLRB 217 [104 LRRM 1370], Holtville and Growers also contend that the UFW may not now assert that the two companies are a single employer, because the Union has recognized separate certifications for each company. However, as the ALJ noted, a finding of single employer status is not incompatible with separate certifications.

Finally, Holtville and Growers argued that the UFW

[5/] In 1975, the UFW objected to the International Brotherhood of Teamsters' certification at Holtville on the ground that the bargaining unit was inappropriate since Holtville was actually part of Growers. In 1977 and 1979 contract negotiations with Growers, the UFW took the position that the contract should cover Holtville employees as well, but dropped the position before an agreement was reached. The UFW also asserted a joint employer relationship between the two companies in unfair labor- practice charges and complaints that were withdrawn or dismissed as part of the 1979 contract settlement.

has waived the right to assert single employer status because it raised the issue previously in charges that had been dismissed or withdrawn. The ALJ found that the Union had not waived its right to reassert its claim herein, since withdrawal or dismissal of a charge is not a decision on the merits and does not bar subsequent litigation of the same or similar issues. (NLRB v. Basic Wire Products, Inc. (6th Cir. 1975) 516 F.2d 261, 266 [89 LRRM 2257].)

For the above-stated reasons, we affirm the ALJ's conclusion that Growers and Holtville are a single employer. The Decision to Shut Down Holtville

As a grower-shipper, Growers harvests, packs, markets and ships crops in which it has acquired a proprietary interest at the time of planting. Holtville was created in 1974 entirely from Growers' assets to conduct Imperial Valley farming operations which Growers had formerly conducted on its own. All of Holtville's crops were grown under contract with Growers, and the major crop, lettuce, was harvested, marketed and shipped by Growers.

Halbert Moller testified that sometime around the end of March 1980 the three principals began informally discussing the possibility of closing Holtville, and they made the final decision in early May 1981. At the time of the hearing, Holtville still existed as a corporation, but Moller testified that the only plans were for it to continue as a land leasing operation, not as a farming operation.

With Holtville shut down, Growers intended to enter

into joint deals with other farmers to replace the lettuce acreage formerly cultivated by Holtville. Moller testified at the beginning of the hearing that possible deals were being negotiated with three or four Imperial Valley farmers, but by the close of hearing all but one had fallen through.

The ALJ noted that although the shutdown of Holtville appears on the surface to be a partial closure, the distinction between partial closing and subcontracting is not always readily apparent. (Bob's Big Boy Family Restaurants (1982) 264 NLRB No. 178 [111 LRRM 1354].) Looked at as a single integrated enterprise, the Growers/Holtville entity was in the business of cultivating, harvesting and marketing various crops, primarily lettuce. The ALJ concluded that the shutdown of Holtville more closely resembled the subcontracting decision in Bob's Big Boy than the partial closure in First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705] because when Holtville closed, the entity would no longer cultivate lettuce through its own farming operation, but Growers intended to replace the lettuce provided by Holtville with lettuce grown under contracts with other farmers. Whether or not its plans ultimately succeeded, the ALJ thought, was immaterial to evaluating the nature of the decision when it was made.[6/]

[6/] The ALJ nevertheless concluded that Respondents had no duty to bargain about the decision to close Holtville because the closure represented a major redirection of operating capital compelled by Growers' inability to obtain further credit from its bank, and labor costs appeared to be a relatively small part of Holtville's operating costs. The Union could not help Growers'

(fn. 6 cont. on p. 10)

We disaffirm the ALJ's conclusion that Growers' decision constituted subcontracting. The evidence does not support finding a subcontracting relationship between Growers and any of the lessees of its land, and we conclude that Growers' decision to discontinue growing lettuce was a managerial decision to go partially out of business and was not subject to mandatory bargaining.

No evidence suggested that the agreements under which Growers leased its land to other farmers were contingent in any way upon the lessees agreeing to grow lettuce for Growers to harvest, pack, ship and market. The evidence shows only that after giving up approximately 1000 acres of leased land and leasing out its own land for a four-year term, Growers then attempted to negotiate deals with three or four Imperial Valley farmers. In Bob's Big Boy there was a written contract to supply shrimp which provided the basis for the NLRB's subcontracting analysis. While we do not think a written contract is necessary to support a finding of a subcontracting relationship, we believe there must at least be a verbal understanding that the lessee is committed to performing a function for the lessor which the

(fn. 6 cont.)

credit situation with Wells Fargo, and no Union concessions about labor costs or agreement to increase worker productivity would have resolved Growers' need for operating capital. Thus, the ALJ concluded that the Union would have been unable to engage in meaningful bargaining about the decision, and to require such bargaining would place a burden on the conduct of the Employer's business that outweighed any benefit for labor-management relations and the collective bargaining process. (First National Maintenance Corp. v. NLRB, supra, 452 U.S. 666; Bob's Big Boy Family Restaurants, supra, 264- NLRB No. 178.)

lessor formerly performed itself. (See Cardinal Distributing Company, Inc. v. ALRB (1984) 159 Cal.App.3d 758.) The evidence in this case does not suggest any such commitment on the part of the lessees of Growers' acreage.

General Counsel contends that the shutdown of Holtville was discriminatory, while Respondents maintain that the reasons for the closure were solely financial.[7/] Abundant evidence was presented at the hearing regarding union and other protected activities on the part of Holtville workers, and of company knowledge of such activities. There was also evidence of company opposition to the Union, including testimony that company foremen had told workers the Union was not good for the workers, that union supporters were "a little crazy," and that union directors were thieves who stole the money they obtained from members.

Respondent's witnesses, however, testified that financial difficulties were the only reason for closing Holtville. Halbert Moller testified that Holtville's difficulties started when Growers got into financial trouble. Beginning in March 1979 and continuing for two years, with one short spurt in the market in May 1980, the market was bad for both lettuce

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[7/] In Textile Workers v. Darlington Mfg. Co. (1965) 380 U.S. 263 [58 LRRM 2657], the U.S. Supreme Court held that a partial closure violates NLRA section 8(a)(3) (which is essentially identical to section 1153(c) of the ALRA) if motivated by a purpose to chill unionism in the remaining portions of the business, and if the employer may reasonably have foreseen that the partial closing would likely have that effect. Thus, "[a]n employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision 'purely economic.'" (First National Maintenance Corp. v. NLRB, supra, [107 LRRM at 2711].)

and celery crops, in which Growers was heavily invested. According to a 1980 report by an outside auditor, Growers had a net loss of $5.6 million during the fiscal year ending March 31, 1980. Until 1980-1981, Holtville showed a modest profit every year but one. But for the 1980-1981 lettuce season, Holtville's losses were $1,300,000. In fall 1979, Growers began to cut corners, for example by not renewing several leases and not replacing personnel who had left.

Marshall Wix, the Wells Fargo Bank vice-president who oversaw agricultural loans at the Salinas branch, testified that Growers' ability to make good on its line of credit changed substantially from March 1979 to March 1980. In February 1980, Wix began requiring monthly financial reports from Growers, and was in virtually daily contact with Don Mitchell regarding Growers' financial condition. In 1980-1981, another bad lettuce season, Growers continued to lose money. As of October 1981, it had not yet made any payments on the $2.3 million it owed Wells Fargo. Mitchell and Moller testified that the bank did not specifically require Holtville to close, and that the decision was entirely that of Holtville's board of directors.

The ALJ concluded that while General Counsel had made a prima facie showing of animus, Respondents established that Holtville was closed mainly because Growers was unable to obtain more credit and needed to reduce the demand for operating capital. We affirm the ALJ's conclusion that although there was evidence of employer opposition to the Union, the reason for the closure of Holtville was economic.

Effects Bargaining

Even though Respondents had no duty to bargain about the decision to shut down Holtville, they did have a duty to bargain about the effects of the decision on the workers. (First National Maintenance Corp. v. NLRB, supra, 452 U.S. 666.)

Although Respondents decided in early May 1981 to close Holtville, Holtville's attorney Larry Dawson did not notify the Union until May 27, 1981, that the company was closing down and was willing to bargain about the effects of the closure. The UFW suggested negotiations begin on June 5, but Dawson said he needed more time to prepare, and so the first meeting was set for June 15.

At the first meeting, the Union's negotiator David Martinez stated that he wanted to bargain about the closure decision as well as its effects, but the Employer maintained that it had no obligation to bargain about the decision. The Union requested information about Holtville's relationship to the other corporate entities, acreage and production data, the identity of any successors or assigns, and the names of all Holtville workers and their cumulative gross wages.

At this or the following meeting, the Union requested a current seniority list. To compensate employees for the effects of the closure, the UFW proposed severance pay of $500 per seniority year for each employee, as well as immediate reimbursement of pension plan funds. The Union also proposed that the company help laid-off workers find employment., and if Holtville or any successor or assign resumed operations, that

it rehire the workers by seniority. Dawson agreed that the company would pay out the pension funds, and provide letters of recommendation for the workers.

At the second meeting, held June 30, little was accomplished. The parties restated their proposals, and Dawson called the Union severance pay proposal "unreasonable."

Beginning with the third meeting, on July 16, the employer was represented by Ron Barsamian. At this meeting, Barsamian conceded the relevance of information about employees' earnings, future plans for the employees and a seniority list. He stated that Holtville had no successors or assigns. He advised Martinez that the company had no calculations of gross earnings available, and that they would take some time to prepare. He also stated that quarterly payroll records for 1978-1980 had been provided to General Counsel and were thus available to the Union. At the same meeting, the UFW reduced its severance pay proposal from $500 per year of seniority to $450. Barsamian made a counterproposal of a total of one week's pay for each employee. He also told the Union that the pension plan checks would be distributed in two or three weeks.

At the session on July 21, Martinez stated that he wanted proof of the company's economic information, and Barsamian asked what he wanted. Martinez said he would find out, but the Union never did request specific information.

The parties did not meet officially again until August 12. The failure to meet was due to the unavailability of Martinez, who was occupied with other Union business.

Between August 12 and 20 the parties met nearly every day, with multiple sessions on some days.

On August 12, Martinez renewed the UFWs information requests and proposals. The Union's severance proposal remained at $450 per seniority year. The company modified its severance pay offer from one week's straight pay to $25 per seniority year.

Most of the August 13 meeting was spent discussing the latest draft of the proposed settlement agreement. The Union agreed that it might consider deferred payments of severance pay.

On August 15, Martinez reduced the Union's severance pay demand to $4-25 per year, and Barsamian raised Holtville's offer to $50 per year. No positions changed on other issues.

At the August 16 session, the parties discussed the possibility of a Union contract with Holtville in case the company resumed farming. Martinez asked for a list of pension fund recipients and amounts, which Barsamian provided the following day. Later that day, Barsamian made a package proposal which included $75 severance pay per year of seniority, settlement of the instant case, and assistance with employees' unemployment insurance claims. If the Union rejected the package, the company would still offer $50 per year severance pay. The UFW reduced its severance pay demand to $400 per year. Barsamian, saying the Union had not made any substantial movement, removed his package offer from the table.

On August 17, Barsamian returned his package proposal to the table with some modification. The Union modified its

severance pay demand from $400 per year to $200 per year payable immediately and an additional $500 per year payable at the end of the 1982-1983 harvest.[8/] Martinez also stated that he was not relying on the company's estimate of 30 workers, and that he estimated there were 57 employees although he did not have an accurate seniority list.

At a third session that evening, the Union reduced the proposed deferred payment from $500 to $300 and suggested allowing the initial payment to be made in installments. The Union also proposed some changes in the settlement agreement.

On August 18, Martinez gave Barsamian a list of 41 workers assertedly entitled to full payment for each year of seniority, and 14 others assertedly entitled to partial payment. Holtville offered a modification of its package proposal, and the UFW responded with modifications of its own proposals. The company later said that its $50 offer for severance pay alone was still on the table. The Union modified its proposal regarding a contract, and reduced its backpay demand.

The following day, August 19, Barsamian gave Martinez employee gross wage compilations for 1975 through 1977 and copies of W-2 forms for 1981. Martinez, by that time, had seen the weekly payroll records that Holtville had turned over to the General Counsel. The parties restated their positions and agreed they were not yet at impasse.

[8/] Martinez denied that the new proposal represented an increase, since the company would have use of the money for two years, the money would be worth less because of inflation, and the workers might never receive the second installment because of the employer's financial difficulties.

Virtually no movement was made at the August 20 session. The final meeting took place August 25 with a mediator who, after going back and forth between the parties several times, told them he thought their positions were irreconcilable.

Barsamian testified that on August 31 he mailed a seniority list to Union representative Ned Dunphy along with some other documents. However, Dunphy testified that no seniority list was enclosed with the packet he received.

The ALJ concluded that Respondents violated their duty to bargain about the effects of Holtville's closure by failing to notify the UFW of the decision in time to give the Union an opportunity to engage in meaningful bargaining, and by failing to provide, and delaying in providing, relevant information requested by the Union.

Respondents' exceptions deny that they engaged in bad faith bargaining, and assert that the Union itself showed bad faith by insisting on decision bargaining, and on bargaining for a contract with Gilbert Chell and Kal-Ed, where the UFW was not certified; by delaying negotiations for three weeks from July 21 to August 12, 1981; and by making "economically preposterous" severance pay proposals. Respondents also asserted that the General Counsel's role in settlement discussions may have affected the parties' positions and precluded a determination of Respondents' state of mind.

We affirm the ALJ's conclusion that the UFW's conduct during negotiations did not constitute bad faith bargaining. The Union never showed any unwillingness to bargain only about

the effects of Holtville's closure or to reach an agreement that dealt only with such effects. The three-week delay caused by the Union shows no bad faith considering the totality of the circumstances: the UFW negotiator was fully available both before and after this period for intense bargaining, and the delay had no substantial impact on negotiations. The UFWs severance pay proposals, although much higher than Respondents', were modified several times. The Union's change from the $400 per year proposal to a proposal of $200 per year immediately and $500 per year after two years, was accompanied by a reasonable explanation for the change and was not predictably unacceptable. Hence we infer no bad faith.

We also affirm the ALJ's conclusion that Respondents did not sustain their burden of showing that the role of General Counsel in settlement discussions affected the parties' positions or precludes a determination of Respondents' state of mind.

Finally, we affirm the ALJ's conclusion that Respondents Holtville and Growers violated their duty to bargain in good faith by delaying notification to the UFW of the decision to close and delaying the start of negotiations until June 15, 1981, approximately six weeks after the decision to close Holtville was made,[9/] and by failing timely to provide the Union with the seniority list and some of the wage information it requested. However, we overrule the ALJ's other findings of bargaining

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[9/] The ALJ found that the decision to close was made by the middle of April 1981. We find that the evidence shows the decision was made approximately May 1, 1981.

violations by Respondents, and overrule her recommendation that a makewhole remedy be applied in this case.

In response to the UFWs request for wage information, Respondents stated that General Counsel had Holtville's quarterly payroll records for 1978-80, that the company had no calculations of gross earnings readily available, and that it would take some time to prepare the information. We find that Respondents committed bargaining violations by not obtaining the 1978-80 payroll records from General Counsel and providing them to the Union, and by delaying in providing wage data for other years until shortly before negotiations ended.

Respondents failed to provide information about disposition of Holtville's land holdings, crops, and disposal of farm equipment, contending that these items were relevant only to decision bargaining. While the UFW requested some proof of the company's economic information (in order to be assured that Holtville was indeed going out of business) the Union never did request specific information about the company's financial condition. Without conceding relevance, the company told the Union that Holtville had no successors or assigns and no Arizona operations. It is not clear that in these circumstances the company had a duty to provide further evidence of the closure, and we find no bargaining violation in its failure to do so.

Meanwhile, the parties did negotiate about the amount of severance pay, the payment of pension funds, letters of recommendation and unemployment insurance for the former employees, and a possible union contract if the company resumed

operations. Movement occurred on all these issues, with both sides making concessions, up to the time that bargaining ceased.

Although Respondents delayed the commencement of bargaining, this delay did not have a significant impact on the opportunity for meaningful negotiations. The delay did not deprive the Union of any significant bargaining strength, as might have occurred if the initial decision to close had been made during a period of peak employment by Holtville. All but 20 or 25 year-round workers were generally laid off from Holtville during the slow spring and summer months. During the week ending May 3, 1981, Holtville had only 19 employees working; at the time bargaining commenced (that is, during the week ending June 21, 1981) there were 7 employees working. Thus, the Union was not deprived of any significant bargaining strength by the delay of negotiations for a short period of time after May 1, 1981, the approximate date of the decision to close.

We conclude that while Respondents committed some violations of their duty to bargain, they did not engage in an overall course of refusing to bargain or surface bargaining. Therefore, we find that makewhole would not be an appropriate remedy in this case.[10/] Rather, a cease-and-desist and bargaining

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[10/] Member Carrillo believes that the Board should provide more definite guidelines for the parties as to when it will award a makewhole remedial order for an employer's refusal to bargain in good faith. Labor Code section 1160.3 authorizes the Board to impose the makewhole remedy "... when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain." The statutory language allows the Board discretion in determining whether to grant makewhole,

(fn. 10 cont. on p. 21)

order will effectively remedy Respondents' violations.

Unilateral Changes in Working Conditions

By letter of September 26, 1980, Halbert Moller notified the administrator of Holtville's employee pension plan to terminate the plan as of October 1, 1980.[11/] The UFW was not notified of the pension plan's termination, nor were the workers notified in the fields.

The parties stipulated that on July 21, 1980, Holtville field workers received a wage increase of forty cents per hour for regular time and fifty cents per hour for overtime. The Union was not notified of or consulted about the wage increase.

General Counsel alleged that while Holtville was closing

(fn. 10 cont.)

see J. R. Norton (1979) 26 Cal.3d 1, and requires a causal connection between the refusal to bargain in good faith and a loss of pay to employees, i.e., in cases involving negotiation conduct, it must be demonstrated that the violations frustrated the negotiation process or prevented the reaching of possible agreement.

In cases where it engages in surface bargaining, an employer by definition engages in bargaining conduct designed to frustrate the negotiation process or prevent the reaching of any possible agreement. Thus, assuming that the Union has bargained in good faith, makewhole relief is appropriate where the Board makes a finding of surface bargaining. However, not all violations of the duty to bargain in good faith amount to conduct constituting surface bargaining. An employer can negotiate in good faith with an open mind towards reaching agreement, if possible, but nonetheless fall short in some aspects of its duty to bargain in good faith. In such circumstances, the Board should require a showing that the violations frustrated the negotiation process or prevented the reaching of possible agreement. I agree that there is no such casual connection with regards to the violations found in this case.

[11/] Moller subsequently sent another letter making the termination effective November 1, 1979, the anniversary date of the plan.

and workers were being terminated in the spring of 1981, the work hours of the remaining employees increased without notice being given to the UFW. Testimony of irrigators and company payroll records supported the allegation.

The ALJ cited National Labor Relations Act (NLRA) precedent holding that pension plans, wages, and increases or decreases in hours of work are all mandatory subjects of bargaining (see ALJ Decision, pp. 154-155), and concluded that all three unilateral changes herein constituted violations of Respondents' statutory duty to bargain. The ALJ rejected General Counsel's contention that the unilateral changes, particularly the termination of the pension plan, were discriminatorily motivated. As evidence of discrimination, General Counsel pointed to the fact that Growers' employees, whose pension plan was terminated at the same time as Holtville's, were given a profit sharing plan while Holtville employees were not. However, the ALJ noted that the profit sharing plan was not extended to the employees of Toro Ranches, the nonunion farming company, either.

Respondents excepted to the ALJ's conclusion that they violated section 1153(e) and (a) of the Act by instituting unilateral changes, but their exceptions brief does not contain any supporting arguments or discussion of these issues.

We affirm the ALJ's findings and conclusions that the unilateral changes in working conditions violated section 1153(e)

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and (a) of the Act,[12/] but that General Counsel did not establish that the changes were discriminatorily motivated. We will order that Respondents make whole former Holtville employees for any losses resulting from the unlawful termination of the pension plan.

ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondents, Growers Exchange, Inc., and Holtville Farms, Inc., jointly and severally, and the officers, agents, successors and assigns of each of them, shall:

1. Cease and desist from:

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

(b) Making unilateral changes in Holtville Farms, Inc. employees' terms or conditions of employment without

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[12/] With regard to increases and decreases in hours of work, there may be occasions when, because of the peculiarities of agriculture, such changes would not require bargaining. For example, unanticipated climatic conditions might require that, for the protection of the crop, employees work a somewhat longer or shorter day (or not at all) until the exigency has passed. This kind of change in hours we would not consider to be a mandatory subject of bargaining. In other situations, NLRB precedent which calls for bargaining would have to be evaluated in terms of its applicability in the agricultural setting. (Lab. Code § 1148.)

giving prior notice to and opportunity to bargain with the UFW concerning such proposed changes;

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

(d) Failing or refusing to give the UFW notice and, on request, an opportunity to bargain over the effects of the decision to close Holtville Farms, Inc.; or

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

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of Holtville Farms, Inc.'s, agricultural employees regarding the effects of the decision to close Holtville Farms, Inc., and regarding other unilateral changes in said employees' working conditions, and embody any resulting understanding in a signed agreement;

(b) Upon request, provide the UFW with information relevant to collective bargaining about the aforementioned subjects;

(c) Make whole former Holtville agricultural employees for all economic losses they have suffered as a result of Respondents' unlawful termination of the employees' pension plan.

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

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

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

(g) Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this Order to all agricultural employees employed by Respondent Holtville Farms, Inc., during the period from July 21, 1980, to October 29, 1981, and thereafter until Respondents commence good faith bargaining with the UFW which results in an agreement regarding the aforementioned subjects, or a bona fide impasse.

(h) Arrange for a representative of Respondents or a Board agent to distribute and read the attached Notice, in all appropriate languages, to the assembled employees of Respondents on company time and property at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions

employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondents to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

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

IT IS FURTHERED ORDERED that the certification of the UFV.', as the exclusive collective bargaining representative of all of Respondent Holtville Farms, Inc.'s agricultural employees, be extended for a period of one year from the date, following the issuance of this Order, upon which Respondents commence to bargain in good faith with the UFW.

IT IS FURTHER ORDERED that the allegations against Respondents Gilbert Chell and Kal-Ed, Inc., be, and they hereby are, dismissed.

Dated: December 21, 1984

JOHN P. MCCARTHY, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After charges were made -against us by the United Farm Workers of America, AFL-CIO (UFW), and after a hearing was held where each side had an opportunity to present evidence, the Agricultural Labor Relations Board has found that Growers Exchange and Holtville Farms are one and the same employer, and that we violated the law by not bargaining in good faith with the union about the effects of our decision to close Holtville Farms, and about changes in working conditions. The Board has ordered us to distribute and post this notice and take the actions listed below.

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

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

Because you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL meet and bargain in good faith with the UFW about the effects of our decision to close Holtville Farms.

WE WILL NOT refuse to provide the UFW with the information it needs to bargain on behalf of Holtville Farms, Inc., employees.

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

Dated:

GROWERS EXCHANGE, INC. HOLTVILLE FARMS, INC.

By:_____ BY:_____
(Name) (Title) (Name) (Title)

If you have any questions about your rights as farm workers or about this notice, you may contact your union or any office of the Agricultural Labor Relations Board. One office of the Board is located at 319 Waterman Avenue, El Centro, California, with this telephone number: (619) 353-2130.

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

HOLTVILLE FARMS, INC.,
GROWERS EXCHANGE, INC.,
GILBERT CHELL and KAL-ED, INC.

10 ALRB No. 49
Case Nos. 80-CE-245-EC
81-CE-25-EC
81-CE-26-EC
81-CE-26-1-EC

ALJ Decision

The ALJ found that Holtville Farms, Inc., and Growers Exchange, Inc., were a single employer, but that Gilbert Chell and Kal-Ed, Inc., were not part of the Holtville-Growers entity. The ALJ concluded that the shutdown of Holtville's farming operations constituted *a* contracting out of its lettuce growing business, but that the decision was not subject to mandatory bargaining because the circumstances showed that the Union would have been unable to engage in meaningful bargaining about the decision. The ALJ concluded that although the Respondents had no duty to bargain about the decision to shut down Holtville, they did have a duty to bargain about the effects of the decision on the workers. The ALJ found that the Respondents failed to bargain in good faith about the effects of the decision to close Holtville, and recommended that a makewhole remedy be applied. The ALJ also concluded that Respondents unlawfully made unilateral changes in working conditions by terminating an employee pension plan and implementing a wage increase without notifying or providing an opportunity to bargain to the Union.

Board Decision

The Board affirmed the ALJ's finding that Holtville and Growers were a single employer. The Board overruled the ALJ's conclusion that the shutdown of Holtville was a contracting out of bargaining work, and found that the shutdown was a partial closure not subject to mandatory bargaining. The Board concluded that Respondents had violated their duty to bargain in good faith about the effects of the partial closure by delaying notification to the Union of the decision to close, by delaying the start of negotiations, and by failing timely to provide information requested by the Union. However, the Board concluded that the Respondents did not engage in an overall course of refusing to bargain or surface bargaining and that therefore imposition of a makewhole remedy would not be appropriate. Rather, a cease-and-desist order would effectively remedy Respondents' violations.

The Board also affirmed the ALJ's conclusion that Respondents had unlawfully made unilateral changes in working conditions.

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The Board ordered Respondents to cease and desist from failing or refusing to bargain with the Union and to meet upon request and bargain collectively with the Union regarding the effects of the decision to shut down Holtville and regarding the unilateral changes.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: HOLTVILLE FARMS, INC., GROWERS EXCHANGE, INC., GILBERT CHELL, and KAL-ED, INC., Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, and ALFREDO MENDEZ, Charging Parties.	Case Nos. 80-CE-245-EC 81-CE-25-EC 81-CE-26-EC 81-CE-26-1-EC

Judy Weissberg and Gloria Barrios,
El Centro, for the General Counsel

Larry Dawson and Ronald H. Barsamian
(Dressier, Quesenbery, Laws & Barsamian),
El Centro and Newport Beach, and
Robert P. Roy, Oxnard (on the briefs),
for Respondent Holtville Farms, Inc.

Terrence R. O'Connor, Salinas,
for Respondent Growers Exchange, Inc.

Scott A. Wilson (Littler, Mendelson,
Fastiff & Tichy), San Diego, for
Respondents Gilbert Chell and Kal-Ed, Inc.

Ned Dunphy, Keene, for Charging Party
United Farm Workers of America, AFL-CIO

No appearance for Charging Party
Alfredo Mendez

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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STATEMENT OF THE CASE

This unfair labor practice action arises from the 1981 cessation of farming at Holtville Farms, Inc. The other respondents—Growers Exchange, Inc., Gilbert Chell, an individual, and Kal-Ed, Inc.--are named in the action on the theory that they and Holtville Farms are a joint or single agricultural employer.

The main violations alleged in the complaint as amended[1/] are that the respondents: shut down Holtville and terminated its employees because the workers engaged in union activities and participated in the processes of the Agricultural Labor Relations Board (ALRB or board); subcontracted or diverted work formerly performed at Holtville to non-union establishments; and failed to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW) about the decision to close[1/] and subcontract work, and about the effects of the decision. Additionally, before the shutdown, some terms and conditions of employment allegedly were

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1. The complaint was amended before and during the hearing. In its final form, it consists of the Fourth Amended Consolidated Complaint (Sept. 28, 1981), the Erratum to Fourth Amended Consolidated Complaint (Sept. 30, 1981), and the Amendment to the Fourth Amended Consolidated Complaint (Oct. 14, 1981). All references to "the complaint" are to this combination, unless otherwise specified.

Subparagraphs 15 (j) and (k) of the complaint, and the references to them in paragraphs 16, 17 and 19, were dismissed at the conclusion of the general counsel's case. See Reporter's Transcript, Vol. XXXII, p. 28. (Hereafter, the transcript is cited as, e.g., RT XXXII:28.)

2. The terms "close" and "closing" are used for convenience, and are not intended as legally precise statements. The fact that farming operations ceased at Holtville Farms is not disputed, but whether the respondents continued the same operations in another form is.

changed unilaterally and discriminatorily. The general counsel asserts that the foregoing conduct constitutes unfair labor practices under sections 1153(a), (c), (d) and (e) of the Agricultural Labor Relations Act (ALRA or the Act).[3/]

Holtville Farms was named in an unfair labor practice charge filed on October 22, 1980, and in two more filed on February 17, 1981. Growers Exchange was first named in an amendment to the third charge, filed May 28, 1981. On June 8, 1981, the charges were consolidated and the initial Complaint issued against both companies. Gilbert Chell and Kal-Ed were not named in or served with any charges; they were first named and served when the Second Amended Complaint was issued on June 23, 1981. All respondents filed timely answers in which, in addition to denying the substantive allegations, they deny being joint employers with any of the others. The answers also set forth various substantive and procedural defenses.

The general counsel sought a preliminary injunction against Holtville Farms and Growers Exchange in the superior court, and after a hearing on June 18, 1981, the court, finding reasonable cause to believe that they were a joint employer, issued a restraining order. Both respondents were enjoined, inter alia, from subcontracting work performed by Holtville employees or implementing the decision to close Holtville without first giving the UFW an opportunity to bargain about the decisions and their effects, and from failing and refusing to reinstate the Holtville employees while

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3. Cal. Labor Code, sections 1140 et seq. All statutory references are to the Labor Code unless otherwise stated.

bargaining unit work remained available. The court's order was subsequently modified to remove the requirement of bargaining about the decision to shut down.[4/]

Following a prehearing conference on July 8, 1981, this matter was heard during the period of July 22-October 29, 1981, at various locations in El Centro, Salinas, and the Monterey Peninsula. All parties had the opportunity to participate in the hearing, to offer evidence and to examine witnesses. The general counsel and all respondents filed post-hearing briefs, and respondents Holtville Farms and Growers Exchange filed reply briefs.[5/]

After considering the briefs and the entire record, including my observations of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

BACKGROUND AND JURISDICTION

Underlying the alleged violations is the contention that all four respondents are actually one joint agricultural employer for purposes of the ALRA. The general counsel then claims that Holtville Farms was initially created and subsequently closed by its parent corporation, Growers Exchange, in order to avoid unionization. Since all four respondents are in essence one, the

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4. ALRB v. Holtville Farms, Inc. (Super. Ct. Imperial Co., No. 2606).

5. On October 18, 1982, the general counsel moved to reopen the case and amended the complaint to incorporate a new complaint based on several recently filed charges. See Growers Exchange, Inc., et al., Case Nos. 82-CE-67-EC, et al. On December 13, 1982, after a hearing, the motion was denied on the ground that the newly alleged matters did not constitute a basis for reopening the record in this case, a year after the hearing ended.

argument continues, the cessation of farming by Holtville Farms was not a total closure but a partial closure of the larger entity. Consequently, the respondents had a duty to bargain with the UFW about the decision to discontinue farming as well as the effects of the decision. Concurrently, motivated by the Holtville employees' union activities and utilization of Board processes, the respondents unilaterally and discriminatorily changed employment conditions, ultimately terminating the employees and diverting bargaining unit work to non-union entities. These actions were all taken without notifying or consulting with the union, the general counsel contends, and when the respondents finally did enter into negotiations, they did not bargain in good faith.

A general picture of the situation provides the context for the more detailed exploration of factual and legal issues that follows. Throughout this decision, where no factual controversy is indicated, the facts as stated are virtually uncontradicted and corresponding findings are implicit.

Holtville Farms, Inc., a California corporation, was created by Growers Exchange in 1974 to conduct farming operations in the Imperial Valley. It is a closely held corporation, the shares being evenly divided among Halbert Moller, its president, Lael Lee, vice-president, and Bennett (Bill) Brown, secretary-treasurer. The three men also constitute its board of directors. When Holtville Farms was formed, Imperial Valley property previously owned and farmed by Growers Exchange was transferred to it. Operating on leased land as well as the land it owns, Holtville cultivated crops exclusively under contract with Growers Exchange. Its primary crop

was lettuce; secondary crops included wheat, alfalfa, Sudan grass, milo, cotton and onions.

Following a 1975 election, the Western Conference of Teamsters was certified by the ALRB as the collective bargaining representative of Holtville's agricultural employees. The UFW had not been on the ballot but objected to the certification nevertheless, asserting, inter alia, that the employer was improperly designated because Holtville Farms was in fact part of Growers Exchange. Its objections were dismissed without the merits of this contention being considered by the board.[6/] The company and the Teamsters did not enter into a collective bargaining agreement, and in 1978 the UFW petitioned for certification. The petition was limited on its face to agricultural employees of Holtville Farms, and nowhere in the related proceedings was it suggested that they were employed by any other entity or should be included in another bargaining unit.

The UFW won the February 1978 election and was certified in 1979. (Holtville Farms, Inc. (July 19, 1979) 5 ALRB No. 48.)[7/] The company then engaged in a technical refusal to bargain: that is, it

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6. Holtville Farms, Case No. 75-RC-36-R.

7. In addition to moving that administrative notice be taken of the board's decisions here and in Holtville Farms, Inc. (1981) 7 ALRB No. 15 (see text, next page), which motion was granted, the general counsel moved that the decisions themselves be admitted into evidence. The motion, ruling on which was reserved, is denied.

Ruling was also reserved on the general counsel's motion to admit into evidence GCX 184, a memo to attorney Larry Dawson from attorney Ron Barsamian that was given to the general counsel inadvertantly. The motion is granted.

expressly refused to bargain in order, it asserted, to test the validity of the certification. An unfair labor practice charge resulted in a determination by an administrative law officer (ALO) in August 1980 that the company acted in bad faith and should make the employees whole. Just before the hearing in this **case** began, the board issued a two-to-one decision (Member McCarthy dissenting) upholding the ALO's conclusions; the decision became final after the close of the hearing. Holtville Farms, Inc. (July 8, 1981) 7 ALRB No. 15, review den. Ct.App., 4th Dist., Div. One, Dec. 31, 1981, hrg. den. Jan. 28, 1982. The majority held that while the company's litigation posture (raising a peak employment issue) was reasonable, its refusal to bargain was nonetheless motivated by a desire to delay bargaining and undermine employee support for the union.

Meanwhile, the decision had been made to stop farming at Holtville before preparations began for the 1981-1982 lettuce season. (Imperial Valley lettuce is generally planted in mid-September through early November; the harvest runs from late November into March.) The union was notified of the decision by a letter dated May 27, 1981. By the time the hearing began, the company had terminated its agricultural employees and disposed of its equipment and farm land. The corporation still existed and maintained an office, but its only ongoing function was as lessor of the land it owns.

Growers Exchange, Inc., is a California corporation formed in 1954. Its principal stockholders and officers are the same three men who own Holtville Farms: Lael Lee is president of Growers Exchange, Halbert Moller is vice-president, and Bennet Brown is

secretary. The remaining stockholders are Donald Mitchell, who also serves as treasurer, and a few relatives of the principals.[8/] The corporate board of directors consists of the four named men.

Growers Exchange is a "grower-shipper": it harvests, packs, markets and ships crops in which it has acquired a proprietary interest at the time of planting. It may incidentally cultivate its own crops, but characteristically a grower-shipper finances and to a limited extent supervises the cultivation by others ("farmers" like Holtville Farms),[9/] and then assumes total responsibility for operations when the crops are ready to harvest. Lettuce is the principal crop handled by Growers Exchange.

The company has its headquarters in Salinas but operates throughout the lettuce-growing portions of California (the Salinas

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8. The record is not clear about the actual percentage each stockholder has. Each principal controls an equal interest, however. That is, apart from a small share held by Mitchell, Brown and two children own one-third; Moller and his wife have equal holdings, together amounting to one-third; and Lee owns one-third.

9. The word "grower" in the record is ambiguous: at times it refers to the entity that puts up growing costs and harvests, packs and sells the crop, while at other times it refers to the entity that actually cultivates the crop. Compare, e.g., a contract like General Counsel's Exhibit 69, between a "grower" and a "farmer," with one like General Counsel's Exhibit 194 or the expert testimony of Andrew Church, where the parties to similar contracts are described, respectively, as the "shipper" and the "grower." To avoid confusion, in this decision the word "farmer" is used to designate the actual cultivator of crops, while "grower-shipper" denotes the harvester-marketer with an interest in the crop. (A grower-shipper may be referred to as simply a "shipper," but strictly speaking a shipper acquires no interest in a crop until it is ready for harvest, at which point the shipper harvests, packs and markets it.).

Hereafter, exhibits of the general counsel are referred to as GCX, e.g., GCX 69; respondent's exhibits are designated by HFX (Holtville Farms exhibits), GEX (Growers Exchange exhibits), and CX (Chell and Kal-Ed exhibits).

and Imperial Valleys, Blythe and Huron) and Arizona. It farmed lettuce and other crops under its own name until 1974, when it created Holtville Farms and another farming company, Toro Ranches, Inc.,[10/] in, respectively, the Imperial and Salinas Valleys. Since then, Growers Exchange as such has not directly engaged in farming. In addition to its harvesting and marketing operations, the company has an interest in several lettuce cooling operations.

Soon after passage of the ALRA, an election conducted at Growers Exchange resulted in a victory by the Teamsters Union, but the Teamsters withdrew its representation petition before the election results were certified,[11/] In February 1977, after another election, the UFW was certified to represent the Growers

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10. In many ways, the structure and operations of Toro Ranches parallel those of Holtville Farms. Because of its similarities, evidence about it was admitted to shed light on conduct concerning Holtville. One significant difference is that no union election was conducted at Toro, and no employee representative has been certified.

References to another entity, Blythe Farms, a partnership owned by the three principals, also appear in the record. Since its structure did not appear to be very similar to Holtville's, inquiry into its ownership and operation was strictly limited.

The general counsel requests that both companies be found to be part of the employer. (See post-hearing brief at p. 85, fn. 55.) Contrary to the general counsel's assertion, neither's relationship to Growers Exchange was fully litigated; nor was notice given that such a finding would be sought. Accordingly, the request is denied.

11. Hal Moller implies in his testimony that the Teamsters were certified at Growers Exchange, entered into a contract with the company, and later repudiated the contract. Reliance is instead placed upon the board's records in Growers Exchange, Inc., Case No. 75-RC-42-M (administrative notice of which is hereby taken) for the assertion in the text. The contract to which Moller referred to appears to be a pre-ALRA contract.

Exchange workers. The union did not raise any issue about the status of Holtville Farms employees in the certification process, and the bargaining unit defined in the board's certification was limited to agricultural employees of Growers Exchange.[12/]

A year after the union was certified, it and Growers Exchange executed their first collective bargaining agreement. When that contract expired in January 1979, an 11-month strike ensued before the parties reached agreement on another. The second contract remained in effect until August 1982.[13/]

The third respondent, Gilbert Chell, was general manager of Holtville Farms from mid-1977 until June 30, 1981. For about 25 years Chell has also, as a sole proprietor, farmed lettuce and other crops on land owned or leased by him and his family; since 1978 all his lettuce was grown under contract with Growers Exchange.

In 1978 Chell formed Kal-Ed, Inc., the remaining respondent. A California corporation whose stockholders and officers are Chell and his wife, Kal-Ed is an agricultural equipment company that did custom tractor and caterpillar work for Holtville Farms, Growers Exchange, and Chell's farming enterprise.

Holtville Farms employees frequently performed services for Chell's farming and equipment operations. No election has been conducted among Chell or Kal-Ed employees as such, and no union has

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12. See Growers Exchange, Case No. 77-RC-8-E.

13. See the 1978 contract (excerpted in GEX 24), the 1979 contract (GCX 133), and Admiral Packing Co. (1981) 7 ALRB No. 43, ALO opn. at p. 5, n. 5 and p. 33, n. 33 (administrative notice of which is hereby taken). During the strike, Growers Exchange was the subject of an unfair labor practice charge for denying access to the union. See Growers Exchange, Inc. (1982) 8 ALRB No. 7.

been certified to represent them.

Certifications notwithstanding, the UFW continued to assert in other contexts that the various entities actually were one. It sought to include Holtville Farms employees in the Growers Exchange bargaining unit during the first contract negotiations in 1977, before it was certified as the Holtville representative, and again after it was certified, during the 1979 negotiations that led to the second Growers Exchange contract. In the 1979 negotiations the union asserted that Kal-Ed and Gilbert Chell employees should be included in the bargaining unit as well. Both times the contracts were limited to Growers Exchange employees.

The union also alleged a joint employer relationship among the entities in several unfair labor practice charges. Earlier charges containing that allegation against Growers Exchange were withdrawn, and the resulting complaints dismissed, as a condition of the 1979 contract settlement. The prior charges asserting a joint employer relationship among Holtville Farms, Gilbert Chell and Kal-Ed were resolved in 1980 by a settlement agreement in which those respondents, while denying they were a joint employer, agreed to act as one.[14/]

Before the settlement was reached, the union made formal bargaining demands upon Gilbert Chell and Kal-Ed, asserting that they were "successors" to Holtville Farms. In response, acting on behalf of both entities, Chell petitioned the board for clarification of the bargaining unit, but the petitions were

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14. See GCX 159. Possible violations of the settlement agreement are not at issue in the present case.

dismissed by the executive secretary on the ground that the unit clarification procedure was inappropriate to determine whether additional employers should be included within an existing certification.[15/]

I find that each respondent is or has been engaged in agriculture in California during the material times herein, and accordingly is an agricultural employer within the meaning of section 1140.4(c) of the Act. I also find that the UFW is a labor organization within the meaning of section 1140.4(f).

THE EMPLOYER

The Facts

Holtville Farms and Growers Exchange

As has been suggested already, the same three people basically own and control both companies. The principal stockholders of Growers Exchange-- Lael Lee, Hal Moller and Bennett Brown—have been the sole stockholders, board of directors, and officers of Holtville Farms since its inception in 1974. Growers Exchange treasurer and controller Donald Mitchell, a minor stockholder and the fourth member of its board of directors, also serves without compensation as controller and de facto treasurer (Brown has the title) of Holtville Farms. Despite his positions, Mitchell's role as decision maker is relatively minor; according to his own testimony, he takes his direction from the others. Lee, Moller and Brown, the three principals, jointly make the major

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15. See Kal-Ed, Inc., Case No. 80-UC-l-EC, et al.

decisions -- decisions about dividend payments, investments, land transfers, desired lettuce acreage and loan applications, for instance -- for both companies. The decisions, first, to create Holtville Farms and, later, to stop its farming operations were theirs.

The Formation of Holtville Farms. Holtville Farms was created entirely from assets of Growers Exchange: the Imperial Valley land owned and fanned by Growers Exchange, together with its farming equipment, was transferred to the new company; farmworkers employed by Growers Exchange in the Imperial Valley became employees of the new company; and Growers Exchange provided the working capital for the new company.

The general counsel contends that Holtville Farms was formed for anti-union reasons. Hal Moller testified that he and the other principals had three reasons for creating it and Toro Ranches, its Salinas Valley counterpart: they wanted Growers Exchange out of farming, thinking that the farming operations would be more successful if managed separately; they wanted Growers Exchange divested of its Imperial Valley farm land because the corporation was acquiring new shareholders who, they felt, were not entitled to an ownership interest in the land; and they wanted to move a Growers Exchange employee into an ownership position through Toro Ranches.

The general counsel points to the formal minutes of the meeting of the Growers Exchange board of directors at which the spin-offs were approved. According to these minutes, one objective of the corporate reorganization was to:

> [s]eparate the farming activities conducted in Imperial Valley and surrounding areas from farming activities

> conducted in Salinas Valley and surrounding areas in order to isolate problems having to do with organized farm labor and to permit dealing with the question of farm labor in the manner best calculated to produce appropriate results in each of the areas.

(The other objectives set forth in the minutes are consistent with Moller's testimony.)[16/]

Respondents assert that this objective had no basis in reality, but was mere "window dressing" put into the minutes in an attempt to insure that the spin-offs were tax free. Edward Singleton, a partner and tax specialist in the accounting firm employed by Growers Exchange, testified that he initiated the idea of concern about labor problems, since it was recognized as a valid business purpose that would qualify the Growers Exchange divestment as a non-taxable transaction rather than a taxable dividend. Paul Hamerly, business attorney for the corporation, testified that he prepared the minutes in question after learning of Singleton's advice and participating in several discussions with the principals about the advisability and implementation of the spin-offs; he said that he inserted the "labor problems" objective to help support the business justification for the spin-offs. Singleton and Hamerly, as well as John Hontalas, another partner in the accounting firm who also participated in many meetings with the principals about the spin-offs agree that labor problems were never mentioned by any of

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16. The other objectives stated in the minutes are:

> 1. Separate the day-to-day farming activities of the corporation from the existing corporate structure.
>
> 2. Permit acquisition of stock in the present corporation by Don Mitchell and Robert G. Kuhnau separate from the direct farming activities. (See GEX 16.)

the principals as an actual reason for the corporate restructuring.[17/]

The statement in the board minutes about labor problems is the only direct evidence of an anti-union purpose for Holtville's formation. I credit the testimony of the three outside witnesses that the idea of incorporating the statement originated with them for tax avoidance reasons and the principals did not suggest that labor problems were in fact a reason for the divestment. It is true that their ongoing professional relationships with Growers Exchange might cause them to be biased, but that is balanced by their being relatively disinterested and having professional reputations to maintain. Furthermore, their explanation is plausible and the reasons offered by Moller to explain the spin-offs are sufficient in themselves.

I accept the respondents' argument that the statement was mere "window dressing" for the Internal Revenue Service, and find that the general counsel has not established by a preponderance of the evidence that the formation of Holtville Farms was motivated by

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17. At the hearing, ruling was reserved on the admissibility of the testimony that the principals did not mention labor problems. None of the parties addressed the issue in the post-hearing briefs. I conclude, as I indicated at the hearing, that the testimony is hearsay, being offered for the truth of the implied statement that labor problems had nothing to do with the formation of Holtville Farms, but is nonetheless admissible for the truth of the matter stated as a prior consistent statement. Moller's testimony about the reasons for forming Holtville Farms was impeached by the conflicting corporate minutes, imputable to all the principals, but their implied statements are consistent with Moller's testimony and were made prior to the preparation of the minutes. (See Evid. Code sections 1236 and 791.) The testimony is admissible in any event as circumstantial evidence of the principals' state of mind about the company's formation.

hostility toward union organization.[18/]

Routine Operations. Before and after Holtville Farms was created, Hal Moller was the principal who generally represented Growers Exchange in the Imperial valley. He was the person who negotiated lettuce growing agreements with other Imperial Valley farmers, and then consulted with them about the cultivation of the crop. When the lettuce was ready to harvest, Bennett Brown and the Growers Exchange harvest supervisor arrived to direct operations, but Moller was still available as needed. And, as he previously had when Growers Exchange was farming, Moller supervised growing operations for Holtville Farms.

Moller worked closely with Gilbert Chell, Holtville's general manager. Chell's predecessor as general manager, his brother Albert, had been Imperial Valley district manager for Growers Exchange, and when the new company was created, according to Moller, Albert Chell's title changed, but not his duties. Moller spent considerable time in the Imperial Valley, and when not there, consulted with Chell by phone at least once a day, and often

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18. In finding that an anti-union motivation for the formation of Holtville Farms has not been proved, I do not intend to imply that no UFW activity was occurring or that Growers Exchange was not hostile to it. See, e.g., Alberto Gonzalez[1] testimony about organizing efforts in the fall of 1974. Were the issue raised in another context (in the tax court, for instance) where it was in Growers Exchange's interest to establish that there were in fact labor problems at the time, I think the company would have little difficulty. Factual findings about 1974 union activity or anti-union animus apart from the formation of Holtville Farms are unnecessary in the present proceeding, however.

more.[19/] Chell was responsible for day-to-day operations, but Moller set policy and had the final say. In lettuce cultivation for example, Moller made out the planting schedule[20/] in consultation with Chell; he discussed pre-planting work in general with Chell and then left specifics, such as arranging for the heavy equipment work, to him; together they planned a basic fertilization program, which Chell then executed; but Chell determined how many workers Holtville Farms needed, and when. In general, Moller either made or was consulted about all major operating decisions for Holtville Farms, and Chell executed them.

Holtville Farms grew crops on land that it leased, in addition to the land it owned, and on occasion leased its own land to other farmers for a single-crop season. Moller made the leasing

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19. Moller estimated that he spent 80 to 90 percent of his time overall, and 100 percent during the lettuce growing season, on Holtville matters, but I find this to be an exaggeration. The claim is uncorroborated by his descriptions of the work he performed and the amount of time he spent in the Imperial Valley. His continued activity with Growers Exchange is demonstrated in Growers Exchange, Inc., supra, 8 ALRB No. 1, ALO opn. at pp. 4, 5 (administrative notice of which is hereby taken). Furthermore, for the fiscal year ending March 31, 1976, Moller's entire salary was allocated to Toro Ranches and Holtville Farms because he spent so much time on their affairs, according to Don Mtichell, but no such allocation was made in later years. The implication is two-fold: at first Moller spent considerable effort on Toro Ranches as well as Holtville Farms; and subsequently he spent less time on the newer companies, and, presumably, more on Growers Exchange.

20. The planting schedules and crop summaries prepared under Moller's direction apparently serve both companies: they were prepared in the Holtville Farms office by its clerical worker, often on its letterhead, and incorporated data on its other crops, not just the lettuce harvested by Growers Exchange; but they also include the lettuce grown for Growers Exchange by other farmers like Chell, Shumard, Fornasero and Nilson. In one instance, on a page entitled "Holtville Farms 1979," appears the entry, "SHUMARD . . . GROWING FOR US" (my emphasis): Shumard's contract was with Growers Exchange, not Holtville Farms. (See GCX 142:16.)

decisions, although Chell usually sought out available land and did most of the footwork. When land was leased for Holtville to farm, often Growers Exchange, not Holtville, was named as lessee. Similarly, when Holtville's land was leased to other farmers, Growers Exchange was sometimes named as lessor. On one occasion, land leased to Growers Exchange was sublet, and Holtville was named as sublessor. The practice of naming Growers Exchange as lessee of land for Holtville to farm began because it was easier to obtain leases for Growers Exchange as a previous tenant and known business, Moller explained, and continued "only out of habit." No explanation was given for naming Growers Exchange as lessor of Holtville land, or vice versa: Moller described one such situation as "a mess."

As mentioned, Holtville Farms cultivated crops exclusively for Growers Exchange. Contractual arrangements between farmers and grower-shippers typically fit into one of two categories commonly known as "farming contracts" and "joint deals." Details may vary widely, but certain features characterize each type of agreement. Under a farming contract, the farmer assumes little or no risk: the grower-shipper puts up most or all of the costs of growing a crop, and gets most or all of the profit (or loss) from its sale. The farmer's basic profit is included in a fixed charge per acre for administration or overhead, although the farmer may also be given an interest in the net profit (after the grower-shipper recovers all costs) from the crop, typically 10 percent, as an incentive. In essence, the farmer is paid to grow a crop that is owned by the grower-shipper.

In a joint deal, also sometimes called a "grower-shipper

agreement," farmer and grower-shipper both own the crop: they share the growing costs, and the profit or loss. Typically, the farmer provides the land, water, labor and equipment to prepare the land and plant and grow the crop to the point of harvest, while the grower-shipper either contributes a fixed sum per acre for the remaining pre-harvest expenses or pays the actual cost of items such as seed, fertilizers and insecticides, and labor for thinning and weeding. The agreement usually contains -- as do many farming contracts -- a fixed "packing charge" due to the grower-shipper for the cost, including a profit, of harvesting, packing, handling, distributing and selling the crop. After deduction of the packing charge, the gross proceeds -- which may show a profit or a loss -- are divided between grower-shipper and farmer in the ratio agreed upon in the contract, usually 50:50 or 66-2/3:33-1/3; the apportionment of growing costs is calculated to reflect the same ratio.

Farming contracts were the basic form of the agreements between Holtville and Growers Exchange. With respect to lettuce, the major crop, after the Growers Exchange board of directors determined how much acreage it wanted in the Imperial Valley, Moller consulted with Chell to decide how much Holtville Farms could provide. Moller also decided what other crops Holtville would grow, and the acreage of each. The general provisions of the contracts were worked out by all three principals, according to Moller, although he alone determined some major details, such as estimated growing costs. He describes himself as arguing and negotiating with himself about the overhead allowance, the figure that included Holtville's profit margin.

The early agreements between Holtville and Growers Exchange, from 1974 to 1976, are typical farming contracts: assuming no risk, Holtville received all its growing costs plus 10 percent of any net profit from the crop. Beginning in 1977, however, Holtville Farms advanced 10 percent of the growing costs and assumed 10 percent of any net loss, as well as profit. Moller testified that this change resulted from a decision by the Holtville board of directors that the risk was "reasonable" and the move, if successful, would help capitalize the company. (Undoubtedly "reasonable" from Growers Exchange's point of view, the benefit to Holtville is not evident.)

For 1980-1981, Holtville's final farming season, there was a drastic change in contract terms: instead of 10 percent, Holtville Farms put up 80 percent of the costs in return for 80 percent of the net profit or loss, and Growers Exchange's interest was reduced from 90 to 20 percent. The three principals acting as the Growers Exchange board of directors made this decision when the bank was unwilling to extend more credit to Growers Exchange but would lend to Holtville if its income could be increased. This event is discussed more thoroughly below, in conjunction with the discussion of Holtville's shutdown.

Moller repeatedly characterized the relationship between the two companies as one where Holtville farmed "for the benefit of" Growers Exchange. This meant, he explained at one point, that Growers Exchange had title to the crops, advanced all costs and assumed all risks, an explanation consistent with his description of all the agreements between the two as farming contracts. It is

clear from Holler's testimony as a whole that he did not view the alterations in contractual terms as affecting the basic relationship between the companies. He also testified that all of Holtville's profits, from leases and one-crop growing agreements with other farmers as well as from its contracts with Growers Exchange, ultimately went to the grower-shipper.

Acting for Growers Exchange, Moller or, at his direction, Chell, negotiated contracts with other Imperial Valley farmers for the lettuce Holtville Farms could not provide. Most of those agreements were joint deals, where Growers Exchange and the farmer share the costs and profits (or losses) equally or on a two-to-one basis, and thus provide little basis for comparison with the Holtville agreements.[21/] Four other farming contracts are in the record, three with Gilbert Chell and one with Glen Shumard, a farmer who is not a party to this action. Those four contracts, although for later crop years, are essentially identical to the early Holtville contracts, i.e., Growers Exchange put up all the costs and assumed all the risks, while the farmer received 10 percent of the net profit, if any, from the sale of the crop. No other contracts in the record allocate costs and risks in a manner similar to the later Holtville ones.

Given the absence of evidence that contractual terms were ignored or modified in their execution, there is no basis in the

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21. The 1980-1981 joint deals with other farmers can be compared with the 1980-1981 Holtville farming contract in one aspect: the packing charge set by Growers Exchange is specified in all the contracts, and the charge to Holtville, $2.75 per carton for conventional packing, is the same as the charge to the other farmers.

record for finding that the agreements between Growers Exchange and Holtville Farms were significantly more or less favorable to either party than the agreements negotiated between Growers Exchange and other farmers. The few contracts that can be compared do not differ significantly.

Moller testified that the usual practice was for him, as president of Holtville Farms, to execute contracts and leases on its behalf, and for Brown or Lee to sign for Growers Exchange. Most contracts between the two companies were executed in this manner, although on one occasion Moller signed for Growers Exchange while Brown signed for Holtville Farms. Other documents reveal that Moller and even Gilbert Chell often executed contracts and leases for Growers Exchange, and Chell frequently executed them for Holtville Farms. Moller testified that whenever Chell signed for either company, he was authorized to do so by Moller.

Labor Relations. In general, the two companies have distinct work forces. Holtville workers stay in one place and perform tilling operations such as planting and irrigating, while Growers Exchange workers follow the harvest around the state and into Arizona. The initial Holtville work force came from Growers Exchange: the farmworkers employed in the Imperial Valley growing operations of Growers Exchange were simply transferred to the payroll of the new company, retaining seniority from their hire dates at Growers Exchange. In some years, Growers Exchange employees did the hoeing and thinning operations at Holtville, work otherwise performed by a labor contractor or, occasionally, regular Holtville employees. Otherwise, there is little evidence of

employees moving from one company to the other, and there is no evidence of workers employed by one company performing functions regularly performed by employees of the other.[22/]

Since the Growers Exchange fieldworkers were covered by a collective bargaining agreement with the UFW, wage rates, seniority, holidays, vacations, pension and medical plans, and other employment conditions for them were established by the contract. One person, Ed Stoll, had the job of administering it for the company. His duties included handling grievances and checking that the company met its contractual obligations about layoff and recall procedures. He reported to and took direction from the three principals. Stoll did not perform any services for Holtville Farms.[23/]

At Holtville, where there was no union contract, some employment terms were set by Gilbert Chell in consultation with Hal Moller. Together they set wage rates, paid holidays and vacations. Chell had inherited a seniority system of unspecified origin that determined the order of layoffs and recalls. Within its framework he was responsible for laying off, recalling, hiring, firing and

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22. No evidence in the record supports the general counsel's assertion (post-hearing brief at pp. 23-24) that it would not be uncommon for farming operation workers and harvesting employees to perform each other's functions during the harvest. The only evidence of any exchange of function is testimony by one Holtville Farms employee that on one occasion he and a co-worker cleaned the Growers Exchange cooler, an isolated incident at most. (There is no evidence about who usually cleaned the cooler.)

23. Donald Mitchell testified that Ed Stoll handled personnel matters for Holtville as well as Growers Exchange. His testimony is the only such evidence, however, and he indicated that he had little direct knowledge of Stoll's activities. The testimony is disregarded, given the weight of contrary evidence.

disciplining workers, an authority he delegated to two field foremen. In labor matters, as in other areas, Moller had the final word, and Chell testified that he told Moller how things were being done in order to give him the opportunity to make suggestions or object. Chell had nothing to do with labor matters at Growers Exchange.

In practice, according to Chell, basic employment terms like wage rates, holidays and vacation were taken from the so-called "master contract," the collective bargaining agreement between the UFW and Sun Harvest. This contract was identical in most respects to the Growers Exchange-UFW contract. The seniority systems at the two companies, with seniority attaching from the date of hire within a job classification, were also alike, the only difference being that the Growers Exchange system also allowed for seniority for a particular geographical area, a provision inapplicable to Holtville Farms. Thus, terms of employment for the agricultural employees of both companies were similar.

Other aspects of employment at Holtville Farms were handled in common with Growers Exchange. Both companies were covered by the same workers compensation insurance policy, although the insurance carrier invoiced them separately. Holtville fieldworkers and Growers Exchange non-union employees such as clerical workers participated in identical medical and pension plans, obtained from the same companies and administered together. The major decisions about these non-contract benefit plans were made by the three principals.

Lael Lee was identified by Hal Moller as the person

primarily responsible for labor relations decisions at Growers Exchange. The evidence about who made basic labor policy decisions for Holtville Farms is characterized by contradictions and disclaimers of responsibility. No one acknowledged making the decision to refuse to bargain with the UFW. Lee testified that Moller and Chell made the bargaining decisions for Holtville, and he had nothing to do with them; in fact, he said he thought Holtville had been bargaining while challenging the election results. (It did not begin to bargain until around the time of the hearing.) Lee also maintained that Ron Barsamian, the attorney who represented Holtville in the negotiations at the time of the hearing, worked under Moller's direction, although he acknowledged that he himself had discussed the Growers Exchange's legal positions of both companies with their respective attorneys.

Moller, on the other hand, seemed unaware that any bargaining was occurring during the hearing; he testified that any decision to negotiate would have been made by Lee, and he himself had not been consulted about any such decision. He was not asked who made the original decision for Holtville not to bargain. He also said he did not know who had hired Holtville's current attorneys. Chell testified that he did not know who had hired Holtville's current attorneys, either. He himself had discussed the original decision not to bargain with Moller and William Macklin, Holtville's labor attorney at the time, and thought Macklin had made it.

Macklin testified that during the time he represented Holtville Chell was his contact with the company, but he also

apprised Lee and Moller of Chell's decisions and the status of the certification and refusal-to-bargain cases. Barsamian, who negotiated first for Holtville but then for Growers Exchange as well, testified that he was hired by Lee, his authority to negotiate for Holtville derived from both Lee and Moller, and he reported to both of them.

It is improbable that Chell made major decisions about Holtville's labor relations by himself. Seeing no need to resolve all the contradictions, I find that both principals, Moller and Lee, were responsible for the company's labor policies.

Shared Facilities. Growers Exchange and Holtville Farms made common use of some facilities, in both Salinas and the Imperial Valley.[24/] They used the same street address and post office box in both locations. In the Imperial Valley, in the town of Holtville, Holtville Farms had an office and a maintenance shop on *a* five-acre parcel of land owned by Growers Exchange. Moller maintained that Holtville Farms paid rent for use of the facilities, but because no rent charges appear in the invoices between the two companies, which are quite detailed, I find that he was mistaken. The office was regularly staffed by one person, Irene Reese, employed and paid by Holtville Farms.

The Holtville office also served unofficially as a part-time office for Growers Exchange. When in the Imperial Valley,

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24. The Holtville Farms post-hearing brief is in error where it states that there is "no evidence of ... common office used in Imperial Valley, common Post Office Boxes [sic], or common clerical employees as between the two companies." (P. 47, emphasis in original.)

Moller used it without regard to which company he was representing. It was the base for Growers Exchange operations during the lettuce harvest. The harvest supervisor used it as needed, and Ed Stoll, who accompanied the harvest as a roving personnel manager, was frequently there although he also had an office elsewhere. Reese performed occasional services for Growers Exchange. Growers Exchange also maintained a coldroom on the property, and used it as the base for trucking operations.

The Growers Exchange office in Salinas, on the other hand, was where most financial and accounting services for Holtville Farms were performed, by Don Mitchell and Growers Exchange staff under his direction. Similar services were performed there for Toro Ranches, the Salinas Valley farming operation. This centralization was a decision of the three principals. Mitchell estimated that he and his staff spent 10 percent of their time on Holtville Farms matters.

Mitchell prepared tax returns and financial reports for Holtville. Its general ledger, accounts payable and payroll records were maintained in Salinas. Holtville payroll checks were computed and issued there, on the basis of timesheets forwarded from the Imperial Valley by Irene Reese. (No one at Holtville Farms routinely reviewed the timesheets after their preparation.) Bills for expenses incurred by Holtville were also sent by Reese to Salinas, where they were paid out of the Holtville Farms general account. The Growers Exchange computer was used to compute the paychecks and to store information about the payroll and accounts payable.

Besides paying Holtville's bills, Growers Exchange

personnel in the Salinas office computed Holtville's growing costs and invoiced Growers Exchange for its share. Each company also occasionally made purchases or paid expenses for the other; invoices reflecting such expenses were prepared in the Salinas office. Confusion about the proper entity to bill for a particular expense was not uncommon: the wrong company was sometimes charged by outside suppliers, by more closely related entities like Gilbert Chell or Kal-Ed, and even by Mitchell's staff on occasion. Questions or problems about Holtville expenses that he could not resolve were referred by Mitchell to Moller, who had the authority to approve them on behalf of either company as circumstances required.

The two major Holtville Farms bank accounts, payroll and general, were maintained in Salinas at Wells Fargo,[25/] where Growers Exchange also banked. Mitchell generally signed the Holtville checks issued in Salinas, although the three principals were also authorized to sign them; the same four people were authorized signers on the Growers Exchange accounts. (Other people were also signers on the various accounts where appropriate.) The same personnel maintained records for both companies; the records for both were stored in the same rooms, segregated according to company; the same vault was used for valuable items of both. Both companies were covered by the same general insurance policies; Growers Exchange billed Holtville for a share of the cost.

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25. A little-used account was also maintained at the Wells Fargo bank in Holtville, for times when checks were needed more quickly than they could be obtained from Salinas. A fourth bank account in the name of Holtville Farms was opened in 1981 in Blythe, California, to accomodate proceeds from the sale of the company's farm equipment. Why a separate, geographically isolated account was needed was not explained.

Mitchell and his staff received no compensation directly from Holtville Farms. Growers Exchange was reimbursed, however. Administrative costs of the Salinas office such as clerical salaries and payroll expenses, office expenses, rent, telephone, and interest were allocated among Growers Exchange, Holtville Farms and Toro Ranches in proportion to their respective payrolls.

No terms were attached to accounts between the companies, and they were not settled on any regular basis. Rather, Mitchell authorized payments from one to another as money was available and needed for operations. Money borrowed on Growers Exhcange's operating line of credit might be used to reimburse Holtville Farms for growing costs, for example, when Holtville needed funds to pay its bills. (Interest on Growers Exchange's bank debt was among the administrative costs proportionately allocated to Holtville Farms, on the rationale that money from the line of credit was available to it.) Growers Exchange did not actually lend money to Holtville, except for some interest-bearing loans to enable it to reduce its tax liability by prepaying expenses.

All assets of Holtville Farms, in addition to those of Growers Exchange, were pledged as security for the Growers Exchange line of credit. Similarly, when a line of credit was established for Holtville in 1981, the collateral comprised all assets of Growers Exchange as well.

Legal representation for both companies has overlapped to a considerable degree. Larry Dawson and Ronald Barsamian of Dressier, Quesenbery, Laws & Barsamian, house counsel for Western Growers Association (WGA), were attorneys of record for Holtville Farms in

the hearing. At the same time Barsamian was the chief negotiator for both companies in bargaining sessions with the UFW and settlement discussions with the union and the general counsel. Wayne Hersh, also a member of WGA's law firm at that time, represented Growers Exchange in contract negotiations in 1979-1980. Macklin, the El Centro labor-management attorney who represented Holtville Farms in ALRB proceedings through 1980, was employed by Growers Exchange for Imperial Valley labor matters during the 1979 lettuce strike.[26/] Paul Hamerly of Salinas is general legal counsel on all non-labor matters, and agent for service of process, for both companies. The only exception is Terrence 0'Connor, the attorney of record for Growers Exchange in this proceeding: he never worked for Holtville Farms, so far as this record shows.

Lael Lee was responsible for hiring all the attorneys but Macklin. Lee identified Dawson and Barsamian, Holtville's attorneys, as his attorneys, with whom he consulted before testifying. Finally, it is noted that large portions of the post-hearing briefs submitted on behalf of the two companies are virtually identical.

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26. Although Lael Lee, the person generally responsible for hiring legal counsel, testified that to his knowledge Macklin never represented Growers Exchange, Macklin's testimony that he was hired by and took direction from Ed Stoll, and was paid by Growers Exchange, to handle local strike problems is unrebutted in its specifics and is therefore credited. Who hired him -- or rather, the firm he then worked for-- to represent Holtville Farms is not clear. He testified that while a law clerk he was first contacted by Chell, but his firm (Byrd, Sturdevant, Nassif & Pinney) already represented the company.

Gilbert Chell and Kal-Ed, Inc.

Many features of the relationship between Growers Exchange and Holtville Farms are absent from either's relationship with the remaining respondents, Gilbert Chell and Kal-Ed, Inc., Chell's equipment company. Neither Chell nor Kal-Ed had any ownership interest in Holtville Farms or Growers Exchange. Chell's employment contract as general manager of Holtville Farms gave him a 10 percent interest in the company's net profit in addition to his salary, but he was not a stockholder, a director, or an officer, and he did not participate in the major decisions affecting the company's direction. For example, he played no role in the decision to stop farming, which cost him his job.

Nor did Chell's own farming enterprise or Kal-Ed have the same type of interlocking financial or accounting relationship with Growers Exchange as Holtville Farms did. Neither business had access to the Growers Exchange line of credit, for instance, and neither's assets were used as collateral for loans to Growers Exchange or Holtville, or vice versa. Their bookkeeping records were not maintained in Growers Exchange's computerized accounting system (except as regular accounts payable of the grower-shipper), and payments were not made from Salinas on their behalf. Chell also hired different accountants and attorneys for his enterprises.[27/]

Nevertheless, Chell's relationship was not limited to managing Holtville Farms. Chell and his brother owned farm land

27. On one occasion, for the preparation of a lease, Chell used another attorney in the same law firm as William Macklin, Holtville's former labor attorney.

that they leased to Holtville Farms, and to Growers Exchange before it. In addition to his other work, Chell was a sales representative for a fertilizer company, and in that capacity sold most of the fertilizers and pesticides used by Holtville Farms, while as Holtville's manager he had a major role in planning their use;[28/] he also sold products to Growers Exchange when it provided them to other farmers. At times Chell acted as an agent for Growers Exchange: he negotiated and executed leases and contracts on its behalf, as well as running less important errands. He was not compensated, apart from his Holtville salary, for these additional services.

Chell's farming operation consisted of lettuce cultivation, under contract with Growers Exchange since 1978 and with others before then, and cultivation of wheat, alfalfa and Sudan grass on his own. As mentioned, his lettuce contracts with Growers Exchange were virtually identical to the early Holtville Farm contracts. Growers Exchange reimbursed all growing expenses and owned the crop, and Chell received the profit incorporated into the growing costs plus 10 percent of any net profit on the crop. Chell generally paid the expenses and then billed Growers Exchange for them. Among the costs he billed were land rent (the land that he farmed being leased from third parties), irrigation water, interest on bank loans taken out to cover other costs, seed, fertilizer (usually from the fertilizer company he represented, so he received a commission),

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28. The sums involved are substantial. Donald Mitchell testified that $300,000 Holtville borrowed in 1981 was used primarily to settle its accout with Pure-Gro, the company CHell represented.

tractor work and labor. Holtville Farms and Kal-Ed provided many of the services and labor Chell charged to Growers Exchange.

Chell used equipment and workers from Holtville Farms for the planting, cultivating, spiking and sprinkling operations on the lettuce crop he grew for Growers Exchange. Holtville billed Chell on a per acre basis for these services, at rates determined by Chell the general manager, and Chell the farmer in turn passed the charges along to Growers Exchange as growing costs. There is no evidence that the rates he set varied significantly from rates charged by others for similar services.

Chell also used Holtville employees to irrigate the lettuce, but he put the irrigators on his own payroll. He billed Growers Exchange for the amount he paid in wages plus a 35 percent surcharge to cover, he explained, employment taxes and workers' compensation. He testified that such a surcharge for payroll expenses is common in the industry.

Holtville employees and equipment were used by Chell for his flat crops, as well. Holtville employees planted, irrigated and cut Chell's Sudan grass, cut and raked his alfalfa, and irrigated and cleaned ditches for his wheat. He put the workers on his own payroll only for irrigation and general labor work (cleaning ditches). He reimbursed Holtville for the other labor and the use of equipment (a planter and a swather, at least), he testified, by lending it at no cost tractors and other equipment belonging to

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Kal-Ed.[29] The arrangements were made by Chell alone, acting on behalf of himself and Holtville Farm at the same time, with no written contracts, invoices or other records, and no exchange of money. Chell conceded at one point in his testimony that this was "a screwy deal." (RT XIII :79.)

Chell's flat crops were frequently managed in the same way as Holtville's flat crops in other respects, as well. For instance, when Holtville employees were available for harvesting, they usually harvested for both entities; otherwise, Chell arranged for the same outside harvester to harvest for both. Chell sometimes sold his own wheat and alfalfa to the purchasers of Holtville's. He arranged to insure his wheat crop along with Holtville's, but with separate billings.

Kal-Ed began operations in 1978[30] with agricultural equipment already owned by Chell, for he had previously provided similar custom tractor and caterpillar services as a sole proprietor. The closely-held corporation was formed by Chell solely for tax purposes, on the advice of his accountant. While his wife is a corporate officer and stockholder, in practice he alone directs

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29. Chell testified at one point that either Holtville billed him for the labor and equipment he used or he exchanged work or equipment in return. Elsewhere, however, he refers only to lending equipment in return, and the documentary evidence indicates that Holtville billed him only for the work on his lettuce crop. Thus, I find that the only payment for the use of Holtville employees and equipment on Chell's non-lettuce crops was the occasional use of Kal-Ed equipment at Holtville Farms.

30. The record contains contradictory evidence about what year Kal-Ed began operations. I find that 1978 was the year, based upon Chell's testimony that it began soon after its articles of incorporation were prepared in July 1978, and upon the earliest Kal-Ed invoices in evidence, which bear that year.

and controls it.

Like Chell's farming operation, Kal-Ed had no regular workforce of its own and relied upon Holtville Farms for labor. (Outsiders were hired for Chell's enterprises only when no one was available from Holtville or Chell's own family.) Holtville employees drove and often serviced Kal-Ed equipment, and fuel and other needed supplies came from company stores. The workers generally remained on the Holtville payroll when working for Kal-Ed, but not always; some appear in Kal-Ed payroll records for the first part of 1980.

Although not the only outside source of equipment used by Holtville Farms and Growers Exchange, Kal-Ed virtually never provided services for anyone but them or Chell himself.[31/] Kal-Ed equipment was used to prepare land for the crops cultivated by Chell and Holtville, and to pull harvest equipment out of the fields for Growers Exchange. Decisions about what work Kal-Ed would

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31. Only two specific examples of Kal-Ed's providing services for others were given, and both involved farmers in contractual relationships with Holtville Farms. In one instance Kal-Ed prepared land for a watermelon crop to be grown by a third party in a joint deal with Holtville Farms, and land preparation was one of Holtville Farms' contractual obligations. Another time Kal-Ed did tractor work, using Holtville Farms employees, for a Holtville Farms one-crop lessee. Chell testified that he was paid for the work, including labor, and reimbursed Holtville Farms by loaning it equipment.

The documentary evidence cited by Growers Exchange in its reply brief (at pp. 3-4) as proving that Kal-Ed pulled tractors for other shippers does no such thing: the invoice describes land on which lettuce for Growers Exchange was grown, and is addressed to and was paid by Growers Exchange (see GCX 148:27); it dates from the 1979 lettuce strike (a situation described elsewhere in the Growers Exchange brief as "anomalous"), and, as the bill indicates, different companies helped each other harvest and pack their lettuce.

perform for Holtville Farms (or himself) were made by Chell alone; decisions about services for Growers Exchange were made in conjunction with the harvest supervisor. The rates for Kal-Ed's services were determined by Chell, based, he testified, upon his survey of the prevailing rates for similar services in the area.

When Kal-Ed equipment was used by Holtville or Growers Exchange, a fixed percentage was deducted on the invoices to compensate for the labor and supplies provided by Holtville regardless of which company utilized Kal-Ed's services. When the discount was applied to land preparation costs at Holtville, the effect was to compensate Holtville, but when the charge to Growers Exchange for pulling out harvest equipment was reduced, the result was that Growers Exchange was compensated for the items supplied by Holtville.[32/] Chell alone determined the appropriate discount, which was 30 percent until the fall of 1978, and then 35 percent, except for 1980 and 1981 invoices to Growers Exchange, when it was 10 percent. The basis for its calculation and the reasons for the fluctuations were not explained.

Chell also utilized Holtville labor and supplies when he used Kal-Ed equipment to prepare his own land. There is no record

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32. Until October 1980, all Kal-Ed invoices were addressed and sent to Growers Exchange in Salinas, and charges for both land preparation and equipment pulling were often included in a common invoice. (Earlier Chell invoices, pre-Kal-Ed, for similar services often included his lettuce growing costs as well.) In Salinas, the discounted land preparation charges, but not the discount applied to the equipment-pulling expense for Growers Exchange, were allocated to Holtville Farms. Neither Chell nor Kal-Ed was advised of any "error" in this billing method, which continued over at least five years. Kal-Ed and Chell invoices, like Holtville invoices, were reviewed and approved by Mitchell or, if necessary, Moller.

of any payment to Holtville for its contribution, nor does a discount appear in the invoices to Growers Exchange for the land preparation for lettuce. If Chell reimbursed Holtville by lending it Kal-Ed equipment, he did not say so.

To summarize, Chell regularly used Holtville employees and supplies for Kal-Ed work. Occasionally, the workers were put on Kal-Ed's payroll, but more commonly they remained in Holtville's employ. Chell alone determined the reimbursement. He sometimes paid for the use of workers and supplies by discounting Kal-Ed's bills (to the benefit of Growers Exchange when it contracted for the services, not Holtville Farms) or by lending Kal-Ed equipment to Holtville at no charge. Chell also used Holtville workers to perform other labor in his own fields. He purportedly reimbursed Holtville with loans of Kal-Ed equipment, except for the irrigators, whom he put on his own payroll. Irrigation work for Chell was assigned to Holtville irrigators in their regular rotation.

When Holtville employees working for Chell or Kal-Ed remained on the Holtville payroll, they continued to receive their usual pay and fringe benefits. In the 1980 ALRB settlement agreement, Chell and Kal-Ed had agreed to provide the same pay and benefits as Holtville. Before the agreement, workers had received less pay when they changed payrolls, but afterwards they received the same. Regardless of the agreement, when put on Chell or Kal-Ed payrolls, Holtville employees no longer received credit towards paid holidays and vacations, or pension and medical plans. Chell's enterprises did not offer those benefits, overtime pay, or a formal seniority system. Chell alone was responsible for the labor

policies of his businesses.

The Holtville field foremen assigned the workers to Chell or Kal-Ed, supervised their work,[33/] and distributed Chell's paychecks. Although most of the bookkeeping for Chell's enterprises was done by his wife in their home, which served for his business address, Chell also made use of Holtville's office and clerical worker. He used the office telephone for business calls, and the foremen turned in the workers' time to Irene Reese without regard for which payroll they were on. Reese maintained Chell's payroll records, and often prepared paychecks and invoices, or did other clerical work, for Chell.

Chell's practices were known in general, if not in their specifics, to Hal Moller, who made no objection.

Analysis and Conclusions

Introduction

The general counsel has alleged in the complaint and argued in its brief that the respondents are a "joint employer," whereas the issue is more correctly characterized as whether they are a "single employer." As has recently been pointed out, although the terms have often been used interchangeably and the differences have been blurred, the two concepts are distinct. NLRB v. Browning-Ferris Industries (3d Cir. 1982) 691 F.2d 1117, 111 LRRM

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33. The testimony of Larry Martinez, the Holtville irrigation foreman, that Chell supervised the irrigators working for him is not credited, being contradicted by testimony from Chell himself as well as assistant foreman Carmelo Saldana and irrigators Alfredo Mendez and Miguel Verduzco.

2748, 2751; *also see* Saticoy Lemon Association (1982) 8 ALRB No. 94, ALO opn. at p. 19.

A "single employer" relationship exists where two or more nominally separate and independent entities in reality constitute a single integrated enterprise, whereas the "joint employer" concept does not depend upon the existence of a single integrated enterprise but rather is a matter of whether two or more otherwise independent entities that are participating in a common enterprise jointly control the labor relations of a given group of workers. (Browning-Ferris Industries, supra, 111 LRRM at 2751-2752.) In a single employer situation, the focus of the inquiry is upon the relationship between the entities, and the degree of common control over their separate labor forces is but one indicator of their interrelationship; in a joint employer situation, on the other hand, the focus of the inquiry is the relationship of each entity not to each other but to the workers, and the critical factor is whether another entity in fact exercises sufficient control over the terms and conditions of employment to be considered a joint employer of the workers along with their nominal employer.

A joint employer relationship has been found under the National Labor Relations Act (NLRA)[34/] in, e.g., NLRB v. Browning-Ferris Industries, supra; NLRB v. Greyhound Corp. (5th Cir. 1966) 368 F.2d 778, 63 LRRM 2434, on remand on this issue from Boire v. Greyhound Corp. (1964) 376 U.S. 473, 55 LRRM 2694; Industrial

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34. ALRA section 1148 requires the board to follow "applicable precedents of the National Labor Relations Act, as amended."

Personnel Corp. (1980) 250 NLRB 1139, 105 LRRM 1054, enforced (8th Cir. 1981) 657 F.2d 226, 108 LRRM 2583, cert. den. 454 U.S. 1148, 109 LRRM 2256; and Tanforan Park Food Purveyors Counsel (1978) 239 NLRB 1061, 100 LRRM 1100, reversed on other grounds (9th Cir. 1981) 656 F.2d 1358, 108 LRRM 2630. This existence of a joint employer has been considered but rejected by the ALRB in, e.g., San Justo Farms, Inc. (1981) 7 ALRB No. 29, and Saticoy Lemon Association, supra, (along with a single employer relationship); the board has yet to find the relationship.

Both boards have also had occasion to consider whether two or more nominally separate enterprises constitute a single, integrated employer. Because patterns of ownership and management are so varied and fluid, they have declined to announce any mechanical rule for such determinations but have stated they will look to a number of factors, no single one of which is determinative. (Rivcom Corp. (1979) 5 ALRB No. 55 (hg. granted Jan. 6, 1983, S.F. 24520); Abatti Farms, Inc. (1977) 3 ALRB No. 83; Louis Delfino Co. (1977) 3 ALRB No. 2; NLRB v. Triumph Curing Center (9th Cir. 1978) 571 F.2d 462, 98 LRRM 2047; Sakrete of Northern California, Inc. (1962) 137 NLRB 1220, 50 LRRM 1343, enforced (9th Cir. 1964) 332 F.2d 902, 56 LRRM 2327, cert. den. (1965) 379 U.S. 961, 58 LRRM 2192.)

To a large extent relying on criteria identified by the NLRB, our board has emphasized such factors as common ownership or financial control, common management of business operations, similarity or interrelation of operations, and centralized control of labor relations. (See, e.g., Radio Union, Local 1264 v.

Broadcast Service of Mobile, Inc. (1965) 380 U.S. 255, 58 LRRM 2545; Rivcom Corp., supra; Abatti Farms, supra; Louis Delfino, supra; NLRB v. Welcome-American Fertilizer Co. (9th Cir. 1971) 443 F.2d 19, 77 LRRM 2064, 3007.) All factors need not be present in order to find a single employer. (Local 627, International Union of Operating Engineers v. NLRB (D.C. Cir. 1975) 518 F.2d 1040, 90 LRRM 2321, rev'd on other grounds sub nom. South Prairie Construction Co. v. Operating Engineers, Local 627 (1976) 425 U.S. 800, 92 LRRM 2507.)

Where common ownership or financial control is present, the other factors deal with the actual exercise of the attendant power. Abatti Farms, supra; also see Sakrete of Northern California, Inc. v. NLRB, supra, 332 F.2d 902. The standard for evaluating the exercise of power is whether, as a matter of substance, there is the arm's length relationship found among unintegrated companies. Local 627, International Union of Operating Engineers v. NLRB, supra, 90 LRRM at 2324; also see NLRB v. Browning-Ferris Industries, supra, 111 LRRM at 2751-2752.

Growers Exchange and Holtville Farms

The inquiry into the relationship between Holtville Farms and Growers Exchange thus begins with an exploration of the extent to which the factors of common ownership or financial control, common management, interrelated operations, and centralized control of labor relations are present.

The presence of common ownership and financial control is

indisputable.[35/] Three men own all of the shares of one corporation, Holtville Farms, and most of the shares of the other. While the three principals (Lael Lee, Halbert Moller and Bennett Brown) are not the sole stockholders of Growers Exchange, their relatives hold most of the remaining stock and they actually control the company. They are three of the four corporate officers and members of its board of directors. (Growers Exchange's treasurer and fourth board member, Donald Mitchell, who is also a minor stockholder, takes his direction from the other three.) The same three men constitute the entire board of directors and sole corporate officers of Holtville Farms.

In addition to owning both companies, the same three men made the major financial decisions for both. They decided what investments would be made and when dividends would be paid. Acting as the Growers Exchange board of directors, they decided to create Holtville Farms, and acting as the Holtville Farms board of directors, they decided to close down its farming operations. They controlled the terms of the farming contracts between the two companies. Operating under their direction, one person, Don Mitchell, controlled the cash flow of both companies.

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35. The general counsel argues that considerable weight should be given to characterizations of Holtville Farms as a "subsidiary," a "spin-off" or an "affiliated company" of Growers Exchange. These descriptions were made either by company principals or under circumstances such that the statements are attributable to them, but are not very helpful. To the extent they indicate that Holtville resulted from a corporate restructuring of Growers Exchange and that by and large the two companies are commonly owned, there is no dispute. Beyond that, they do not contribute to a determination of whether the two companies are sufficiently integrated to be considered as one.

Major financial decisions for the two companies were intertwined. For instance, no terms were fixed for settling accounts between them; rather, funds were transferred from one to the other as needed. Another example is the fact that all assets of Holtville Farms were pledged as collateral for the Growers Exchange line of credit, and vice versa. In a change from former contracts, Holtville was assigned 10 percent of the risk of the crops with the only perceivable benefit going to Growers Exchange, not Holtville, since the latter already received 10 percent of any profits.

The financial interrelationship is sharply illustrated by one feature of the events leading to Holtville's shutdown. The closure is discussed below; the pertinent point here is that when they considered it necessary, the three principals altered the farming contract for the 1980-1981 growing season to shift the major financial responsibility from Growers to Holtville. (Holtville's interest in the crop, which in previous years had been 10 percent, jumped to 80 percent.) The principals had and exercised the power to risk the welfare of the farming company for the well-being of the larger enterprise.[36/] As Hal Moller said, Holtville Farms was operated for the benefit of Growers Exchange.

Of course, there are more interconnections between the two companies than common ownership and financial control. Holtville Farms was created in the first place with Growers Exchange assets to take over Growers Exchange Imperial Valley farming operations.

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36. Growers Exchange concedes that Holtville would not have suffered its large loss in 1981 but for the need to restructure the grower-shipper's bank loan. (See its post-hearing brief, p. 51.)

Growers Exchange financed the operations, which continued as before, with Moller and the farm manager continuing to perform the same functions for the new company as they had for the old. The same workers continued to do the same jobs using the same machinery. A successor to Growers Exchange, Holtville Farms was also its alter ego. (See John Elmore Farms (1982) 8 ALRB No. 20.)

The operations of the two companies were interrelated to a large extent. All of Holtville's crops were grown under contract with Growers Exchange, and the major crop, lettuce, was harvested, marketed and shipped by it. The amount of lettuce and the timing of its cultivation were geared to meet Growers Exchange's needs. Growers Exchange also contracted with other farmers for lettuce, but Holtville Farms was its main source in the Imperial Valley. Nothing indicates that Holtville received substantially more or less favorable terms from Growers Exchange than other farmers did, but neither does anything indicate that it was in a position to shop for more favorable terms elsewhere. The integration of farming and harvesting functions here is similar to that in Rivcom Corp., supra, 5 ALRB No. 55, and Abatti Farms, supra, 3 ALRB No. 83, where it contributed significantly to the board's finding of single employers.

The respondents argue that managerial responsibility for the two companies was divided among the common owners, with Lael Lee, president of Growers Exchange, being the one most directly involved with managing its harvest operations, and Hal Moller, president of Holtville Farms» being more involved in the Imperial Valley growing operations. The board found a single employer in

Abatti Farms, supra, despite a sharper division of responsibility than is present here.[37/] Moller did not devote himself exclusively to Holtville's affairs. He represented Growers Exchange in the Imperial Valley, where he was responsible for negotiating contracts with other farmers and supervising the cultivation of their lettuce up to the point of harvest. At times he acted simultaneously for Growers Exchange with respect to Holtville, as when he alone determined major details of contracts between the two. He participated in Growers Exchange affairs elsewhere in the state, as well.

Furthermore, Moller was not the only Growers Exchange executive to play a role at Holtville. Lee himself hired its legal counsel (whom he identified as his own attorneys at one point), and he and Moller shared responsibility for its basic labor relations policies. As controller and de facto treasurer for Holtville as well as Growers Exchange, Don Mitchell supervised the financial affairs of both companies. In short, the demarcation of responsibility is not as clear as respondents would have it.

The respondents argue, somewhat inconsistently, that Holtville Farms was independently managed by Gilbert Chell. it is true that Chell had considerable authority as general manager of Holtville. He directed the day-to-day work: he was in charge of

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37. In Builders Realty Mortgage Co. (1970) 186 NLRB 568, 76 LRRM 1210, cited by the respondents, not only was day-to-day management of the two companies totally separate, with no one linking them as Moller does here, but they also had totally unintegrated functions and operations, one being a heavy construction company and the other the operator of a motel and restaurant chain.

hiring, firing, and disciplining workers; he decided how many workers were needed, and when; he decided the need and arranged for outside contractors; and he supervised, directly or through his foremen, the performance of employees and outside contractors.

However, he worked closely on a regular basis with Moller. Moller was frequently in the Imperial Valley, and when he was not, he and Chell consulted by telephone at least once a day. Moller supervised the cultivation practices and together with Chell made major decisions about items such as crops, seed varieties, and acreages. Chell made a point of telling Moller how he was doing things, so that Moller could register objections. Moller could veto any decision Chell made.

The two companies shared many facilities. In both the Imperial Valley and Salinas, they used the same street address and postal box number. In the Imperial Valley, Holtville Farms had a rent-free office on property owned by Growers Exchange, and Growers Exchange personnel used the office and the clerical worker as needed, without compensating Holtville. Holtville's accounting was done at the Growers Exchange office in Salinas, by Growers Exchange staff with the use of the Growers Exchange computer. Holtville payroll checks were computed and issued there, its bills were paid from there, accounts between it and Growers Exchange were calculated there, and its financial reports and tax returns were prepared there. The same Salinas bank was used by both companies, and for the most part the same people were authorized to sign checks for both.

Legal representation overlapped to a large extent, with the

same attorneys or law firms often representing both companies simultaneously. And although they are represented separately in this proceeding, large portions of their post-hearing briefs are identical. (See John Elmore Farms, supra, 8 ALRB No. 20, ALO opn. at p. 109 fn. 9.)

The two companies were sometimes viewed interchangeably. Chell and Kal-Ed billed Growers Exchange for services provided to Holtville, and Growers Exchange retained the benefit of deductions for expenses advanced by Holtville to Kal-Ed. Land for Holtville to farm continued to be leased in the name of Growers Exchange, which was also named at times as lessor of land actually owned by Holtville. (In Canton, Carp's, Inc. (1959) 125 NLRB 483, 45 LRRM 1147, one fact contributing to the finding of a single employer was that the parent corporation signed leases for its subsidiaries when the lessor wanted "someone responsible.")

Another indication of a single integrated employer is common control of labor relations. See, e.g., Rivcom Corp., supra, 5 ALRB No. 55; Gerace Construction, Inc. (1971) 193 NLRB 645, 78 LRRM 1367; Sakrete of Northern California, Inc. v. NLRB, supra, 56 LRRM 2327. Relevant factors include the interchange of employees between the entities and a common labor relations policy, but the presence or absence of any factor is not conclusive. See, e.g., Rivcom Corp., supra; Abatti Farms, Inc., supra, 3 ALRB No. 83; Canton, Carp's, Inc., supra.

Here the work forces of the companies were separate, and performed different functions. Holtville Farms inherited its original complement of workers from Growers Exchange, but after that

there was no interchange of employees. And, in major aspects, the labor relations policies of the two companies were distinct. Basic employment conditions for agricultural workers at Growers Exchange were established by its contract with the UFW, while Holtville Farms refused to bargain with the union.[38/] Different people, Stoll at Growers Exchange and Chell at Holtville Farms, were responsible for labor matters at their respective companies in the first instance, and neither exercised any control over labor relations or employment conditions at the other company.

Actual working conditions were not dissimilar, however. Basic employment terms at Holtville --wages, holidays and vacations—were drawn from the same master UFW contract that set them for the Growers Exchange fieldworkers, the seniority systems at

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38. Respondents argue that the labor relations policies of the companies are totally distinct because they had a "Jekyll-Hyde" approach toward the UFW, implying that Growers Exchange was affirmatively pro-union while Holtville resisted unionization. (See Holtville Farms' post-hearing brief p. 53, Growers Exchange's post-hearing brief at pp. 25-26.) Even though Growers Exchange did not challenge the union's certification and entered into two union contracts, other evidence contradicts the suggestion that their relationship was totally amicable: the testimony of Alberto Gonzales indicates that the company vigorously opposed early UFW organizational efforts; even though, as Hal Moller testified, the company voluntarily granted access to UFW organizers in 1977, it denied access during a strike in 1979 (Growers Exchange, Inc., supra, 8 ALRB No. 7); and it had been a member of a group of employers found to have bargained in bad faith with the UFW during the negotiations that generated that eleven-month strike (Admiral Packing Co., supra, 7 ALRB No. 43 [the allegations against Growers Exchange itself were dismissed because it reached a contract settlement before the ALO's decision issued, id., ALO opn. p. 5, n. 5]).

No finding on the issue is required. Assuming arguendo that the characterization of the companies' respective labor policies as "Jekyll-Hyde" is correct, the common control of those policies supports the finding of a single employer nonetheless.

the two companies were basically identical, and Holtville fieldworkers participated in the same pension and medical plans as the non-union employees at Growers Exchange. See Louis Delfino Corp., supra, 3 ALRB No. *2,* slip opn. at p. 3, where the fact that each of four ranches had the same "Master Agreement" with the Teamsters Union, "and thus [had] identical terms and conditions of labor," was one reason for Considering the four a single employer.

More significantly, the three principals had final control over all labor matters, and actively exercised that control. They made the decision to join Holtville employees with Growers Exchange non-contract employees in common benefit plans. At Growers Exchange, Stoll reported to and took direction from them, and the union contract he administered was negotiated under their direction and ratified by them. At Holtville Farms, employment decisions were made in consultation with or subject to at least tacit approval by Moller, and basic decisions about labor policies were made by either him or Lee. Neither Stoll nor Chell had a free rein to establish labor policies for his own company. (See Local 627, Operating Engineers v. NLRB, supra, 518 F.2d 1040, 90 LRRM 2321, 2324 n. 10.) The principals' control of labor relations policies was not merely potential, as the respondents argue, but actual. (See Gerace Construction, Inc., supra, 78 LRRM at 1368.)

Separate policies and the absence of employee interchange do not preclude a finding of single employer status. Rivcom Corp., supra, 5 ALRB No. 55; Canton, Carp's, Inc., supra, 125 NLRB 483, 45

LRRM 1147 (1959).[39/] The board found two companies to be a single employer in a situation like this, where one had a union history and the other did not. Abatti Farms, supra, 3 ALRB No. 83. Variances in local conditions will not defeat application of the single employer principle were there is overall control of critical matters at the top level. See Rivcom Corp., supra; Sakrete of California, Inc. v. NLRB, supra, 56 LRRM at 2331.

In sum, there was common ownership and financial control of Holtville Farms and Growers Exchange. Their primary operations as farmer and harvester-shipper were functionally integrated, their finances were intertwined, and they shared, in varying degrees, offices and office personnel, bookkeeping and accounting services, and legal representation. Although they were separately managed and had different labor policies, local authority was limited; management and labor relations overlapped and at the top level were actively controlled by the principals. The two companies do not operate at arm's length, as unintegrated enterprises. Separate in name only, Holtville Farms in fact functioned, as Hal Moller said, solely for the benefit of Growers Exchange. They should be considered a single employer.

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39. In NLRB v. Welcome-American Fertilizer Co., supra, 443 F.2d 19, 77 LRRM 2064, 3007,the absence of employee interchange was not as significant as respondents imply (see Holtville Farms' post-hearing brief at pp. 48-49, Growers Exchange's post-hearing brief at p. 23). Other factors absent here contributed to the court's holding that a parent company and its subsidiary were not a single employer, including competition by the subsidiary with outside companies for the parent company's patronage and the absence of substantial ownership or financial control of the parent company by the directors and officers of the subsidiary.

Gilbert Chell and Kal-Ed

Having concluded that Holtville Farms and Growers Exchange are a single employer, I consider now whether the remaining respondents, Gilbert Chell and Kal-Ed, Inc., are part of the same entity. Although some factors suggest an integrated enterprise, ultimately the evidence fails to establish one. The Growers Exchange-Holtville Farms entity played such a substantial role in providing labor for Chell's enterprises, however, that it should be considered the primary employer of Holtville's employees even when Chell or Kal-Ed was their nominal employer.

Chell's farming enterprise and Kal-Ed, the equipment company, do constitute a single integrated employer. Chell is the sole owner of his farming operation, and he and his wife are the only stockholders, officers and directors of Kal-Ed, Inc.; the corporation was formed solely from assets previously owned by Chell, to perform functions he previously performed as a sole proprietor; it provides agricultural equipment for Chell's farming operation; and he alone manages the operations and controls the labor relations of both enterprises. Thus, common ownership and financial control, common management, interrelation of operations, and centralized control of labor relations are all present.

Functionally, Chell and Kal-Ed operations were substantially integrated into Growers Exchange and Holtville Farms. Chell leased farm land to Holtville, and to Growers Exchange before it. For several years he grew lettuce exclusively for Growers Exchange, under farming contracts that were virtually identical to

the early contracts between Holtville and Growers Exchange.[40/] &s a commission salesman, he sold fertilizers and pesticides to both companies.

Virtually the only paying customers of Kal-Ed were Growers Exchange and Holtville Farms. Kal-Ed equipment was used to prepare land for Holtville Farms, and to pull harvest equipment out of the fields for Growers Exchange. Kal-Ed was not their exclusive supplier of heavy agricultural equipment, but other suppliers were used only when Kal-Ed could not fill the need. Workers to drive and service the equipment, as well as supplies like fuel, were provided by Holtville Farms.

Chell also used Holtville workers and equipment on his own crops, lettuce and non-lettuce. His lettuce was planted, cultivated, spiked and sprinkled by Holtville Farms, operating like an independent contractor. Irrigators regularly employed by Holtville but temporarily placed on Chell's payroll irrigated his lettuce, Sudan grass and wheat as part of their regular

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40. The general counsel protests that Chell grew lettuce at no cost to himself (see the post-hearing brief at p. 32); that, however, is the essence of a farming contract. &s mentioned above, the contracts with Chell are identical in their terms to the company's farming contract with a third pary, Glen Shumard, about which there is no allegation of impropriety. The general counsel also complains that Growers Exchange paid for irrigation water for Chell (brief at p. 26), but water is a standard growing expense.

The general counsel claims (also at p. 26) that Growers Exchange paid the rent for land Holtville Farms leased from Chell, but the cited evidence does not support the assertion. The only invoice for land rent (GCX 148:186) is to Chell from Growers Exchange, and is for land that had been farmed by Holtville but leased in the name of Growers Exchange (see GCX 74). The land was being subleased to Chell for the remainder of the leasehold, after which Chell was to lease it directly from the owner.

rotation. Other Holtville employees on occasion planted and cut his Sudan grass, cut and raked his alfalfa, and cleaned his ditches. Holtville employees also drove Kal-Ed equipment when it was used on Chell's land. Apart from the labor on his lettuce, which he passed on to Growers Exchange as a growing expense, and the other work done by the irrigators while on his payroll, Chell compensated Holtville for the use of its workers, equipment and supplies only with informal loans of Kal-Ed equipment.

Chell utilized Holtville 's facilities in his operations in other ways, as well. When Holtville employees worked for Chell or Kal-Ed, Holtville field foremen assigned them, supervised them, kept their time, and distributed their paychecks. The Holtville office worker helped prepare paychecks, payroll records, and invoices for Chell and Kal-Ed, and Chell used the telephone in the office to conduct his own business.

In addition to the significant degree of functional integration, common management of Chell's enterprises and Holtville Farms is present, most notably in the person of Chell himself. As general manager of Holtville, Chell was the key to its interconnections with his businesses. He determined the farming company's needs for the fertilizers and pesticides that he supplied, and for the heavy equipment that Kal-Ed supplied. He authorized the use of Holtville workers, equipment and supplies in his own enterprises, and on Holtville 's behalf set his own payment terms, including the in-kind payments of loans of Kal-Ed equipment. He was frequently able to make arrangements for his own non-lettuce crops as he and Hal Moller made them for Holtville's flat crops; thus, his

crops were often insured, harvested or marketed in the same manner as Holtville's. As Kal-Ed's overseer, Chell also set the terms for the use of its equipment by Holtville Farms and Growers Exchange.

On the other hand, while Chell had sole authority over his own enterprises, his authority at Holtville Farms was limited by Moller's supervision and veto power and by all three principals acting as the board of directors. And although Chell acted as an agent of Growers Exchange on occasion, he had no authority to make decisions for it and was uninvolved in its management. When the three principals decided to close Holtville, Chell was not consulted about the decision. He himself was damaged by it, losing his job, a lessee, a major Kal-Ed customer, a fertilizer and pesticide customer, and a source of readily available labor. Conversely, no one else at Growers Exchange or Holtville Farms participated in the management of Chell's enterprises, except for the Holtville field foremen who supervised the workers.

Unlike Holtville Farms, Chell did not farm exclusively for Growers Exchange. Growers Exchange had no interest in his crops, and until 1978 he had grown lettuce for other shippers. Also unlike Holtville Farms, records for Chell’s enterprises were not kept in the centralized accounting system maintained by Growers Exchange, except as regular accounts. Chell's tax returns were prepared by his own accountant and he had separate legal representation.

Most important, no common ownership or financial control links Chell and Kal-Ed with Growers Exchange-Holtville Farms. The employment contract provision that gave Chell a percentage of

Holtville's profits on top of his salary was an employment bonus, not a proprietary interest. Chell is not *a* shareholder, officer or director of the larger entity, and its principals do not have any proprietary interest in his businesses. The concerns are financially independent of each other as well, except in the sense of being each other's customers and suppliers.

In sum, then, the absence of common ownership, financial control and top-level management precludes Chell's enterprises from being considered a single employer with Growers Exchange-Holtville Farms. Nevertheless, Growers Exchange-Holtville Farms played a major role in the provision of labor for Chell and Kal-Ed.

With few exceptions, notably members of Chell's own family, Holtville employees constituted the work force for Kal-Ed and Chell's farm. Most of the time they remained on Holtville's payroll, but regardless of payroll, working for Chell or Kal-Ed was little different than working for Holtville: the workers were still assigned and supervised by the Holtville field foremen, who still kept their time and distributed their paychecks; they performed the same kind of work with the same equipment; they received the same rate of pay, although not the same fringe benefits. Except for their work on Chell's flat crops, the labor they performed continued to benefit Growers Exchange-Holtville Farms, since it acquired Chell's lettuce and was the major customer for Kal-Ed's equipment. Chell was able to utilize Holtville's work force in such a manner only because of his position as Holtville's general manager.

On balance, based on the whole activity of each, even when Chell or Kal-Ed was their nominal employer, Growers

Exchange-Holtville Farms provided a more stable bargaining relationship for Holtville employees. Consequently, it should be considered their primary employer. (See San Justo Farms, supra, 7 ALRB No. 29; Joe Maggio, Inc. (1979) 5 ALRB No. 26; Saticoy Lemon Association, supra, 8 ALRB No. 94, ALO opn. at pp. 20-22.)

Procedural Contentions

The respondents assert several reasons for not finding them to be a single or joint employer, regardless of their interrelationships. The contentions of Gilbert Chell and Kal-Ed that they were not named in or served with any of the charges, or designated as an employer in any certification of a collective bargaining representative issued by the board, are moot, since they have not been found to be part of the employing entity. The charges against them should be dismissed.

Growers Exchange contends that it would be denied due process of law, because until the present proceeding it had no notice of any claimed bargaining obligation with respect to Holtville Farms employees. The grower-shipper was first named as a party in this proceeding in the third charge as amended (No. 81-CE-26-1-EC); in the initial Complaint it and Holtville Farms were alleged to be "joint employers and/or alter ego [sic]." The union never formally demanded that the company bargain with it about Holtville Farms employees.

This is not the first time the issue of Growers Exchange's relation to Holtville employees has been raised, however. In 1975 the UFW objected, unsuccessfully, to the certification of the

Teamsters as the Holtville representative on the grounds that the bargaining unit was inappropriate, since Holtville was actually a part of Growers Exchange. In its 1977 contract negotiations with Growers Exchange, and again in the 1979 negotiations, after it was certified as the Holtville representative, the UFW took the position that the Growers Exchange contract should cover Holtville employees as well, but dropped it before an agreement was reached. As part of the 1979 contract settlement, unfair labor practice charges and related complaints alleging a joint employer relationship between the companies were withdrawn or dismissed.

It has long been accepted that notice to one entity which is part of *a* single or joint employer constitutes notice to the other entity or entities. See, e.g., Perry Farms, Inc. v. ALRB (1978) 86 Cal.App.3d 448, 466, affirming in pertinent part (1978) 4 ALRB No. 25; Ace-Alkire Freight Lines, Inc. v. NLRB (8th Cir. 1970) 431 F.2d 280, 75 LRRM 2020; Bagel Bakers Council of New York (1976) 226 NLRB 622, 94 LRRM 1292, enforced (2d Cir. 1977) 555 F.2d 304, 95 LRRM 2444; Barrington Plaza and Tragniew, Inc. (1970) 185 NLRB 962, 75 LRRM 1226, enforced as modified sub nom. NLRB v. Tragniew (9th Cir. 1972) 470 F.2d 669, 81 LRRM 2336; Esgro, Inc. and Esgro Valley, Inc. (1962) 135 NLRB 285, 49 LRRM 1472.

Growers Exchange relies on the decision in Alaska Roughnecks & Drillers Association v. NLRB (9th Cir. 1977) 555 F.2d 732, 95 LRRM 2965, cert. den. (1978) 434 U.S. 1069, 97 LRRM 2747, denying enforcement to Mobil Oil Corp. (1975) 219 NLRB 511, 90 LRRM 1075. There the board held that Mobil Oil unlawfully refused to bargain with the certified representative of employees of a

subcontractor that performed drilling operations on Mobil's offshore drilling platform. The holding was based on the board's finding that Mobil was a joint employer, primarily because of the control it exercised over the subcontractor's employees. Mobil had not been .named in the certification process and no bargaining obligation on its part had been claimed until after it terminated its agreement with the subcontractor. The Ninth Circuit declined to enforce the board's order, holding that since Mobil had no notice or opportunity to participate in the representation process, it was entitled to rely upon the board's certification naming only the subcontractor as the employer. Growers Exchange claims that, like Mobil Oil, it did not have timely or adequate notice that it could be required to bargain about Holtville's employees.

Alaska Roughnecks is distinguishable on its facts. Here the union repeatedly claimed, with both the board and Growers Exchange, that the company had a duty to bargain with it about Holtville Farms, whereas no bargaining obligation was claimed in Alaska Roughnecks until the refusal to bargain charge. Citing Ace-Alkire Freight Lines, Inc. v. NLRB, supra, 431 F.2d 280, 75 LRRM 2030, the court concedes that its result might be different had Mobil been approached by the union earlier. (Alaska Roughnecks, supra, 95 LRRM at 2969.) In Ace-Alkire, the joint employer's contention that it should not be required to bargain because it had never been formally served with a bargaining request was without merit, because it knew the union claimed to represent its employees and was seeking to bargain with it. (Ace-Alkire, supra, 431 F.2d at 282; also see Sun Maid Growers v. NLRB (9th Cir. 1980) 618 F.2d 56,

104 LRRM 2543, 2545.) Growers Exchange cannot maintain that it was unaware of the UFW's position.

Moreover, Alaska Roughnecks involved a joint, not a single, employer. Where entities are basically independent even though involved in a joint enterprise, depending on the circumstances notice to one entity might not be adequate notice to the others, but where the entities are in essence one, as Growers Exchange and Holtville Farms are here, notice to one company should be adequate notice to the entire employer.[41/] In the latter situation, the unacknowledged portion of the employer has constructive if not actual knowledge of the claims against it by virtue of the common ownership and management that link it to the nominal employer. To hold otherwise would place a premium on the successful concealment of the connections between companies, for if a close identity were kept hidden through the certification process, then the aggregate employer would evade any obligation toward its constituent's employees or their representative.

Holtville Farms and Growers Exchange also contend that the

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41. See Coastal Growers Association (1981) 1 ALRB No. 9, slip opn. at p. 13, n. 3 (majority decision reconsidered and affirmed (1982) 8 ALRB No. 93), where Member Ruiz, dissenting, distinguishes Alaska Roughnecks, supra, 555 F.2d 732, on the ground suggested here, namely, that in the case before the board the respondents were not "separate entities" as they were in Alaska Roughnecks. (Alaska Roughnecks was an alternative basis for the IHE's recommendation and was not commented upon by the board majority, which adopted the recommendation on its primary ground.)

Respondents here suggest that the union should properly have pursued its position by way of a unit clarification proceeding, a way precluded in Coastal Growers Association, according to the IHE's reasoning, by the absence of notice of the original certification proceeding.

UFW is precluded from asserting that the two companies are a single employer because it previously recognized separate certifications for each company.[42/] They argue that the union 'knowingly acquiesced in the status of Holtville Farms as a separate entity when it attempted during contract negotiations with Growers Exchange to have Holtville employees included in the bargaining unit, but settled for contracts that did not cover the Holtville workers.

The argument implicitly assumes that separate certifications and a single employer are incompatible: that is, that a single bargaining unit necessarily follows from a finding that the two companies constitute a single employer. In fact, however, the two issues are quite distinct, as is clear in the case on which the respondents rely, A-1 Fire Protection, Inc. (1980) 250 NLRB 217, 104 LRRM 1370.

In A-1 Fire Protection, the allegation was that two companies, one which had a union contract and one which did not, had refused to bargain in violation of NLRA section 8 (a) (5), the equivalent of ALRA section 1153(e), by refusing to treat the employees of both companies as a single bargaining unit and refusing to extend the contract of the union company to the employees of the non-union company. The board had already held, and the court of appeals had affirmed, that the two companies were a single employer

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42. Respondents also argue in their briefs that the general counsel should be barred for the same reason, but their affirmative defenses to that effect were stricken. See RT XXXVII:14-16. Although different reasons were given there, the response given here regarding the union is equally applicable to the board and general counsel. (The affirmative defenses asserting a waiver by the union were not stricken on the mistaken assumption that a question of fact was involved.)

(A-1 Fire Protection, Inc. (1977) 233 NLRB 38, 96 LRRM 1440, aff'd in part sub nom. Road Sprinkler Fitters Local 669 v. NLRB (D.C. Cir. 1979) 600 F.2d 918, 101 LRRM 2014), and the issue on remand, the decision cited by the respondents, was whether the union had relinquished the very right upon which the alleged violation turned, the right to claim that employees of both companies were part of the bargaining unit covered by the contract with the union company. The board once again dismissed the refusal to bargain allegation, holding that the "clear and unmistakable waiver" standard was inapplicable because the union had no statutory right to represent the employees of the non-union company and thus had no right to waive, clearly and unmistakably or otherwise; and further, that the union had voluntarily agreed to the scope of the bargaining unit and had knowingly acquiesced in the existing "double-breasted" operation during contract negotiations. None of the opinions suggest that the union had relinquished its right to assert that the two companies were a single employer.

Similarly, in South Prairie Construction Co. v. Operating Engineers, Local 627, supra, 425 U.S. 800, 92 LRRM 2507, the Supreme Court affirmed the holding that two companies should be considered a single employer, but remanded the case to determine whether the employees of both companies were properly within the same bargaining unit. There, too, the refusal to bargain allegation turned on the appropriate bargaining unit, an issue that was not determined by the finding that the companies were a single employer. (425 U.S. at 805; see A-l Fire Protection, Inc., supra, 233 NLRB at 39.)

In the instant proceeding there is no allegation that the

appropriate bargaining unit is one which combines both Holtville and Growers Exchange employees, and none of the issues turns on that point. Since the companies operate in geographically noncontiguous areas, the scope of the bargaining unit is discretionary with the board, and separate certifications are not precluded. (See ALRA section 1156.2; Bud Antle (1977) 3 ALRB No. 7; Bruce Church, Inc. (1976) 2 ALRB No. 38.) Consequently, were one to assume for the purpose of argument that by its actions the union has condoned separate certifications and bargaining units for each company, it is still not foreclosed from asserting the companies' single employer status.[43/]

Finally, Growers Exchange and Holtville Farms argue that the UFW is barred from asserting that the companies are one because it has raised the issue previously and the charges have been dismissed or withdrawn. In 1975, when the UFW petitioned to have the Teamster election victory at Holtville Farms set aside on the grounds, inter alia, that Holtville Farms was improperly designated

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43. Another distinction between the present case and A-1 Fire Protection, supra, 250 NLRB 217, 104 LRRM 1370, is that there the union did not have the statutory right to represent the employees in question (the "crucial distinction," according to the board, 104 LRRM at 1373) while here the union does, since it has won elections and been certified as the representative of the employees of both companies. Consequently, if deciding whether the union had relinquished its right to claim that all the employees should be in the same bargaining unit were necessary, the "clear and unmistakable waiver" standard would apply since a statutory right is at issue (id.). The respondents have not met their burden of proving that the union expressly or by clear implication relinquished its statutory claim during contract negotiations, however, for the bargaining history establishes only that the union made and dropped the proposal, not that it consciously yielded its position. See Tocco Div. of Park-Ohio Inds. (1981) 257 NLRB 413, 414, 107 LRRM 1498; Equitable Gas Co. (1979') 245 NLRB 260, 264, 102 LRRM 1470 (ALJ decision).

as the employer, the executive secretary's dismissal of the petition was affirmed by the board without a decision on the merits. As part of the 1979 contract settlement with Growers Exchange, when the union withdrew all pending charges against the company, including some alleging a joint employer relationship with Holtville Farms, there is no indication that the union expressly agreed that its position was meritless or that it would not raise the issue again.

Respondents provide no authority or grounds, other than the bald assertion, for the proposition that by its conduct the union waived its right to reassert its claim in another proceeding, and the law is to the contrary. The withdrawal of dismissal of a charge is not an adjudication on the merits and does not bar subsequent adjudication by the board of the same or similar issues. NLRB v. Basic Wire Products, Inc. (6th Cir. 1975) 516 F.2d 261, 266, 89 LRRM 2257; American Laundry Machinery, Inc. (1982) 263 NLRB No. 131, 111 LRRM 1137.

Growers Exchange and Holtville Farms have not asserted any compelling reasons why they should not be found to be a single employer despite their relationship.

THE DECISION TO CLOSE HOLTVILLE FARMS

The Facts

The Shutdown

By the end of June 1981, the growing operations at Holtville Farms were dismantled and the workers were terminated pursuant to a decision by the three principals of Growers

Exchange-Holtville Farms[44/] to close the farming company before the 1981-1982 lettuce season. The date and scope of their decision are contested, as well as the reasons for it. In this section, factual determinations are made, first, about the decision-making process and the effect of the shutdown on bargaining unit work, and then about the proffered motives for the employer's actions.

Hal Moller testified that the three principals finally decided to close Holtville early in May 1981, after discussing the possibility in informal meetings since around the end of March 1980. He said that early in April 1981 they began to explore whether closing was possible and how it would be done. Later that month he instructed Gilbert Chell to find out whether Holtville could get released from two long-term leases (all the other leases were due to expire over the summer), and whether lessees could be found for the land the company owned. The decision to close was finally made when Chell reported in late April or early May that they would be able to dispose of the land. Implementation began on May 14, when Moller told Chell the company would no longer farm and authorized him to notify the employees,[45/] and the removal of farm equipment was begun. Another principal, Lael Lee, placed the decision to

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44. Hereafter, the word "employer" refers to the combined Growers Exchange-Holtville Farms entity.

45. The general counsel correctly points out (brief at p. 66) that Chell contradicts Moller by testifying that he understood from Moller that notices to the employees would be sent from Salinas. Nevertheless, Chell goes on to say that he told the foremen to tell the workers, and later he states that he directed foreman Larry Martinez to prepare a termination notice for the workers. The inconsistency about who was supposed to or did in fact notify the workers is not significant.

close around mid-May. The union was notified of the decision by letter dated May 27, 1981.

Gilbert Chell confirmed that Moller told him the principals were thinking of closing the company and asked him to explore how they might dispose of its land. At first he testified that this occurred in early May, but later he said Moller informed him of the closure in late April or early May. For several weeks Chell tried to put together backing for a "package" where he would manage a new entity, "Rodeo Ranches," that would lease most of what had been Holtville Farms for the cultivation of flat crops, not lettuce. The Growers Exchange-Holtville Farms principals were not among the potential participants in Rodeo Ranches.

After learning in mid to late June that the backing for Rodeo Ranches had dissipated, Chell testified, he arranged instead a transaction with La Brucherie, a local farmer and erstwhile contingent investor in Rodeo Ranches, where La Brucherie would lease all the property owned by Holtville and the property that he, Chell, had been leasing to Holtville (one of the expiring leases); La Brucherie would also replace Holtville as lessee on another parcel. According to Chell, he kept Moller posted on developments all along, but the Holtville Farms-La Brucherie lease was not finally prepared and sent to Salinas until late June. He also said that the arrangements to lease the property were completed in early May. The lease itself is dated June 30, 1981, but the evidence is unclear about when it was actually executed. "Rodeo Ranches" is typed in as lessee, but underneath, hand-written, appears "La Brucherie Ranch, Inc.," followed by "M.G. La Brucherie, Pres." Stands of alfalfa,

the only crop then growing, were conveyed to La Brucherie with the land.

Chell also confirmed that he was able to arrange the release of Holtville Farms from the other lease as well. That parcel and the other parcels on which the leases were expiring were leased out again by their owners without the participation of Chell and without the retention of any interest by Growers Exchange-Holtville Farms or its principals. The dates of the new leases are not in the record.

When terminations as a consequence of the shutdown commenced is not obvious from the record. Fieldworkers at Holtville Farms were laid off from January 20, 1981, through the end of June, in all the intervening months except March. Holtville's operations were seasonal in nature, however, and all but 20 or 25 year-round workers were generally laid off during the slow spring and summer months. None of the 1981 layoffs that occurred before May was shown to be due to anything other than the usual course of business.[46/] The parties stipulated, however, that some workers received termination notices when they were laid off; the earliest such

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46. Assistant foreman Carmelo Saldana testified convincingly that in March 1981 field foreman Larry Martinez discussed with him how to best reduce the work force if the company closed, with Martinez saying that the terminations should be gradual, to minimize problems with the union and the board. Martinez confirmed having such a conversation with Saldana, but could not recall when; he also testified that he was not actually told the company was closing until late May or early June 1981, although he suspected as early as February of 1980 that it might happen. In the absence of other evidence corroborating unseasonal layoffs in the spring, I conclude that while the conversation did occur as reported by Saldana, it was prompted by the suspicion that the company might close, and was unrelated to any layoffs actually happening at the time.

notice appears to have been given to Salvador Moya, who according to company records last worked on May 2.[47/]

The repair shop at Holtville Farms was closed around May 15. Some of Holtville's farming equipment was purchased for Kal-Ed by Gilbert Chell; he testified that he made the purchase with the intention of using the equipment at Rodeo Ranches. An invoice documenting the purchase is dated May 14, 1981. Chell's testimony that the equipment was old and in poor condition is uncontradicted, and the evidence does not support the general counsel's assertion that it was sold for less than its fair market value.[48/] The sprinkling equipment was sent to Toro Ranches and the remaining equipment was moved to Blythe, where, according to Lael Lee, efforts were being made to sell it. Lee and Moller both testified that security considerations prompted the move; the general counsel's contention that its purpose was to conceal continued use of the equipment by Growers Exchange is unsupported.[49/]

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47. See GCX 168-F, GCX 189. Moya's layoff is labelled "seasonal" in the payroll records but according to the same records he worked throughout the summer of the previous year. The hearing record is replete with contradictions about which employees were year-round and which were seasonal.

48. Holtville's invoice to Kal-Ed (GCX 101), which lists the purchased items and their prices, and a Holtville list of assets (GCX 100), which sets out market values as of July 31, 1980, are cited in support of the assertion, but the equipment on the list of assets was not correlated to the specific equipment bought by Chell and there is no evidence of the market value of any equipment at the time of the sale, almost a year after the asset listing was prepared.

49. The general counsel's assertion that the equipment was sent to Blythe Farms (see note 10, above), not some other place in Blythe is unsupported by any direct evidence and, in view of Lee's uncontradicted denial, is rejected.

By the first of July, Holtville was no longer farming. At the time of the hearing, its office was still open and Irene Reese continued to work there, but this situation was to end, Moller testified, when everything was cleared up. Salaries were still received by the three principals ($5,000 per year, paid semi-monthly), in addition to Reese. (What entity paid Reese is not clear: at one point Moller said it was Holtville Farms, but at another point he said he thought she might be on the payroll of Growers Exchange after June.) Along with the last of the farmworkers, Gilbert Chell and the Holtville field foremen were terminated at the end of June. At the time of the hearing a few Holtville workers had obtained short-term work with Chell or Kal-Ed. One foreman, Larry Martinez, had been hired by La Brucherie upon Chell's recommendation.

Holtville's corporate existence continues, but Moller testified that the only plans were for it to continue as a land leasing operation, not to reopen as a farming operation. Holtville employees testified that they had observed other, non-Holtville workers working on land and crops formerly farmed by Holtville, but apart from ownership of the land, neither Holtville nor Growers Exchange was shown to have any continuing interest in either land or the crops.

His plans to manage Rodeo Ranches having fallen through, Chell himself was unemployed. He had no further involvement with the land he had leased to La Brucherie, and Kal-Ed had not provided agricultural equipment for a fee on any land formerly farmed by Holtville. (Chell testified that he had lent equipment at no charge

to someone else, who used it on the land owned by Chell but now leased to La Brucherie.) Chell planned to continue to grow flat crops or lease out the land he himself had been farming. He hired an outside contractor to cut, rake and bale his Sudan grass, work that formerly had been performed on occasion by Holtville employees.

In June Moller had proposed a joint deal with Growers Exchange for a lettuce crop, but Chell had to decline because he could not afford the growing costs. At the time of the hearing he did not contemplate any future contractual relationship with Growers Exchange and had no plans to grow lettuce.

In late April or early May, Moller had begun to look for joint lettuce deals in the Imperial Valley for Growers Exchange for 1981-1982. Growers Exchange intended, he explained, to enter into joint deals with other farmers to replace the lettuce acreage formerly cultivated by Holtville Farms and Toro Ranches. (RT VII:71-72.) (Toro Ranches was being closed, as well as Holtville Farms. Its closure is discussed below.) Possible deals were being negotiated with three or four Imperial Valley farmers at the time of the hearing, Moller testified, but by its close all but one had fallen through.

The factual basis for the allegation that the employer subcontracted or diverted bargaining unit work is reduced to the joint deals Growers Exchange negotiated or attempted to negotiate to replace the lettuce formerly supplied by Holtville Farms. (The general counsel does not contend that any unlawful subcontracting occurred prior to Holtville's closure.) Moller's testimony about the employer's plans is corroborated by the offer of a joint deal to

Chell. As far as is indicated in the record, however, Chell did not contract to grow lettuce for Growers Exchange again, and no 1981-1982 lettuce deals were planned for the land Holtville had been farming. There is no prior history of lettuce contracts between Growers Exchange and the new lessees of Holtville Farms.

The employer retained no interest in the non-lettuce crops formerly cultivated by Holtville, and received no benefit from the labor performed by the new lessees other than indirectly, in the form of rent for the land it owned. Growers Exchange-Holtville Farms did not retain any interest in the land or crops farmed by Chell or the equipment owned by Kal-Ed, either, and it received no benefits from the labor performed on the crops or with the equipment.

Even though work formerly done by bargaining unit workers was still being performed, it was no longer performed under the direction or for the benefit of the employer, except for the joint lettuce deals. The legal effect of this situation is considered below, in the discussion of the bargaining obligation.

The general counsel contends that the decision to close Holtville was made in 1980, with the first step to implement it taking place when the pension plan was cancelled in September 1980; Growers Exchange states that it was made in late April 1981, and Holtville Farms places it in early May. The general counsel's claim is rejected because, even though the possibility of closing was under discussion in 1980, the only evidence indicating such an early decision is satisfactorily explained otherwise—the termination of the pension plan as a separate cost-cutting measure, and the early

1981 layoffs as the usual seasonal practice--and is outweighed by evidence pointing to a later date.

It is also clear that the decision was effectively made earlier than May 14, even though not officially announced until then. The sale of farm equipment to Kal-Ed is documented in the invoice of May 14 but must have been under way previously, for it is improbable that the equipment was selected and the terms negotiated all in one day. Nor is it likely that the removal of other equipment could begin without advance planning. Distribution of termination notices apparently started on May 2.

According to Holler's testimony, in early April the principals began to consider how to implement a shutdown, and soon thereafter Chell was asked to explore options for disposing of the land. From that point on, uncertainty about disposing of the land was the only reason for irresolution; otherwise, a firm decision had already been made. I find that although the decision was still revocable, it was effectively made on or before April 15, 1981.

Discrimination

The more crucial dispute is about the reasons Holtville Farms was closed. The general counsel contends that the farming operations were stopped for discriminatory reasons, while the employer maintains that the shutdown was prompted solely by financial considerations. Evidence supporting the general counsel's position is related first.

There is ample evidence of visible union support among the Holtville farmworkers. The UFW won the 1977 election by a 3-to-l

margin. Workers wore union buttons at work. Many attended union meetings, which were frequently held in company fields; sometimes, in fact, Chell or the field foremen informed workers that the meetings were to take place. Union supporters chosen as representatives by other workers met with Chell or the foremen at times to discuss work-related problems, and the supervisors knew that the spokesmen were delegated union representatives. On one occasion, Chell was presented with a letter signed by 21 workers requesting that he negotiate with the UFW on behalf of Holtville Farms. The company concedes that it had knowledge of its employees' union activities.[50/]

No direct evidence suggests that the company closed for anti-union reasons, but there is evidence *of* hostility toward the union. Credible testimony from various workers establishes that on numerous occasions during 1980 and 1981, Chell and the foremen made comments to the effect that the workers would be better off without the union, that they were "stupid" to support it, or that they should not pay attention to their "crazy" union leaders. In a conversation with assistant foreman Carmelo Saldana about how layoffs would be handled if the company closed, irrigation foreman Larry Martinez suggested that the workers should be terminated

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50. See Holtville Farms' post-hearing brief, p. 75. Some evidence of union support is disregarded: attendance at negotiating sessions, because it occurred after the company was closed; and a work stoppage during the 1979 UFW strike against Growers Exchange, because it is ambiguous. Some workers may have participated to avoid what they felt was an intimidating situation (see Holtville Farms, Inc., supra, 7 ALRB No. 15), while others wanted to demonstrate support for the strikers (see RT XIX:8-9, 23, 26-30 [Ambriz]; 50-52 [Cota]).

gradually to avoid problems with the union or "the state" (the ALRB).[51/] chell told two terminated employees that if the workers did not put too much pressure on the company, perhaps in one or two years it would farm again.[52/]

Further evidence of anti-union animus is found in the prior refusal-to-bargain decision, Holtville Farms, supra, 7 ALRB No. 15. There the Board found, based upon "numerous and serious" instances of illegal conduct, that the company's refusal to bargain was motivated by "a desire to delay, and to undermine the Union" (slip opn. at p. 13), and its bad faith warranted imposition of the make-whole remedy. The illegal conduct found to have occurred in 1979 includes attempts to promote a decertification drive, threats, promises of benefits, disparaging characterizations of union officials, unlawful interrogation, and a wage increase granted unilaterally, by-passing the union. Additional unilateral changes in working conditions, implemented more recently, are discussed below.

Employees also on occasion took their grievances to the local office of the ALRB. Sometimes they told Chell or the foremen they intended to go or had gone to the board even though no charges were filed. (Some incidents occurred after the decision to close the company, and are disregarded.) Workers testified against the

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51. See note 46, above.

52. The comment was credibly reported by Francisco Ambriz (RT XIX:19); other details about the conversation in which it occurred were corroborated by the other worker, Avelino Cota (sse RT XIX:76, 81-82), and by Chell, who also did not deny making the statement (see RT XXXVI:69).

company in previous board hearings, as well.

The general counsel also cites an incident in September 1980 involving *a* letter sent by some Holtville employees to Growers Exchange in Salinas. The letter contains various allegations of mismanagement of Holtville by Chell and the field foremen, and urges Growers Exchange to become better informed, but does not mention the union or refer to specific complaints about working conditions. It is unsigned, but the name and address of the writer's father, a known union activist, appear on the envelope. Hal Moller brought the letter to Holtville, where foreman Martinez, with Chell's knowledge and tacit approval, duplicated it and distributed copies to the workers, purportedly "so they could find out what's going on behind their own backs." (RT XXIX:169.)

On August 24, during the course of the hearing, another letter, signed by the three principals, was sent to all employees of Growers Exchange, with copies to their unions. The letter advised them that "if the issues raised in the hearing are not resolved soon, it may not be possible for Growers Exchange to enter into contracts with Growers in the Imperial Valley and elsewhere," resulting in "severe cutbacks in volume of operations - including large scale layoffs[.]" The letter stated that the company felt its employees "should be informed of the possible consequences of failure to resolve these issues in time." (GCX 165.)

Business Justification

The employer presented evidence of financial difficulties which, it contends, were the sole reasons for closing Holtville

Farms, Lael Lee testified that the poor financial condition of Holtville alone -- two bad crop years, lack of operating capital, a big debt to Growers Exchange--was the main reason it closed, and that Growers Exchange's own financial condition was not a major consideration. The testimony of Hal Moller differed. He said that the closure was precipitated by a series of bad lettuce years that affected Growers Exchange and Toro Ranches, as well as Holtville, and Growers Exchange was overextended and unable to borrow more money. "Something had to close down someplace. We had to tighten our belt. The whole operation—the three combined operations here, Holtville Farms, Toro Ranches and Growers Exchange[--]something had to give here ..." (RT VII:40).

Other evidence supports Moller's explanation.[53/] According to financial statements prepared by controller Don Mitchell, from its formation in 1974 until the 1980-1981 crop year Holtville Farms was modestly profitable: its income exceeded its expenses in every year but one (its net income ranged from $2,500 to $215,000 except for the fiscal year ending October 30, 1978, when it suffered a net loss of $30,000), and the company's retained earnings increased from $2,500 to $194,000 over the years despite dividend payments ranging

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53. The facts in this section are mainly drawn from the testimony of Hal Moller, Don Mitchell, and Wells Fargo loan officers Marshall Wix and Thomas Ferrari, in addition to the cited documentary evidence. Those witnesses generally corroborate each other, the inconsistencies among them are minor, and the major points of their testimony are uncontradicted. Corroboration for some points, can be found in the testimony of Chell (who, for example, confirms Moller's report of reduced lettuce acreage at Holtville Farms) or other witnesses. The analysis of the financial situation is also consistent, for the most part, with the testimony of certified public accountant David Harris, an expert witness called by the general counsel.

from $3,000 to $60,000 in four of the six years. Growers Exchange had not been doing so well, however. During the same period, according to Moller, Growers Exchange had its only profitable year in Imperial Valley lettuce in 1978-1979.[54/] This testimony is corroborated by status reports prepared by Mitchell, which cover all of Growers Exchange's Imperial Valley lettuce contracts, its joint deals with other farmers as well as its farming contracts with Chell and Holtville Farms. The reports show, before Holtville Farms was allocated its shared, net losses ranging from $68 thousand in 1977 to $1.5 million in 1980, except for 1979 (the year of the strike), when the deals produced a net income of almost $1 million.[55/]

The record contains relatively little evidence documenting the financial status of Growers Exchange operations outside the Imperial Valley, but what there is indicates that the company was not doing well elsewhere, either. A 1980 report by an outside auditor reveals that the company incurred a net loss of $5.6 million during the fiscal year ending March 31, 1980, and as of that date its liabilities exceeded its assets by almost $1.9 million. The

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54. Contrary to the general counsel's assertion (post-hearing brief at 84, fn. 54), Moller did not say Holtville Farms made a profit in one year only. His testimony about there having been only one profitable year was with reference to the Holtville Farms-Growers Exchange lettuce deals, not Holtville's overall operations. See RT VII:49.

55. The Holtville Farms financial statements (GCX 162) incorporate data on all its crops, not just lettuce, and the profit or loss on each is not shown.

It is interesting to note that in one status report, Holtville's lettuce is listed as Growers Exchange's "own" lettuce. (See GCX 163, p. 1.) In the status reports in general, no care is taken to differentiate between the interests of Growers Exchange and Holtville Farms.

auditor's report also confirms testimony by several witnesses that the company was in default on bank loan obligations totaling over $2 million, and states that "there are conditions which may indicate that the Company will be unable to continue as a going concern." (GCX 164.)

Beginning in 1979, because of the generally unfavorable lettuce market, officials of Wells Fargo Bank became concerned about the status of its loans to Growers Exchange. Early in 1980 they began meeting with the Growers Exchange principals and Don Mitchell to discuss how the company was going to repay the $2.3 million it owed on its line of credit. As a consequence of those discussions, several cost-cutting steps were taken: managerial, sales and office personnel who left were not replaced; travel, transportation, and vehicle maintenance costs were reduced; some vehicles were sold; and the proportion of wrapped lettuce, which has a higher profit margin in packing costs than unwrapped lettuce, was increased.

Most significantly, expenditures were reduced by reducing the company's investments in growing crops: lettuce acreage in the Imperial Valley, including at Holtville Farms, was reduced in 1979 and again in 1980; in Salinas in 1980 celery operations at Toro Ranches and a joint lettuce deal with another company were cancelled; and lettuce acreage in the Blythe and Huron areas was reduced. Moller estimated that the company reduced its lettuce acreage by 25 percent in the eighteen months preceeding July 1981.

Closing Toro Ranches (as well as Holtville Farms) was among the cost-saving measures discussed as early as March of 1980, and the principals decided to reduce the company's farming operations as

its land leases expired in 1980, rather than renew them. Toro's closing was gradual: one ranch was being farmed until the end of 1981 although lettuce was last grown in the summer of 1980, and at the time of the hearing, Moller said, the company's main function was as a lessor of agricultural equipment to other growers.

Nothing suggests that labor costs in the lettuce growing operation were a significant element of the employer's financial difficulties. The only evidence on the subject indicates the contrary. Gilbert Chell testified that Holtville's financial condition was not a consideration when decisions were made about wage increases, because labor costs were not a large percentage of operating costs. (RT XXXVII:55-56.)

Despite the cost-cutting measures, the financial situation did not improve substantially, and money was needed to finance the 1980-1981 Imperial Valley lettuce crop. Wells Pargo was unwilling to lend more money to Growers Exchange, since it had already borrowed to the limit of its line of credit and was in default, but it was willing to lend to Holtville Farms, if the farming company could realize enough revenue to service the loan. The amount Holtville received from its usual lettuce contract with Growers Exchange, 10 percent of the net profit, was inadequate, so the principals altered the terms of the contract between the companies to provide Holtville with an 80 percent interest in the crop.

The effect on Growers Exchange of altering its contract with Holtville Farms and otherwise reducing the scope of its business was to reduce its market exposure, which in turn reduced its need for credit. The other aspect of the bank's concern,

Growers Exchange's ability to repay what it had already borrowed, was to be addressed in a restructuring of its debt, a process that was still incomplete at the time of the hearing. The potential reduction in income for Growers Exchange from having a smaller interest in Holtville's lettuce crop was relatively insignificant in the broad scope of Growers Exchange's harvesting, selling and cooling operations,[56/] and would have little effect on the company's ability to repay its debt.

On the basis of the new contractual arrangement, the bank verbally committed itself in July or August 1980 to extend credit to Holtville Farms, although the plan was not actually implemented until February 1981. A line of credit was approved for $800,000, of which $300,000 was actually borrowed. The money was used, according to Mitchell, to pay bills incurred by Holtville Farms. The bank was repaid from the proceeds of the 1981 flat crops.

Unfortunately, the 1980-1981 season was another bad one for lettuce. The status report shows the Imperial Valley deals resulting in a net loss of $1.3 million. The impact on Holtville Farms, according to an interim financial statement, was a net loss of $1.2 million for the six months ending April 30, 1981, reducing the retained earnings with their $193,000 credit to a debit balance

56. Nothing in the record directly indicates the financial impact of Holtville's operations on Growers Exchange, but some information is available. In 1980, for example, sales of Imperial Valley lettuce (not limited to Holtville Farms) grossed $1.9 million (GCX 163, p. 2), about 9 percent of the total Growers Exchange revenue of $21.3 million for the fiscal year ending March 31, 1980 (GCX 164, p. 3).

of $1.0 million.[57/] The information provided by these reports is not complete. For example, the status report does not allocate proceeds or the loss from the lettuce deals among Growers Exchange and Holtville Farms, Chell and the other farmers, so the amount lost by each entity is not ascertainable. (In his testimony, Mitchell attributed the entire loss to Holtville Farms, but said it was more than the Growers Exchange board of directors could afford to continue to lose. RT XXIII:200-201.) Nevertheless, the general picture of substantial losses seems accurate enough.[58/]

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57. Mitchell testified that he did not prepare this interim statement until after the decision to close Holtville Farms had been made, but the status report on the Imperial Valley (GCX 163, p. 1) was available and was discussed at meetings about the decision. Since that report sets forth the scope of the loss, the fact that the details of its effect upon Holtville Farms were not calculated until later is of little consequence. (The general counsel points to an unexplained discrepancy in the retained earnings figures in the Holtville Farms financial statements: the balance of $194,188.96 reported as of October 31, 1980, is shown as $193,136.96 in the six-month report of April 30, 1981 (see GCX 162); for purposes here, however, a discrepancy of $1,000 in almost S200 thousand is insignificant.)

As evidence of Holtville's worsening financial condition, Mitchell points to a shift in the balance of payments between it and Growers Exchange during this six-month period, where Growers Exchange owed it $.5 million as of October 31, 1980, but by April 30, 1981, it owed Growers Exchange $1.1 million. The shift from an account receivable to an account payable is given little weight for several reasons: Holtville also had as of October 31, 1980, an unexplained accounts payable balance of $.5 million; since there are no other interim financial statements, there is no basis for comparing the $1.13 million figure with the usual state of affairs halfway through the fiscal year, in a seasonal business; and finally, Mitchell himself had almost total discretion over payments on accounts between the two companies, so the balance between them was subject to manipulation.

58. Growers Exchange and the general counsel both introduced market reports in their efforts to prove that particular crops were or were not profitable. I found the reports to be of

(Footnote continued----)

The effect of its Imperial Valley losses on the entire Growers Exchange operation is not detailed, but the available information indicates that overall Growers Exchange continued to lose money, albeit at a slower rate. As of October 1981, it had not yet made any payments on the $2.3 million it owed Wells Fargo.

This analysis of the financial situations of the companies is not inconsistent with the evaluation given by David Harris, a certified public accountant called by the general counsel as an expert witness. Harris wanted more information than was made available, but did not question the validity or accuracy (other than in minor details) of what he received. He testified that Growers Exchange appeared to be financially healthy at the end of its 1979 fiscal year. (Bank officer Marshall Wix confirmed that Wells Fargo was not concerned at that stage.) Harris was unwilling to express an opinion about whether Growers Exchange's 1980 losses were cause for alarm, but noted that by 1981 the company was beginning to turn .around, with losses smaller than they had been, though if the

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(Footnote 58 continued----)

little use: they contain information about prices but little about costs, and while the record as a whole contains generalized information about costs, it is devoid of details. Thus, for lettuce , for example, we may know the average 1980 F.O.B. price per carton in the Imperial Valley (GEX 9:19), but we do not know the cost to Growers Exchange of growing, harvesting, etc., the carton. Growers Exchange's estimating efforts (brief at p. 47) rely on overly broad generalizations. Growers Exchange, of all parties, was in a position to provide detailed information about its production costs, but did not do so.

Even though I do not endorse the particular figures provided, I do accept the unrebutted proposition that 1980 and 1981 were bad lettuce years for the industry in general and Growers Exchange in particular.

company were liquidated then its shareholders would not recover their investment.

He described both-Holtville Farms and Toro Ranches as generally profitable. The large 1980-1981 loss suffered by Holtville appeared to him to be caused by its changed contractual relationship with Growers Exchange; the different risk ratio resulted in significantly different net income for the two entities. Harris was not convinced that Holtville had to close, in spite of its heavy 1980-1981 loss, and suggested alternatives. One suggestion was that its farming contracts be restructured so as to be more favorable to Holtville Farms, but he was not specific about the terms he would consider more favorable. And while he expressed the opinion that Holtville appeared to be in a position to borrow working capital, he also was not asked and expressed no opinion about the necessity or manner of increasing the company's cash flow in order to finance credit extended to it. (Most of the other suggestions had had to do with cutting expenses by "streamlining" operations. Many had in fact been tried at Growers Exchange, if not Holtville.)

As has been mentioned, Moller testified that three of the four 1981-1982 Imperial Valley joint lettuce deals he negotiated for Growers Exchange had fallen through during the course of the hearing, and the fourth was doubtful. Moller attributed this to rumors about the ALRB proceedings, saying he had been told that the farmers backed out because they were afraid they might become involved.

On at least one occasion, however, Growers Exchange

apparently took the initiative in advising a farmer of its difficulties. According to a letter concerning the deal with Sam Etchegaray, the one farmer with whom Growers Exchange had an executed agreement for 1981-1982, Growers Exchange counsel[59/] had advised Etchegaray's attorney during the hearing that it might be unable to honor its commitment "'because of [its] present labor problems.[1]" Also in evidence is a letter from attorney William Macklin, who formerly represented Holtville Farms and appeared as its witness at the hearing, to other farmer-clients advising them not to enter into a deal with Growers Exchange while the case was pending, but there is no direct, non-hearsay evidence that farmers in fact withdrew from or declined to enter into deals with Growers Exchange as a result of hearing about the ALRB proceedings.

How Growers Exchange expected to finance its interest in those deals is very unclear. When asked, Moller minimized the problem (RT XLIV:130-131), but no concrete explanation was offered. Although its financial situation improved during the spring and summer of 1981, given its still outstanding debt to the bank, the prospects for new credit still looked bleak, as bank officer Wix indicated. As is apparent from the employer's sudden shift in its negotiating posture (discussed below), the rumors about ALRB proceedings and labor problems caused sufficient difficulty for Growers Exchange to become eager to settle this case. They also

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59. Ron Barsamian is identified in the letter as counsel for Growers Exchange. Although he and the company maintained throughout these proceedings that he represented Growers Exchange only in settlement discussions with the union and general counsel, this apparently was not always made clear to others. See the discussion above of overlapping attorneys as evidence of the single employer.

diverted attention from Growers Exchange's shaky financial condition.

The general counsel contends that mismanagement of Holtville Farms contributed to the employer's financial difficulties, but the reported incidents are relatively minor. At times irrigators and sprinklers were paid for full shifts when they accomplished their assigned tasks in less time. The union representative for the irrigators, Alfredo Mendez, was paid on occasion for time he spent driving around with the irrigator foreman, Larry Martinez, in Martinez's truck. Martinez testified that he found it convenient to discuss labor problems in this manner, while Mendez interpreted the practice as an effort to "buy" him. One time Claudio Val, the union representative for the sprinklers, was overpaid approximately $300; evidence from the employer establishes that the overpayment was inadvertant. Another time, according to Val, he and four co-workers were paid with checks from Holtville Farms for about a week's work spent cleaning and painting Gilbert Chell's house. Chell denied that this occurred, but Chell's denial was in his self-interst and I found Val, based on his demeanor, to be a credible witness in general? I therefore find that it did occur.

Nonetheless, even if these acts are properly characterized as mismanagement, their financial consequences could not amount to more than a few thousand dollars spread over several years, an amount too insignificant to have an impact on the general financial situation. I am also unpersuaded that, with the possible exception of Mendez's being paid for time spent riding in Martinez's truck,

they were done with the intent to "avoid union or ALRB interference."[60/]

Analysis and Conclusions

Whether the terminations of the Holtville Farms employees violates sections 1153(c) and (d) of the Act[61/] depends upon whether the decision to close the company was unlawfully motivated.

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60. See the general counsel's post-hearing brief at p. 98. The general counsel argues that Chell's personal gardener was paid by Holtville Farms, but Val's testimony establishes only that the same person worked as both a gardener for Chell and a sprinkler for Holtville and nothing proves that he was paid by the company for his work as Chell's gardener.

The general counsel also refers to the "callous" treatment accorded the letter sent to Growers Exchange advising of alleged mismanagement. (The incident is described above.) The letter, of course, is not competent evidence of the events represented in it. Arguably, sending the letter is protected conduct, and distributing copies of it to all the workers is intimidating and tends to interfere with the exercise of section 1152 rights. The possible section 1153(a) unfair labor practice was not alleged or fully litigated, however, and consequently I decline to find a violation.

61. Section 1153 states in pertinent part:

> It shall be an unfair labor practice for an agricultural employer to do any of the following:
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> * * *
>
> (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.
>
> * * *
>
> (d) To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under [the ALRA].

The same legal analysis applies to both sections. See Martori Brothers Distributors v. ALRB (1981) 29 Cal.3d 721; Bacchus Farms (1978) 4 ALRB No. 26, affirmed 115 Cal.App.3d 1005.

If the company was closed for lawful reasons, the accompanying terminations are not unfair labor practices.

The leading case on the subject of unlawfully motivated closings is the 1965 Supreme Court decision in Textile Workers v. Darlington Mfg. Co., 380 U.S 263, 58 LRRM 2657. The board of directors of Darlington, a corporation that operated a textile mill, decided to liquidate the corporation and close the mill immediately after an election narrowly won by the Textile Workers, following a campaign during which the company had threatened to close if the union won. The NLRB found that the mill closing was prompted by anti-union animus, and held the closure to be a violation of NLRA section 8(a)(3) (which is essentially identical to section 1153(c) of the ALRA). The board also found Darlington to be part of a single integrated employer, a group controlled through Deering Milliken & Co., a selling house that marketed the textiles produced by the mills.

Consequently, according to the national board, Deering Milliken could be held vicariously liable for Darlington's unfair labor practices or, alternatively, Deering Milliken itself had violated the Act by closing part of its business, Darlington, for a discriminatory purpose. Based in part on the determination that the closing was unlawful, the board also held that the company's failure to bargain over the closure violated NLRA section 8(a)(5) (the equivalent of section 1153(e) of the ALRA). Darlington Mfg. Co. (1962) 139 NLRB 241, 51 LRRM 1278. The court of appeals, denying enforcement of the board's remedial order, held that an employer has the absolute right to close part or all of its business regardless

of anti-union motives. (Darlington Mfg. Co. v. NLRB (4th Cir. 1963) 325 F.2d 682, 54 LRRM 2499.) The Supreme Court reversed the court of appeals and remanded the case to the board.

The Supreme Court held that an employer has an absolute right to terminate an entire business for any reason, including anti-union bias, but not a right to close part of an enterprise regardless of reason. Because a partial closing may have repercussions for the balance of the business, it violates section 8(a)(3) if motivated by a purpose to chill unionism in the remaining portions and if the employer may reasonably have foreseen that the closing will likely have that effect. (Darlington, supra, 58 LRRM at 2661.) The case was remanded for the board to determine whether Darlington's closure was intended to chill unionism at other units controlled by Deering Milliken.

The Supreme Court also makes it clear in Darlington that the criteria for finding that a business being closed is part of a larger enterprise where discriminatory motive may come into play, a "partial closing," are not as strict as for finding a single, integrated employer. Organizational integration is not necessary. A violation of section 8(a)(3) is made out if the plant or business being closed for anti-union reasons is controlled by people who (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed business, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in the remaining business; (2) act to close the business with the purpose of producing such a result; and (3) occupy a relationship to the

remaining business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities. (58 LRRM at 2661-2662.)

It is thus clear from Darlington that if Holtville Farms were an independent business that completely closed down, sections 1153(c) and (d) are not violated regardless of the reasons for the closure. Like the mill in Darlington, however, Holtville is part of a larger enterprise. Since Holtville and Growers Exchange are a single employer, the elements of "interest" and "relationship" with respect to the larger enterprise set forth in the first of the Darlington criteria are necessarily satisfied. (See Darlington, supra, 58 LRRM at 2662.) As it did there, however, the evidence here falls short of establishing the factors of "purpose" and "effect" embodied in the second and third criteria. (Ibid.)

The general counsel's reliance on evidence of anti-union animus at Holtville Farms is misplaced, since the requisite motivation for the violation in a partial closing is a purpose to chill unionism in the remaining portions of the business. Implicit in Darlington is the conclusion that an employer may lawfully close part of its business because of hostility toward union activities there, as long as no adverse impact upon unionization in other parts of the enterprise is intended. Nor may an adverse effect on workers in the remainder of the business simply be assumed. Even if the consequence of discouraging concerted activities is foreseeable, evidence of motivation aimed at achieving that effect is necessary. (Darlington Mfg. Co., supra, 58 LRRM at 2662.)

In considering the employer's purpose, little weight is

given the self-serving testimony about Growers Exchange's good relationship with the UFW. Growers Exchange stresses the fact that it has had contracts with the union, but neglects to mention that the recent contract was not achieved until almost a year after the previous contract expired, and then only after a long and bitter strike. The company was also found to have prevented union organizers from taking access during the strike, in violation of section 1153(a). (Growers Exchange, Inc., supra, 8 ALRB No. 7.) The argument that because of their union contract, Growers Exchange employees had nothing to fear from Holtville's closing is also unpersuasive. Unionism can be chilled not only by resisting certification of a representative or negotiation of a union contract in the first place, but also by discouraging strict enforcement of an existing contract or militant demands for a future one. Recent history throughout the country demonstrates that union contracts provide minimal protection from closings.

Indeed, Growers Exchange warned its own employees by letter that if the issues raised in this proceeding were not resolved quickly, the company anticipated severe cutbacks and large scale layoffs. A reasonable inference to be drawn from the letter is that perseverance by the UFW and the workers at Holtville Farms in the pursuit of their rights under the ALRA threatened the jobs of Growers Exchange employees, who would be well-advised to do something about it. The letter is evidence of possible adverse consequences for Growers Exchange employees from Holtville's shutdown. However, it was not sent until four months after the principals decided to close Holtville, and is not convincing

evidence of their motive at that time. Thus, while a chilling effect on Growers Exchange employees might be reasonably forseeable, evidence that Holtville was closed for that purpose is lacking.

The foregoing discussion has proceeded on the premise that an anti-union motive for closing Holtville has been established. I conclude, however, that while the evidence is sufficient for a prima facie showing of animus, the respondents have convincingly demonstrated that the shutdown was primarily for economic reasons, and would have occurred in the absence of protected activity.[62/] The immediate reason for closing was a shortage of operating capital; a less direct cause was the poor performance of Imperial Valley lettuce over several years.

Holtville's main function was to provide lettuce for Growers Exchange to harvest and market; the secondary crops were solely intended to make the farming operation more efficient. As the farming contracts with their 10-90 percent division of costs and profits demonstrate, the farming company depended upon Growers Exchange for operating capital. In 1980, Growers Exchange was seriously overextended and was unable to obtain further financing in its own name. Since the bank was willing to extend credit to Holtville if its revenue could be increased, the farming contract between it and Growers Exchange was drastically revised, so that the

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62. Where there is more than one possible explanation of employer action, once the general counsel has established a prima facie case, the burden of proof shifts to the employer to show by a preponderance of the evidence that the adverse action would have been taken even absent the protected activity. See Martori Bros. Distributors v. ALRB, supra, 29 Cal.3d 721; Royal Packing Co. (1982) 8 ALRB No. 74; Nishi Greenhouse (1981) 7 ALRB No. 18; Wright Line (1980) 251 NLRB 1083, 105 LRRM 1169.

farming company assumed 80 percent of the costs and profits.

As a consequence of the reallocation of the risk, Holtville Farms, not Growers Exchange, bore the brunt on paper of the $1.3 million lost on the Imperial Valley lettuce deals for 1980-1981.[63/] Ultimately, of course, it made little difference how losses or profits were allocated between the two companies, or which of them was the borrower of operating funds, because in the main the funds came from or went into the same pockets—or, in the case of default, from the same assets. For Growers Exchange, Imperial Valley lettuce had been a losing proposition in six of the last seven years, and a major contributor to its financial difficulties. Up to this point Holtville had been modestly profitable, but its profits had been realized from its flat crops and in spite of lettuce, its raison d' etre.

Holtville Farms was closed, then, because Growers Exchange could not get more credit and needed to reduce the demand for operating capital.[64/] Still faced with the obligation to repay

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63. The general counsel argues that the shift in contractual terms made it more likely that Holtville Farms would suffer a loss. This is not so, of course. The percentage of risk has to do, not with the likelihood of loss, but only with the allocation of profit or loss among the parties. As Don Mitchell pointed out, if the parties knew there would be no profit, they would not enter into the venture in the first place.

64. Growers Exchange admits that the 1981 loss to Holtville would not have occurred but for the difficulties with Growers Exchange's line of credit. (Post-hearing brief at pp. 50-51.) The general counsel points to the discrepancy between the company witnesses who suggest that they were urged by bank officials to close Holtville Farms (see RT 11:182; RT XXVII:110), and the bank officials who testified that they learned of the closing after the fact (RT XLIII:42-43, 116). Given that the principals were aware that the bank was unwilling to lend more money and wanted expenditures reduced, who actually was first to suggest that the company close makes no difference.

Growers Exchange's $2 million debt, the principals decided to shut down the fanning operation in order to decrease expenditures and even generate some funds by leasing its land and selling its equipment. They hoped to replace Holtville's lettuce with lettuce grown in joint deals, where Growers Exchange would put up only 50 percent of the costs, but where they would get even the lesser amount of financing was unclear.

Alternatives to closing Holtville may have existed, as the accountant called by the general counsel suggested, and the decision to close may even have been a poor one. But the issue is the motive for the decision, not its wisdom, and the board may not substitute its judgment for the business judgment of the employer. NLRB v. Kingsford (6th Cir. 1963) 313 F.2d 826, 52 LRRM 2555; NLRB v. Houston Chronicle Publishing Co. (5th Cir. 1954) 211 F.2d 848, 33 LRRM 2847. Growers Exchange did not manufacture its $2 million debt and a cut-off of credit in order to create a pretext for closing Holtville.

Other evidence besides the financial data supports the conclusion that the closure was chiefly motivated by economic considerations, not discrimination. After Holtville closed, Growers Exchange did not enter into new farming contracts that required it to put up all the growing costs, but it did offer Gilbert Chell, with whom it formerly had a. farming contract, a joint deal (which he turned down, because he lacked the necessary capital).

It also shut down the farming operation at Toro Ranches, where no union was involved. Although the decision was made a year earlier, the reason was essentially the same. Large sums of money

were needed to renew expiring land leases, and the bank was unwilling to extend more credit and insisting that expenditures be reduced. Similar treatment of the two operations, one with a union and one without, belies an intent to discriminate against the union operation.[65/]

In short, while there is evidence of employer hostility toward Holtville employees' participation in protected activity, there is little evidence that the decision to close Holtville was motivated by a desire to chill unionism in the remaining parts of the Growers Exchange enterprise as required by Darlington. (Textile Workers v. Darlington Mfg. Co., supra, 380 U.S. 263, 58 LRRM 2657.) Moreover, although being rid of the union was undoubtedly viewed as a bonus, the weight of the evidence convincingly establishes that the primary reason for closing down the Holtville farming operation was economic.

Since it was not unlawfully motivated, the permanent termination of the Holtville employees did not violate sections 1153(c) or 1153(d).

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65. The general counsel correctly points out that Hal Moller expressed more concern for the plight of the terminated non-union Toro employees than for the union members at Holtville. (Compare RT VII:39-40 with RT V:50-51.) Nonetheless, the assertion (brief at p. 86) that new jobs were found for the Toro employees is unsupported. David Martinez, cited by the general counsel, testified only that Barsamian told him the Toro employees had gotten jobs, but he did not remember Barsamian's saying anything about how they got the jobs. (RT XVIII:116-117.) There is no evidence that the two groups of workers were treated differently.

THE BARGAINING OBLIGATION

The Facts

Chronicle of the Bargaining Sessions

Growers Exchange, of course, did not recognize any obligation to bargain with the union about the employees of Holtville Farms, and until May 27, 1981, Holtville Farms flatly refused to bargain as well. On that day, however, Holtville attorney Larry Dawson sent the UFW a letter notifying it that the company was closing down and was willing to negotiate about the effects of the closure, but would not waive any arguments pertaining to the union's certification.[66/] Triggered by the letter, bargaining sessions occurred on thirteen days over the next three months, but ended fruitlessly. The issues raised are the scope of the respondents' bargaining obligation, and whether the parties at the table reached a legitimate impasse. If found to have engaged in surface bargaining, the respondents maintain as a defense that the union likewise did not bargain in good faith. The respondents also contend that the general counsel played an improper role in the negotiating process.

The chief negotiator for the union was David Martinez, UFW executive board member and regional coordinator. Larry Dawson initially represented Holtville Farms, but was replaced by attorney Ron Barsamian after the second session. Holtville was the only

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66. See GCX 116. The letter contains an allusion to a certification challenge pending before the board, but at the time it was written the board had already certified the UFW (Holtville Farms, supra, 5 ALRB No. 48) and had the refusal-to-bargain case (Holtville Farms, supra, 7 ALRB No. 15) under consideration.

company at the table at first, but Barsamian entered the negotiations with expanded authority. In addition to negotiating for Holtville about the effects of the closure, he was expressly authorized to explore possibilities of settling this litigation on behalf of all four respondents. He had authority to bind Growers Exchange, but with respect to Gilbert Chell and Kal-Ed, he was limited to conveying information and positions to and from Chell's attorney. From the reports of the meetings it is apparent that after Barsamian replaced Dawson, Growers Exchange was present at the bargaining table for all intents and purposes, in spite of limits on Barsamian[1]s explicit authority, and Chell and Kal-Ed were eavesdropping. Chell personally attended a few sessions but was generally unrepresented except for Barsamian's limited role.

In addition to Martinez, the UFW was represented at most meetings by Holtville ranch committee members, who did not participate in the official exchanges, and at a few sessions towards the end, by Ned Dunphy, from the union's legal department. Some of the latter sessions were also attended by Larry Dawson for Holtville Farms and Terry 0'Connor and Ed Stoll for Growers Exchange. The following synopsis is drawn from the testimony of the chief negotiators, Martinez and Barsamian, whose reports are in accord for the most part.

Responding to Dawson's letter within a few days, the union suggested that negotiations begin on June 5. Dawson replied that he needed more time to prepare, so the first meeting was arranged for June 15, 1981. At that meeting the union announced that it wanted to bargain about the decision to close Holtville as well as its

effects, but the company took the position, which it effectively maintained throughout the negotiations, that it had no obligation to bargain about the decision, which was already made and was irrevocable. The union also requested certain information and made its first "effects" proposal.

Consistent with its stated views that it was dealing with a joint employer and the decision to close Holtville was *a* mandatory subject of bargaining, in its first information request the union asked about: the relationships among six entities, Holtville Farms, Growers Exchange, Blythe Farms, Toro Ranches, Gilbert Chell and Kal-Ed, and the composition of their boards of directors; the lands on which "the company"[67/] had been or anticipated operating during 1979-1982, by locale, acreage and produce; acreages of leased land for the same period, and the identity of new holders of leases being surrendered; the disposal of farm equipment; plans for any of the entities to employ Holtville supervisors or recommend them for employment elsewhere; the identity of any successors or assigns to Holtville; whether any of the entities had operations in Arizona; whether Gilbert Chell was going to continue operations; any plans the company had for the future of Holtville's workers; the identity of all Holtville workers and their gross wages for the entire period they had worked; and the identity of workers entitled to payments

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67. In their testimony as well as, according to their reports, in the bargaining sessions, both negotiators repeatedly referred to "the company" without explicitly stating which entity or entities they meant. At times the identity can be inferred, but at other times it remains ambiguous, causing confusion on occasion between the negotiators themselves.

from the terminated pension plan and the amount due each.[68/] At either this or the following meeting, the union also asked for a current seniority list. There was no response to the information request at this meeting.

Regarding the effects of Holtville's closure, the union proposed that each employee received severance pay of $500 for each year of seniority, and that the company immediately pay to the workers the funds due from the terminated pension plan. The union also wanted the company to agree to notify any successors or assigns that the union represented the bargaining unit, and to give the union advance notice of successors or assigns. And the union proposed that the company assist the laid-off workers to find employment, with either related entities or other Imperial Valley employers, and that Holtville, if it resumed operations, or any successor rehire the workers on the basis of seniority.

In response, Dawson agreed only that the company would pay out the pension plan funds, although he could not say when, would provide letters of recommendation for the workers, and would not contest their claims for unemployment insurance benefits. At Dawson's request, any further response and the scheduling of the next meeting were postponed until after the superior court hearing on the general counsel's efforts to obtain an injunction.[69/]

Little was accomplished at the second meeting, held on June 30. Dawson took the position that the superior court chamber order

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68. The unilateral termination of the pension plan is discussed below.

69. See note 4 above, and the accompanying text.

issued the preceding week, which enjoined the company from proceeding to close without bargaining about both the decision and the effects, conflicted with the recently issued ruling of the United States Supreme Court in First National Maintenance. (First National Maintenance Corp. v. NLRB (June 22, 1981) 452 U.S. 666, 107 LRRM 2705.) He wanted more time to evaluate the company's legal position and decide whether to supply the information the union requested. Martinez reiterated the union's proposals and offered to consider any company proposals that would halt the actualization of the decision to close. Dawson again acknowledged the company's obligation to pay out the pension plan funds, but still did not know when the money would be available. He characterized the union's severance pay proposal as "unreasonable," and said that until the UFW made a reasonable proposal the company would have no response.

The record does not indicate how the following meeting on July 16 was scheduled. Beginning with this meeting, the employer was represented by Dawson's successor, Ron Barsamian. In the interim the board had issued its decision holding that Holtville's technical refusal to bargain was in bad faith and ordering it to make the employees whole. (Holtville Farms, Inc. (July 8, 1981) 7 ALRB No. 15). Consequently, Martinez wanted to expand the subjects under discussion to include contract bargaining and a make-whole settlement. He presented a slightly modified version of the UFW's standard information request for contract negotiations. Barsamian replied that the company would continue to refuse to bargain about a contract, because it was going to appeal the board's decision to the courts, but was willing to bargain about effects without waiving its

objections to the union's certification.

Consistent with this position, the only information Barsamian was willing to provide was that which he viewed as reasonably related to effects bargaining. Taking the position that the union had waived any argument it might have had about a joint employer, he also refused to provide information about any other entity.

Thus, in response to the union's initial request, the only information Holtville conceded was relevant was the identity of its own board of directors, information about each employee's earnings, future plans for the employees, and a seniority list. Barsamian told Martine2 who the members of the company's board of directors were. He told him that all Holtville employees were losing their jobs and were free to apply for employment with the other entities named by the union or with anyone else. Drawing back from Dawson's earlier offer of letters of recommendation, Barsamian also said that upon request by a worker or a potential employer, Holtville would provide information about the worker's employment history, including an evaluation of performance. (At a later meeting Barsamian also agreed that plans to employ Holtville supervisors were relevant, and advised the union that there were none.)

Without conceding relevance, Barsamian advised Martinez that Holtville Farms had no successors or assigns, and no operations in Arizona. He referred Martinez to Chell's attorney for information about Chell's plans. Regarding admittedly relevant wage information, Barsamian advised Martinez that the company had no calculations of gross earnings readily available but had given the

general counsel payroll records for 1978-1980. As he did throughout the negotiations, Barsamian also referred Martinez to the general counsel for information the employer declined to provide.

On severance pay, the union reduced its proposal from $500 per year of seniority to $450. In response, Barsamian, observing that the standard severance payment in California agriculture was around $100 for each year worked, made the company's first counterproposal: one week's pay, total, for each employee. He suggested that more money would be available, and more progress made on other aspects of the negotiations, if the union accepted the shutdown and surrendered any claims to reinstatement. He advised the union that the pension plan had been terminated as of May 1980[70/] and checks would be distributed in two to three weeks; a list of the workers entitled to payments, and the amounts, would be provided. Barsamian testified that he told Martinez at this meeting that the respondents were eager to settle this litigation because it was interfering with Growers Exchange's efforts to make joint deals for the 1981-1982 lettuce season.

At the fourth session on July 21 neither party changed its position regarding the appropriate subjects of bargaining or the information to be provided. Along with severance pay, the union demanded another amount comparable to what the company would have paid into the pension plan had it continued, since it had been

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70. The plan was actually terminated effective November 1979. (See discussion below.) Barsamian testified that his statement to Martinez was based on information provided by either Larry Dawson or controller Don Mitchell, and he later learned the date he had given was incorrect.

unilaterally discontinued without notice to the union. (This demand was not mentioned again, and apparently was dropped.) Martinez told Barsamian that the union believed bargaining unit work was being performed by non-union workers,[71/] but Barsamian denied it, asserting that no bargaining unit work was available. This led into a general discussion of current economic problems in the Imperial Valley, their impact on the company's decision to close, and the difficulty of finding replacement jobs. When Martinez remarked that he needed proof of the company's economic information, Barsamian asked what was wanted, and Martinez replied that he would have to find out. {The union never did request specific information about the company's financial situation.) Barsamian testified that he thought neither he nor Martinez was prepared to do any "nitty-gritty" negotiating that day.

Martinez announced that he was unavailable the following week, so the meeting ended without another being scheduled. An off-the-record meeting was held on July 31, but the next official session did not occur until three weeks later. The failure to meet was due to Martinez's unavailability; he was occupied by other union

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71. This was based on the reports by former Holtville employees that they had observed other workers perform functions on the same crops growing on the same land that they had worked on, but as discussed above, there is no evidence that the employer retained an interest in the crops. The suspicion that Holtville Farms was not in fact entirely closed was a constant undertone of the negotiations. The union's skepticism about the employer's intentions was also based, Martinez explained, on such factors as the union's long-standing belief that Growers Exchange had created Holtville and other farming companies in order to avoid the union, and the persistence in challenging the union's certification at Holtville. Many of the union's inquiries were intended to determine whether the farming operation was in fact shutting down or whether it would reappear in another guise.

business, especially an effort to obtain access to the property of a company in the Salinas area whose employees were on strike.

During the hiatus, attorneys for the respondents and the general counsel met to explore possibilities for settling this case. They discussed proposals for all the provisions of a settlement agreement except those covering the effects on the bargaining unit workers of Holtville's closure, a subject which, the participants agreed, was more properly within the purview of employer-union bargaining, not the settlement talks. Progress was made, and prospects for a settlement that would include the union appeared sufficiently promising to warrant recesses and continuances in the hearing, which had begun on July 22.[72/] By August 12, Holtville Farms, Growers Exchange and the general counsel had reached accord on most terms (apart from those concerning the effects of the closure), but still differed on two major provisions.

One difference concerned the geographical scope of the agreement: the general counsel wanted to bind the respondents' operations statewide, while the companies wanted their obligations under the agreement limited to the Imperial Valley. The second, more complicated area of disagreement was the scope of a duty to be assumed by Growers Exchange to notify and bargain with the union about growing agreements the company intended to enter. The general counsel wanted the company to have a duty to notify and bargain upon request whenever it entered into any type of third-party growing

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72. Portions of the transcript that contain reports on the settlement discussions were admitted into evidence (see RT XXXV:77-78, XLIX.:194, L:1) and are, along with Barsamian's testimony, the source of the account given here.

contract, including grower-shipper agreements or joint deals (which the parties had considerable difficulty defining), but the company, while professing a sensitivity to the concern that growing contracts could be used to undercut the union's position and divert bargaining unit work, insisted upon being able to continue its usual methods of operation unhampered by a potential bargaining obligation.

During the same period, after Martinez failed to keep a commitment to meet on August 10, Barsamian contacted Boren Chertkov, the General Counsel in Sacramento, to enlist his aid in getting the union to return to the table. In one or more of their telephone conversations, Chertkov indicated that if the union did not become available for bargaining within a reasonable time but the other parties reached agreement, he would be willing to approve a unilateral settlement (one to which the union was not a party) that would omit terms concerning the effects of the closure but would include an order directing the respondents and the union to bargain about them.

On August 12, a conflict between regional representatives of the general counsel and headquarters in Sacramento temporarily disrupted settlement discussions and the hearing.[73/] At the same

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73. See RT XII. The record does not contain competent evidence from which conclusions about the substance of the disagreement can be drawn, nor is it apparent that any such conclusions would be material or relevant. Speculation at the time and in the briefs (see e.g., Holtville Farms' post-hearing brief at pp. 154-158) about the nature and details of the disagreement is just that. Ironically, the union and the respondents each viewed the conflict as being in the interest of the other.

time Martinez again became available, and a period of intense bargaining began. Between the 12th and 20th the negotiators met every day but one, with late-night and multiple sessions on some days. (Barsamian's report that he and Martinez "literally" killed themselves (RT XIII:3) is a slight exaggeration.) Barsamian went to Salinas to meet on the 12th and 13th, and the remaining sessions took place in the Imperial Valley.

The bargaining became increasingly convoluted, with a proliferation of topics under discussion. The subjects on the table at one time or another included: the decision to close Holtville; the effects of the decision, including severance pay and reinstatement; back pay for alleged discriminatees, based on the union's claims that the closure was discriminatorily motivated and a sham, so bargaining unit work remained available; a collective bargaining agreement; a make-whole agreement to settle the monetary aspect of the refusal-to-bargain case already decided by the board; and a settlement agreement that would settle either this case alone or all of the above.

At the August 12 meeting, Martinez renewed the union's prior information requests and proposals. The union's severance pay proposal remained at $450 per seniority year; it also demanded an unspecified amount of backpay for discriminatory layoff. Martinez specified that the union wanted two years' guaranteed work for the Holtville employees and a collective bargaining agreement with the joint employer. According to Barsamian, this was the first time Martinez clearly said that the union wanted a contract that would cover all six entities (Toro Ranches and Blythe Farms, along with

the four respondents); Martinez testified that he believed he had made that clear all along. Barsamian told Martinez that Toro Ranches was closing down at the end of the current season.

To satisfy the make-whole award of the refusal-to-bargain case Martinez also stated, without specifying amounts, that the union wanted, for August 1979 to the present, the 22 per cent from Adam Dairy (a reference to the board's holding in Adam Dairy (1978) 4 ALRB No. 24, that in calculating a make-whole award, an amount representing fringe benefits, 22 percent of the total compensation, was to be considered), plus 2 percent to represent union dues; then 10 percent could be deducted for the workers who had qualified for the company's pension plan. Based on what workers told him, Martinez figured that Holtville pay rates were comparable to the Growers Exchange contract rates, except for cost of living adjustments, overtime pay and other differences in fringe benefits.

Barsamian responded that it was impossible to guarantee two years' work, and he would never agree to pay dues on top of a make-whole settlement. He argued that the pension fund payout, which he estimated at $150,000, was an unexpected cash benefit that should be taken into account in calculating the financial impact of the terminations on the workers. Barsamian testified that at this point, for the first time, he opened up decision bargaining by explaining to Martinez that Holtville could not operate because it could not get money from the banks, and it was open to any proposal the union might have, such as a loan from its pension plan, that could provide an alternative to closing. In his testimony, Martinez did not mention any discussion of this subject until a later

meeting.

Barsamian also told Martinez that the company did not have the money to pay both make-whole and severance payments, and proposed that the technical refusal-to-bargain case be left to the courts. Martinez replied that while he personally understood the company's position, the workers could not understand how pursuing its objections to the union's certification was not bad faith on the company's part. Barsamian suggested that the parties work on the non-economic portions of a settlement agreement for this case, based upon the accords reached with the general counsel, and leave the effects of the closure to a bargaining order in the agreement which, as part of a board-approved settlement, could be taken directly to court for enforcement--"a super duty to bargain," as he described it. The company's offer for severance pay was modified from a straight one week's pay for each worker to $25 for each year of seniority, with Barsamian making it clear that the amount could be increased if the union was cooperative about settling other issues.

Most of the sixth meeting, held on August 13, was spent discussing in detail the latest draft of the proposed settlement agreement. The union had major differences with the draft: it wanted the entire agreement applied to Toro Ranches and Blythe Farms, as well as the four respondents; it agreed with the general counsel that the scope should be state-wide, not limited to the Imperial Valley; it wanted acknowledgement of a contract embodied in the agreement, not just recognition of a duty to bargain if Holtville or a successor resumed farming; it wanted other entities that grew crops for Growers Exchange to observe the union contract

if they were controlled by the "joint employer" instead of Growers Exchange merely assuming a duty to bargain about third-party growing contracts; and it wanted the joint employer clearly obliged to bargain about, not just "discuss," any decision to partially close or subcontract work, as well as the effects of any such decision. At a later meeting Barsamian agreed to this last position, but the others remained in contention.

For a collective bargaining agreement, Martinez proposed the master contract the union already had with Growers Exchange, with modifications similar to local supplements to be bargained as needed for the different segments of the joint employer. He and Barsamian discussed the difficulty of defining when Growers Exchange had sufficient control over a farming entity to warrant application of the contract. Barsamian asserted that the company would be at a competitive disadvantage if it had to bargain with the union about grower-shipper deals before entering into them, but would be willing to give the union notice of such deals after they were signed.

At this meeting, Barsamian also gave the first estimates of the aggregate value of the current severance pay proposals: assuming a total of 160 years of seniority, which he said he estimated by approximating the number of years worked by each of the former employees named in the complaint, he calculated that the UFWs proposal of $450 per year would cost $72,000, while the employer's proposal of $25 per year would cost $4,000. Barsamian asked if the union would consider deferring payments, and Martinez responded that it would, depending on the amounts involved.

The seventh meeting took place in Calexico on Saturday,

August 15, with Larry Dawson, Gilbert Chell and the workers' committee in attendance along with Barsamian and Martinez. Barsamian complained about the absence of Ned Dunphy of the UFW legal department, whom he had expected. The difficulty of defining the third-party growing contracts that might be subject to notice or a duty to bargain and the problem of jobs for the Holtville employees were again discussed without resolution. Harvest jobs with Growers Exchange, suggested by Barsamian, were of little interest to the workers because the jobs required traveling; to Martinez's suggestion of jobs with other Imperial Valley farmers, Barsamian responded that the employer could not provide them because the farmers, not Growers Exchange, were responsible for employing the non-harvest workers.

There was movement at this meeting on the severance pay proposals. Barsamian increased the company's offer from $25 to S40 for each year of seniority, and Martinez reduced the union's demand to $425 per year. Martinez also put forward tentative figures for settling other aspects of the dispute: $68,000 for back pay in this case and $35,000 for the make-whole award in the refusal-to-bargain case. He explained that the later figure was based on representations Barsamian had made about the general counsel's valuation of the award. No one changed positions on other issues. After some discussion about each side's waiting for the other to make substantial movement, Barsamian increased the company's severance pay offer to $50 per year, for a total of $8,000 based on his estimate of 160 seniority years.

The parties met again the following day, Sunday the 16th.

In a discussion of the contract demand, Martinez explained that the union wanted a contract with Holtville Farms so the workers would be protected if the company or a successor resumed farming. Barsamian said he did not think getting a contract with Holtville would be difficult, but he questioned the value of one, since in his view it would not be legally binding on successors, who would in any case be obliged to bargain by the proposed settlement agreement; furthermore, there were no jobs anyway.

Barsamian reported that the total of the pension plan distributions was close to $115,000, an amount, Martinez pointed out, that was substantially lower that Barsamian's earlier figure of $150,000 and included payments to Gilbert Chell and the company principals. (Barsamian testified that he had been misadvised about the amount, by Hal Moller he thought.) Martinez still wanted a list of recipients and amounts, which Barsamian provided the next day.[74/] There was another fruitless discussion about jobs.

Later in the meeting, Barsamian made a package proposal: severance pay for each employee of $75 per year of seniority, for an estimated $12,000; no settlement of the refusal-to-bargain case; acceptance of the settlement agreement in this case, which would require Holtville Farms or any successors to bargain for a contract in the future but would not require successors to assume a contract; job recommendations and assistance with unemployment insurance for

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74. Martinez, apparently confusing the final accounting with another accounting given him by a worker, testified on rebuttal cross-examination that he did not receive a final accounting from the company (RT XLIX:144), but that contradicts his own testimony on direct examination (RT XVIII:176) as well as Barsamian's.

employees, but no job guarantees; and distribution of a small amount of interest, $1,000 or so, remaining from the pension fund. Barsamian told Martinez that the company could not legally bind successors to assume a contract. If the package was unacceptable, bargaining on effects alone, apart from any settlement of the case, the company offered severance pay of $50 per seniority year. The union reduced its severance pay demand to $400 per year. Saying that the union had not made substantial movement, Barsamian removed the employer's package from the table.

The following day Barsamian and Martinez were joined by Larry Dawson for Holtville Farms and Terrence 0'Connor and Ed Stoll for Growers Exchange. Observing that company lawyers were available to go over settlement language, Barsamian again objected to Ned Dunphy's absence. Martinez replied that at Barsamian's request he had tried to get Dunphy there, but Dunphy's presence was not essential since he, Martinez, had authority to bargain on everything. Barsamian returned the package proposal of the previous day to the table,[75/] with a modification: the severance offer of $75 per year would be paid immediately, but the parties would also agree that negotiations could be reopened for more money if Growers Exchange generated money from its harvest operations or Holtville resumed farming.

From $400 per seniority year, the union modified its

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75. Barsamian testified that in response to his restatement of the package, Martinez explicitly stated for the first time that the union wanted a contract not just with Holtville, but with the joint employer. He previously testified, however, that this misunderstanding had come to light and been clarified at an earlier session.

severance pay proposal to $200 per year payable immediately and an additional $500 per year payable at the end of the 1982-1983 harvest. (Later the date of March 1, 1983, was specified.) Barsamian protested that the movement was actually an increase, but Martinez explained that the union did not view it that way: the employer got the use of the money for two years and the future payment would not be worth as much when received, because of inflation; and if the employer really was in dire straits, then the workers would never receive the second installment and would have given up half of their $400 demand. He observed that the offer responded to the employer's proposal of an initial payment coupled with possible future negotiations for more, only the union wanted the deferred payment be specified instead of left for future bargaining. Martinez also announced that the union was not relying on Barsamian's estimate of 30 workers with 160 years of seniority among them: he did not have an accurate seniority list but estimated that there were approximately 57 employees.

At a second session that evening, the parties reviewed a revised version of the proposed settlement agreement. Although the employer's official position was that those areas where agreement had been reached with the general counsel were final, Barsamian indicated they could be reopened if necessary to obtain a settlement with the union. Concerning the duty to notify or bargain about third-party growing agreements, the employer proposed inserting language from the current Growers Exchange-UFW contract, part of the so-called "grower-shipper clause" that permits the company to enter into any type of growing contract at will as long as it does not

"subvert" the union.[76/] The employer was also willing to give the union notice and copies of singed growing contracts, but only for Imperial Valley lettuce and only for a year. The union's reservations about the agreement were basically unchanged from the earlier discussion of the 13th. The parties also disagreed about the language of the preamble to the settlement and the duration for posting the notice to employees, with the union wanting 90 days, the company wanting 25, and the general counsel proposing 60.

When the negotiators resumed late that night for the third session of the day, the union modified its severance pay proposal; reducing the deferred payment from $500 to $300 per year and permitting the initial payment to be made in installments. The discussion focused on the treatment of growing contracts in the settlement agreement once again. Martinez agreed to the insertion of the language from the grower-shipper clause if it was modified to prohibit the contracts from circumventing the settlement agreement or resulting in the loss of bargaining unit work, but the union also wanted a provision extending the union contract to any farming entities "controlled" by Growers Exchange by virtue of its growing contracts. The union's proposals in some areas were reduced to writing and given to the company.

The following day, August 18, there were again several sessions. Ned Dunphy joined the other negotiators sometime during the day. Barsamian gave Martinez a written response to the union's information requests in which the employer reiterated its refusal to

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76. The employer proposed incorporating the first paragraph of article 38 of the contract, quoted below in note 81.

provide information it considered relevant only to bargaining for a contract or about the decision to close Holtville. With respect to information about the earnings of Holtville employees, the response advised only that the ALRB had been provided with quarterly reports (actually they were weekly payroll records) for 1978 through 1980. Verbally, Barsamian told Martinez that Holtville would try to provide gross wage information for the pre-1978 years and copies of W-2's for 1981, and that information necessary to compute a make-whole award might be forthcoming if settlement of this case appeared possible. Although it had agreed to do so, the employer had not yet provided a seniority list.

Declaring that the union was increasing its severance pay demand by enlarging the number of people assertedly entitled to it, Barsamian advised Martinez that the employer would not make another economic offer unless the union first provided a list of the people it contended qualified. Martinez replied that the union had never agreed to accept the employer's estimates, and was still unable to calculate the number of seniority years because Holtville had never provided a seniority list. Later that day Martinez gave Barsamian a list of 41 names of workers assertedly entitled to full payment for each year of seniority, and 14 more assertedly entitled to part payment. Based on this list, the union now calculated that back pay for the current case should be $90,000. Martinez also informed Barsamian that the union did not consider itself bound by the ALRB's valuation of the make-whole award and wanted substantially

more—over $400,000.[77/]

The parties reviewed their differences over the settlement agreement. Martinez explained that from the union's perspective, the shortcoming of the employer's current proposal about grower-shipper agreements was that it did not provide for the union contract to be extended to farming entities controlled by Growers Exchange. The union still maintained that Toro Ranches and Blythe Farms could legally be covered as part of the joint employer, but was willing to agree to their exclusion if, *as* Barsamian asserted, their inclusion would be illegal because they were not named as respondents and the union was not certified to represent their employees. Nothing was said by either party about how this issue might be resolved. No agreement was reached on other modifications the union wanted, including state-wide applicability, union contracts with Gilbert Chell and Kal-Ed, as well as Holtville Farms; and acknowledgment of the make-whole obligation from the refusal-to-bargain case.

The company had a new package proposal which would be withdrawn if any part was rejected: acceptance of the latest draft of the settlement agreement; settlement of all litigation, including the refusal-to-bargain case and the injunction proceedings in this case; letters of recommendation for Holtville employees; and a lump sum of $35,000 to be paid within 60 days, distribution of which

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77. Neither negotiator mentioned this figure in connection with this particular meeting, but it was given by Martinez in his rebuttal testimony as the tentative amount demanded at an unspecified time (see RT XLIX:135), and this appears to be the logical time for it. Martinez did not explain how the amount was calculated.

would be left to the union.

After a caucus, the union responded with some modifications of its own proposals. In addition to proposing language about the extension of the union contract to employer-controlled farmers, it dropped its demand for 7 percent interest on the make-whole award (but not the 2 percent for union dues), and reduced its backpay demand to $80,000. It maintained its position on severance pay.

Barsamian replied that the company had offered all that it could, and characterized the $35,000 offer as "final." He accused the union of backtracking and increasing its demands. Martinez answered that the union had simply maintained its position on make-whole and backpay, with the difficulties arising because the company had not provided the gross wage information needed for calculating the amounts; and the appearance of an increase in the severance pay proposal was due to the deferral of part of it which, the union was aware, might never be received. Barsamian and Martinez argued about whether the union would have been able to calculate the backpay and make-whole amounts if it had the gross wage information it had requested. Barsamian asserted that Martinez had never requested the information he actually used to calculate the union's make-whole estimate.

Later, the company said its $50 offer for severance pay alone, made as a separate proposal several meetings earlier, was still on the table and open to negotiation. The union withdrew the language it had submitted on extending the union contract, leaving as its proposal the grower-shipper clause from the current Growers Exchange contract plus a provision prohibiting circumvention of the

settlement agreement or bargaining unit work. The union also reduced its backpay demand for the second time that day, back to the $68,000 it initially estimated.

Barsamian responded that the union's proposal was not acceptable, and asked if the union had any suggestions about how it might help put Holtville Farms back in business, if that was the only way Growers Exchange could continue to function. When Martinez pressed for particulars, Barsamian reminded him that he had agreed to look into a loan from the pension fund, but when Martinez then asked how much the company owed, Barsamian's only response was that the union had not previously asked for information about the company's financial situation. Barsamian urged Martinez to make a proposal about a union-sponsored loan, and Martinez agreed to look into it. Noting that the proposals on the table did not reach the issue of decision bargaining, Barsamian also asked if the union would be willing to consider a pay cut. Martinez responded that it was a bit late to begin bargaining about the decision to close, which the company had maintained was non-negotiable.

Barsamian informed Martinez that the company would proceed with litigation, although it was still willing to meet with the union, and he asked the union to calculate what amount it would accept for a lump-sum settlement of everything. They agreed to meet again the following day.

The next day was no substantive movement. Barsamian gave Martinez compilations of employee gross wages for 1975 through 1977, and copies of W-2's for 1981. Martinez had by this time seen the weekly payroll records that the employer had turned over to the

general counsel. Both sides recapitulated their positions. Barsamian explained that the company had two packages on the table, both "final offers" open until 5 o'clock the following day: one for $35,000 for settling everything, including the make-whole award, and one for $12,000 ($75 per year for 160 years of seniority) to settle this case alone; in either instance, the precise language of the settlement agreement could still be negotiated. The company's offer for severance pay alone of $50 per year was still outstanding. When Barsamian pointed out that the union had never made a counterproposal on just the economic effects of the closure, Martinez responded that its position was the same severance pay proposal it had on the table as part of an overall settlement. According to Barsamian, he and Martinez agreed that the parties were taking their final positions, but were not yet at impasse.

At the next session, on August 20, the union made some movement. It reduced its proposal on the duration of posting the notice to employees from 90 to 60 days; it reduced its demand for guaranteed work for the Holtville employees from two years to one; and it reduced its backpay demand from $68,000 to $67,500, indicating it would be willing to move more on that amount. Martinez also explained that an agreement was not conditioned on settling the make-whole award. In all other respects, the union maintained its previous positions.

The company repeated that its package offers were still open until 5 o'clock. On effects alone, in addition to $50 per year severance pay and distribution of the pension funds (which had already occurred), it offered to follow the law if Holtville

reopened, cooperate with recommendations for jobs, and not obstruct union efforts to impose legal obligations upon successors or assigns. Barsamian also specified an amount of $500,000. for the suggested loan from the union pension fund, and asked for a detailed request for any financial information the union wanted.

The parties met once more, on August 25, with a mediator whose attendance the board helped arrange. He met separately with both sides and reviewed their positions, which remained unchanged. After going back and forth between them several times, the mediator said he "was not born in Bethlehem," and told them he thought their positions and their different views of their rights were irreconcilable.

Barsamian testified that a week later, on August 31, he enclosed a seniority list for Martinez with other documents he was mailing Ned Dunphy. A cover letter corroborates his testimony. Dunphy testified, however, that when he received the packet no seniority list was included, and Martinez testified that he never received one.

Attorneys for the general counsel did not participate in face-to-face settlement discussions after negotiations between the employer and the union resumed on August 12. Company negotiators complained about the general counsel's unavailability but the union representatives did not think their presence was needed, and general counsel attorney Judy Weissberg, who had primary responsibility for the case, reported that she saw no useful role to perform while the parties themselves were engaged in serious effects bargaining. In a telephone conversation with Barsamian, Weissberg had agreed that

Growers Exchange's obligation under a possible settlement agreement could be limited to the Imperial Valley, but it is unclear from the record whether her modified proposal on geographical scope was acceptable to all the respondents. The other major area of disagreement between the employer and the general counsel, the extent of an obligation to bargain about third-party growing contracts, remained unresolved.

Summary of Positions

To recapitulate, bargaining began at a leisurely pace, with four meetings in the two months following Holtville's May 27 letter, and then accelerated so that roughly eleven sessions took place within a nine-day period. The initial slowness was because Holtville's first negotiator, Larry Dawson, claimed a need for more preparation time, but the three-week hiatus before the intensive sessions began was the result of the unavailability of union negotiator David Martinez. Only Holtville was at the table with the union at the outset, but beginning with the third session on July 16, when Barsamian took Dawson’s place as negotiator, Growers Exchange took part in the negotiations as well. Although Barsamian had limited authority to act for them as well, Gilbert Chell and Kal-Ed did not actually participate in the exchange of positions and no proposals were made to them or on their behalf.

Initially, Holtville Farms was willing to discuss only the effects of the decision to close it. Growers Exchange's entry into negotiations was prompted by the realization that the litigation arising from the dispute with the UFW, in court and in this

proceeding, was interfering with its ability to make lettuce deals, and consequently, as Barsamian conveyed to Martinez, the employer became eager to settle this case. The union, on the other hand, also wanted to discuss the decision to close Holtville Farms, a monetary settlemnt of the refusal-to-bargain case, and the substance of a collective bargaining agreement that would cover, not only Holtville Farms, but any de facto farming subsidiary of Growers Exchange.

Throughout the negotiations, the employer effectively refused to bargain about the decision to close Holtville. Barsamian characterized his suggestions that the union consider lending money for the company's continued operations as opening up the subject, but no meaningful discussion took place then, and in fact could not, since the company had already disposed of its farm land. The employer did not modify its prior refusal to provide requested information it deemed relevant only to decision bargaining.[78/] While the union never expressly conceded the issue, it did not continue to press for its discussion, and its overall positions implicitly accepted the finality of the shutdown.

The employer also refused throughout the negotiations to bargain about a collective bargaining agreement or provide information it considered relevant only to that issue. Although Barsamian suggested on August 16 that a contract with Holtville would not be a stumbling block to an agreement, the employer's

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78. Holtville Farms concedes in its post-hearing brief (see pages 127, 95) that it refused to provide information about the decision to close and until August 20 refused to bargain about the decision.

proposals never went beyond recognizing an obligation to bargain about a contract in the future, in the context of a stipulated settlement agreement. The union, on the other hand, persisted in its proposal that its contract with Growers Exchange be extended to cover not only Holtville Farms, where it was certified, but also Gilbert Chell, Kal-Ed, Toro Ranches and Blythe Farms, although it finally agreed to drop the latter two if their inclusion was not legal. All five entities were part of the "joint employer," in its view, and it wanted the contract with Holtville in the event the company or a successor resumed operations. It also wanted any successor to be required to assume the contract.

Some bargaining did occur on the related issue of the make-whole award ordered in the refusal-to-bargain case, although the parties remained far apart in their proposals.[79/] Both parties made it clear, though, that settling the make-whole claim was not a prerequisite for reaching an agreement about effects.

Concerning the effects of the decision to close, proposals were exchanged about the pension plan, employment for the laid off workers, obligations of any successors and assigns, and severance pay. The only topic that was resolved was the pension plan: from the beginning the company acknowledged its obligation to pay out

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79. The union estimated the value of the make-whole award at over $400,000. The employer offered $23,000 indirectly—the difference between its $12,000 package for settling this case alone and its $35,000 package for settling the refusal-to-bargain case as well. ALJ Thomas Sobel recently determined that the amount due is approximately $188,000 through June 30, 1981, plus interest. See Holtville Farms, Inc., Case Nos. 79-CE-114-EC, et al. (March 31, 1983) supplemental decision in Holtville Farms, Inc., supra, 7 ALRB No. 15.

funds from the termination plan, and although in the interim Barsamian provided the union with incorrect and misleading information about the pension plan, finally the funds were distributed and the union was given an accounting.

On the subject of jobs, from initially suggesting that Holtville should be reopened and the workers reinstated, the union moved to a proposal that the employer provide two years guaranteed work, subsequently reduced to one year, with any Imperial Valley grower. The union also wanted agreement that upon the resumption of operations by Holtville or a successor, the workers would be rehired on the basis of seniority. The employer consistently maintained that it could not guarantee work for any period or provide jobs with any entity but Growers Exchange. Harvest jobs with Growers Exchange were not acceptable to the union because they entailed moving around the state, while the work at Holtville had been stable. The employer did agree not to hinder worker claims for unemployment insurance benefits (not much of a concession, since it did not contend that anyone was out of work through the workers's own fault) and to provide letters of recommendation. Its only other concession was to agree that if Holtville were to reopen, the workers would be rehired in seniority order.

The union proposed that the employer give it advance notice of any successors or assigns, and notify them that the workers were represented by the UFW. The employer was willing to agree as part of a complete settlement to obligate successors to bargain with the union, but not to assume a contract. Without a settlement, it was willing to notify successors that they might be obligated to

bargain, but not to notify the union of their takeover.

The parties made substantial movement on severance pay, but ended up far apart nonetheless. The union initially proposed $500 for each year of seniority. After it reduced its demand to $450, the employer made its first counterproposal, offering a flat one week's pay for each employee; it subsequently moved to $25 per seniority year. Not until the sixth meeting were any estimates made of the aggregate value of the proposals. At that point Barsamian valued the union's proposal of $450 per seniority year at $72,000, and the employer's proposal of $25 per year at $4,000, based upon an estimated 160 seniority years, derived from approximating the number of years worked by the employees named in the complaint; he did not explain -- at least not while testifying—the basis for his estimate of the number of years worked by those employees. The union then lowered its demand to $425 per seniority year, and the employer moved up, in two steps, to $50—or $8,000 total, based on 160 seniority years. The employer then proposed $75 per seniority year, or $12,000, as part of a package proposal for settling the case; for severance pay alone, apart from any settlement, it offered $50 per seniority year. The union responded by reducing its demand to $400 per year.

After the employer suggested that more severance pay might be negotiated in the future, the union made a two-stage proposal of $200 per seniority year payable immediately and an additional $500 per year payable in 1983. Pointing out that the employer had suggested deferred payments and the possibility of negotiating future amounts, Martinez explained that the union wanted the amount

of any deferred payment specified, not left open, and did not view its new proposal as an increase because for two years the employer would have the use of the money, its value would decrease due to inflation, and it well might never be received if the employer was in dire straits being portrayed. The union subsequently reduced the amount of the deferred payment from $500 to $300, and offered to take the initial $200 per year in installments. It also announced that it did not accept Barsamian's figure of 160 seniority years. At the employer's request, the union provided a list of 53 people who it contended were entitled to some severance pay. Shortly before negotiations ended, the employer proposed, in settlement of both this and the refusal-to-bargain case, another package containing $35,0000, the allocation and distribution of which would be left to the union.

Thus, when negotiations ended on August 20, the union's severance pay proposal was $200 per seniority year to be paid immediately, although installments were acceptable, and $300 per year to be paid in 1983. The proposal was the same whether it stood alone or was part of a settlement agreement. The employer had on the table one proposal for severance pay alone of $50 per seniority year. It also had submitted two package proposals, the time for acceptance of which had expired. In one, the monetary offer was $35,000 in a lump sum for settling all litigation, including the make-whole award, and the other, $12,000 (representing $75 per year for 160 seniority years) for settling this case alone.

As the severance pay proposals show, effects bargaining had become inextricably interwoven with settlement discussions. The

discussions between the employer and the general counsel while Martinez was unavailable had brought about a tentative agreement on many terms that did not directly relate to the effects of Holtville's closing, but two major subjects remained unresolved. Barsamian had been told by General Counsel Boren Chertkov that if the union did not appear within a reasonable period of time for effects bargaining and if a settlement was otherwise reached, he would be willing to approve a unilateral settlement in which, inter alia, the respondents would be directed to bargain in the future about the effects.

A few days later bargaining did resume, however, and a possible settlement agreement became a major topic of the discussions between the employer and the union. The union accepted many provisions worked out by the general counsel and the employer, and fruitful discussion of other aspects ensued. For instance, on the issue of grower-shipper agreements, the union was more sympathetic to the employer's position than the general counsel had been. Unlike the general counsel, the union did not insist on advance notice and an opportunity to bargain about legitimate growing contracts, although it did want protection from subversion of the agreement or bargaining unit work. The employer agreed to give the union notice and copies of its growing agreements after they were negotiated, although the offer was limited to one year and the Imperial Valley. For a period the union insisted that the employer agree to the extension of its union contract to any farming operation it "controlled," but finally the union withdrew its proposed language and accepted with minor modifications the proposal

put forth by the employer.

Other provisions remained unresolved, however, including the duration of the posting period for the notice to employees and the language of the preamble to the settlement agreement. More signicantly, the parties still disagreed about the geographic scope of the settlement and the parties to it, although they were drawing closer on the latter issue. Another basic difference reverted to the issue of contract bargaining: the union wanted the settlement to include acknowledgment of a contract with all segments of the alleged joint employer, while the employer was willing only to acknowledge a duty to bargain about a contract if farming resumed at Holtville. Another issue that needed to be resolved if the case were to be settled was the union's demand for back pay for allegedly discriminatory layoffs of Holtville employees, but the topic was barely discussed. The union persisted in its claim, with a final demand of $67,500, while the employer tacitly denied the claim in its entirety.

Regarding information requests, the employer admitted a duty to provide information reasonably related to effects bargaining, and as a, consequence answered some queries about Holtville Farms alone, such as the composition of its board of directors, the existence of successors or assigns, and future plans for supervisors and workers. Some information furnished by the employer was incomplete. For instance, it advised the union that there were no plans "at this point" for Holtville to farm in 1982, but declined to provide copies of land leases; and it advised the union that "most of Holtville's equipment has not, cannot, be sold and is simply being stored," without mentioning that some was sold

to Gilbert Chell.[80/]

The employer agreed to provide an up-to-date seniority list and information about past earnings of Holtville employees, both requested at the onset of negotiations. Nonetheless, it failed to provide wage information about 1978 through 1980, referring the union to payroll records it had turned over to the general counsel instead, and it did not deliver information for any other years until the day before negotiations ended. The press of the litigation was the only explanation given for the delay. Ten days after the talks stopped, Barsamian mailed the union a seniority list (which Martinez never received). Barsamian's only explanation for not providing it sooner was that so many lists were available he did not know which to turn over. (RT XXXV:114.)

The employer asserted various reasons for refusing to respond to other inquiries. It would not provide information it deemed relevant to the decision to close Holtville, because it had no duty to decision bargain. It refused to provide information about relationships among the companies that composed the alleged "joint employer" because, it asserted, the union had waived its claim of joint employer status, which the employer denied in any event, and furthermore, the information was irrelevant to effects bargaining. It declined to respond to the union's standard information request because it was pursuing its challenge to the union's certification in court. Barsamian also advised the union that much of the information the employer refused to furnish had been provided to the ALRB.

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80. The quotations are from the employer's written response of August 18, 1981 (GCX 125).

Analysis and Conclusions

Decision Bargaining

Before a consideration of the nature of the bargaining that occurred can be undertaken, a delineation of the scope of the employer's duty to bargain is needed. ALRA section 1153(e), modeled after section 8(a)(5) of the NLRA (29 U.S.C. section 158(a)(5)), makes it an unfair labor practice for an agricultural employer "[t]o refuse to bargain collectively in good faith" with the certified representative of its agricultural employees. In language essentially identical to NLRA section 8(d) (29 U.S.C. section 158(d)), section 1155.2 of the ALRA defines the duty to bargain in good faith as:

> . . . the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Interpreting NLRA sections 8(a)(5) and 8(d) in NLRB v. Wooster Division of Borg-Warner Corp. (1958) 356 U.S. 342, 42 LRRM 2034, the Supreme Court approved a distinction between mandatory and permissive subjects of bargaining. Mandatory subjects are "wages, hours, and other terms and conditions of employment": concerning other matters, the employer and the employees' representative are free to bargain or not. Also see O.P. Murphy Produce Co., Inc. (1981) 7 ALRB No. 37.

In Textile Workers Union v. Darlington Mfg. Co. (1965) supra, 380 U.S. 263, 58 LRRM 2657, discussed above, the court

announced that an employer has no duty to bargain about a decision to go out of business entirely, regardless of the motive for the decision. More recently, in First National Maintenance Corp. v. NLRB (1981) supra, 452 U.S. 666, 107 LRRM 2705, it held that at least under the circumstances of the case before it, an employer also has no duty to bargain about an economically motivated decision to shut down part of its business. In both instances, even though the consequence is the loss of bargaining unit work and the union has a legitimate interest in job security, the decision to close does not come within the "terms and conditions of employment" about which bargaining is mandatory because to require bargaining would be to interfere unduly with the prerogatives of management. (A partial closing motivated by anti-union animus may come within the purview of NLRA section 8(a)(3) (29 U.S.C. section 158(a)(3)) or ALRA section 1153(c). Darlington, supra; First National Maintenance, supra; see discussion above.)

In First National Maintenance, the court sets forth a balancing test:

> ... in view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of business. 107 LRRM at 2710.

It then went on to conclude that:

> . . . the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision .... 107 LRRM at 2713.

The court implied that its holding was narrow. It noted that it was intimating no view about other types of management decisions such as plant relocations, sales, other kinds of subcontracting, automation, and so forth, all of which were to *be* considered on their particular facts. (107 LRRM at 2713, fn. 22.) It described specific facts of the case before it (some of which are discussed below) in order to illustrate the limits of its holding, and analogized the employer's decision to halt work at a specific location to "a change not unlike opening a new line of business or going out of business entirely." (107 LRRM at 2713.)

Without suggesting disapproval of its earlier decision, the court distinguished Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203, 57 LRRM 2609, where it held that "contracting out" of the type present there, involving the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment, is a mandatory subject of bargaining. First National Maintenance, supra, 107 LRRM at 2709-2710, 2713. Fibreboard has been broadly interpreted as mandating bargaining over any business decision that can be characterized as one to subcontract bargaining unit work. O.P. Murphy Produce Co., Inc., supra, 7 ALRB No. 37 (citations omitted).

Combined, with Darlington, First National Maintenance establishes a per se rule that bargaining about a decision motivated purely by economic considerations to go partly or totally out of business is not mandatory. (See Paul W. Bertuccio (1982) 8 ALRB No. 101.) But if the action that causes the loss of bargaining unit

work is something other than an abandonment of part or all of the employer's operation or the permanent elimination of goods or services formerly produced—if, for instance, it can more accurately be characterized as subcontracting, mechanization, a crop decision, a plant relocation, etc.-- then the holding of First National Maintenance does not apply, and the case must be considered on its own facts. See First National Maintenance, supra; Paul W. Bertuccio, supra (crop decisions); O.P. Murphy, supra (mechanization); Bob's Big Boy Family Restaurants (1982) 264 NLRB No. 178, 111 LRRM 1354 (subcontracting); (NLRB) General Counsel Memorandum 81-57 (Nov. 30, 1981), 109 SNA LRR 67 (Jan. 25, 1982).

Where the applicability of the per se rule is not evident, the facts of the situation must be reviewed to determine whether the employer's decision is amenable to the collective bargaining process or whether, because the decision represents a significant change in operations or lies at the very core of entrepreneurial control, the benefits of collective bargaining are outweighed by the burden it places on the employer's need to operate freely in making such management decisions. See First National Maintenance, supra; Bob's Big Boy Family Restaurants, supra. A determination of suitability to collective bargaining requires an analysis of such factors as the nature of the employer's business before and after the action, the extent of capital expenditures, the basis for the action, and, in general, the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives. Bob's Big Boy Family Restaurants, supra; Bertuccio, supra; also see

O.P. Murphy, supra.

The initial issue here, then, is whether the decision to shut down Holtville Farms comes within the per se rule applicable to economically motivated decisions to go out of business partly or totally. Here the decision was economically motivated primarily, but since Holtville was part of the larger Growers Exchange operation, it was not a decision to go out of business entirely. Although the shutdown appears on the surface to be a partial going out of business, the distinction between partial closing and subcontracting is not always readily apparent (Bob's Big Boy Family Restaurants, supra, 111 LRRM at 1356).

A major feature distinguishes Holtville's shutdown from the partial closure considered in First National Maintenance. There the employer, a supplier of maintenance services, decided to terminate its contract with a customer because of a fee dispute. Since the employer hired personnel separately for each customer and did not transfer employees between locations, the decision meant the employees who worked for that customer were discharged. In discussing the limits of its holding, the court noted, first, that the employer "had no intention to replace the discharged employees or to move the operation elsewhere." First National Maintenance, supra, 107 LRRM at 2713.

Here, however, Growers Exchange did intend to replace the lettuce formerly grown by Holtville with lettuce grown by other farmers. In this respect, the situation is similar to Bob's Big Boy Restaurants, supra, where a commissary that furnished restaurants with prepared foodstuffs closed the department and terminated the

employees that processed one item, shrimp, and contracted with an outside firm to supply packaged shrimp instead. The board pointed out that the employer still supplied processed shrimp to its constituent restaurants; the only difference was that the processing work on the shrimp was now performed by the employees of the outside supplier, instead of the respondent's own employees. (111 LRRM at 1356.) Since the respondent's business, that of providing prepared foodstuffs to the restaurants, remained basically the same, the action did not have a major impact on the nature and direction of the business. (Ibid.)

The Growers Exchange-Holtville Farms entity, looked at as a whole, was in the business of cultivating, harvesting and marketing various crops, primarily lettuce. After Holtville closed, Growers Exchange was still directly engaged in the business of harvesting and marketing lettuce as it had been. It no longer cultivated lettuce through its own farming operation, but it intended to replace the lettuce provided by Holtville with lettuce grown under contracts with other farmers. The degree of success of its plans is immaterial to an evaluation of the situation at the time of the decision to close Holtville.

Growers Exchange intended to remain in the business of cultivating lettuce, albeit indirectly. In its joint deals, it acquires a proprietary interest in the lettuce crop when the crop is planted, by virtue of providing half or two-thirds of the funds needed to grow it; it consults about cultivation practices, although the farmer employs the workers and directly supervises the growing of the crop; and the cultivation of the crop is timed to fit its

harvesting needs and marketing judgments. It has a smaller financial interest in the joint-deal crops than in the crops grown by Holtville (except for the last year, when it had only a 20 percent interest in Holtville's crops), but in all other respects it performs the same basic functions regardless of the farmer. For Growers Exchange, like Bob's Big Boy, there was nothing that could be "objectively termed a major shift in the direction of the Company." (Bob's Big Boy Family Restaurants, supra, 111 LRRM at 1356.) Holtville's closing did not have a major impact on the nature and direction of the employer's total business.

The joint deals distinguish this case from NLRB v. Adams Dairy, Inc. (8th Cir. 1965) 350 F.2d 108, 60 LRRM 2084, cert. den. (1966) 382 U.S. 1011, 61 LRRM 2192, upon which the respondents rely, where the court held that a dairy that stopped distributing its products, sold its trucks and discharged its salesmen-drivers had no duty to bargain about its decision to terminate that phase of its business. There the court relied on the fact that the employer retained no legal, managerial or financial interest in the operations of the independent contractors who took over the distribution, but here the employer has all three types of interest in the operations of the independent contractors that grow its lettuce in place of Holtville.

Growers Exchange argues that its joint deals are

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specifically authorized by its contract with the UFW.[81/] But what is at issue here is the scope of the employer's duty to bargain with the UFW as the representative of employees of Holtville Farms, not Growers Exchange, and even if it is assumed that the employer's conduct does not violate the union's contract with Growers Exchange, that says nothing about the rights of Holtville employees. The employer's assertion of the Growers Exchange contract is ironic in view of its refusal to bargain about a contract for Holtville employees. Furthermore, the provision relied upon by Growers Exchange also contains a limitation not mentioned by it, which states that the company will not subvert the union by entering into such agreement. Evidence was taken that the intent of this limitation was to prevent the use of growing contracts to eliminate

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81. The reference is to article 38 of the contract, the first paragraph of which reads as follows:

> ARTICLE 38 GROWER-SHIPPER CONTRACTS
>
> It is recognized by Company and Union that various types of legal entities are used by growers and shippers in the agricultural industry, including partnership, joint venture and other legal contractual arrangements, in the growing, packing, harvesting and selling of agricultural crops. Neither the Company nor the Union shall prevent the Company from entering into these legal arrangements by any of the provisions of this Agreement, nor will the Company subvert the Union by entering into these legal arrangements. In addition, and whenever it is possible for the Company to perform the work of weeding, thinning or hoeing, the Company will do so, it being the intent to provide jobs for bargaining unit workers. (Underlining added.)

In its argument, Growers Exchange quotes the first clause of the second sentence without mentioning the second, underlined clause. (See post-hearing brief at pages 34-35.)

The contract also contains an article restricting the company's right to subcontract. See GCX 133.

bargaining unit work. Consequently, there was a contract containing such a provision that covered Holtville employees, the employer's conduct would appear to violate it, and not be justified by it.

The situation is different with respect to the other crops grown by Holtville Farms, however. When Holtville closed, the production of non-lettuce crops stopped entirely: the employer no longer grew, harvested or marketed alfalfa, wheat and the other crops, and did not seek to replace them. In this respect, closing Holtville was, "a change not unlike . . . going out of business entirely." (First National Maintenance, supra, 452 U.S 666, 107 LRRM 2705, 2713.)

In sum, then, the decision to close Holtville amounted to a decision to discontinue entirely a relatively minor line of the business, the production of non-lettuce crops, and to contract out one step, cultivation, in the major line, the production of lettuce. The latter aspect renders the per se rule of First National Maintenance inapplicable.

Another significant distinction between this case and First National Maintenance is the employer's labor relations history. A history of bad labor relations and unfair labor practices has been a factor in opinions finding a duty to bargain about management decisions that eliminate jobs, even in the absence of an anti-union reason for the employer's conduct. In NLRB v. Transmarine Navigation Corp. (9th Cir. 1967) 380 F.2d 933, 65 LRRM 2861, where no duty to decision bargain was found, the absence of a history of animosity between union and employer was one reason given by the

court for finding itself in accord with some decisions, NLRB v. William J. Burns Internat. Detective Agency, Inc. (8th Cir. 1965) 346 F.2d 897, 59 LRRM 2523, and NLRB v. Adams Dairy, Inc. (8th Cir. 1965), supra, 350 F.2d 108, 60 LRRM 2084, and at odds with others, NLRB v. Winn-Dixie Stores, Inc. (5th Cir. 1966) 361 F.2d 512, 62 LRRM 2218, cert. den. 385 U.S. 935, 63 LRRM 2372, and NLRB v. American Mfg. Co. (5th Cir. 1965) 351 F.2d 74, 60 LRRM 2122 (section 8(a)(3) violation also found). (Tranmarine Navigation Corp., supra, 380 F.2d at 937-938.) In First National Maintenance, the court mentions as limiting features the absence of a claim of anti-union animus and lack of evidence of the employer's abrogation of ongoing negotiations or an existing bargaining agreement, (First National Maintenance, supra, 107 LRRM at 2713), by its comments implicitly preserving the distinction made in Transmarine.

In the present case, although the decision to close Holtville Farms was primarily motivated by business considerations, the opportunity to be rid of the union in the growing operation played a part. There were no ongoing negotiations or existing agreement which might have been abrogated only because the company refused in bad faith to bargain. Had contract negotiations occurred, the union might have obtained provisions "implementing rights to notice, information, and fair bargaining" in the event of a shutdown. See First National Maintenance, supra, 107 LRRM at 2711. The employer's past relations with the union should be a factor when the benefit for labor-management relations and the collective bargaining process is balanced against the burden on management. The animosity engendered when the employer is able to

eliminate bargaining unit work while failing to meet its legal obligations toward the union is costly to the public's interest in the collective bargaining process and the peaceful goals of the Act.

Consequently, the shutdown of Holtville Farms was not simply an abandonment of a portion of the employer's business purely for economic reasons, and the holding of First National Maintenance is not controlling. Instead, the case must be considered on its own facts, analyzing such factors as those raised in Bob's Big Boy Family Restaurants, supra, and O.P. Murphy, supra. The impact of the decision on the nature of the employer's business has already been discussed.

The disposition of capital assets that accompanied the shutdown is not decisive. Holtville disposed of its leased land by the expiration or surrender of the leases without obligation or cost. The land the company owned was not sold, but was leased out for a four-year term, for a sum approaching one-half million dollars, payable in installments over the lease period. Some farm equipment was sold to Kal-Ed almost immediately for $15,000, but the rest was dispersed to other facilities, and its value and final disposition do not appear in the record. Thus, as far as is apparent, the company has not irrevocably disposed of any crucial capital assets. The most substantial element of capital restructuring is the leasing out of company-owned land, and while the total rental value is considerable, the transaction is by its terms for a limited period.

The closure did represent, however, a major re-direction of operating capital, a move compelled by the constraints on Growers

Exchange's ability to obtain further credit from the bank. The operating capital required to finance half of the lettuce growing costs of independent farmers is approximately half of the amount required to finance all of Holtville's lettuce growing costs. (The modest profits realized on the non-lettuce crops covered the cost of growing them but contributed little to the cost of growing lettuce.) As far as appears from the record, labor costs were a relatively small part of Holtville's operating costs.

Nothing in the nature of the change itself makes the decision inherently unsuitable to collective bargaining. Given the economic situation that prompted the decision, however, I cannot discern a meaningful role for bargaining. The union could not help Growers Exchange get further extensions of credit from the bank, nor could its ability to make concessions about labor costs or productivity or to suggest ways of increasing managerial efficiency materially affect the need for operating capital.

I conclude that the employer had no duty to bargain about the decision to close Holtville and contract out lettuce cultivation because, given the employer's situation and objectives, the union would have been unable to engage in meaningful bargaining. See Bob's Big Boy Family Restaurants, supra, 111 LRRM 1354, 1356. Under the circumstances of this case, to require bargaining would be to impose a burden on the employer's ability to conduct its business that outweighs the benefit for the collective bargaining process. See First National Maintenance, supra, 107 LRRM at 2710.

Effects Bargaining

Even though the employer had no duty to bargain about its decision, it did have a duty to bargain about the impact of the decision on the workers. (See, e.g., First National Maintenance Corp. v. NLRB (1981) supra, 452 U.S. 666, 107 LRRM 2705, 2711; NLRB v. Transmarine Navigation Corp. (9th Cir. 1967) supra, 380 F.2d 933, 65 LRRM 2861; NLRB v. Royal Plating & Polishing Co. (3rd Cir. 1965), supra, 350 F.2d 191, 196, 60 LRRM 2033; Highland Ranch v. ALRB (1981) 29 Cal.3d 848, 176 Cal.Rptr. 753, affirming in pertinent part (1979) 5 ALRB No. 54.) The duty to bargain about the effects arises from the union's legitimate concern about the future of the displaced workers (see First National Maintenance, supra; Royal Plating & Polishing, supra), and bargaining may cover such subjects as severance pay, vacation pay, seniority and pensions, among others, which are necessarily of particular importance and relevance to the employees. (NLRB v. Transmarine Navigation Corp., supra, 380 F.2d at 939; Highland Ranch v. ALRB, supra, 29 Cal.3d at 857.) Effects bargaining must be conducted in a meaningful manner and at a meaningful time. (First National Maintenance, supra, 107 LRRM at 2711.)

The employer violated its duty by failing to notify the union of- the decision to close Holtville in time to give the union an opportunity to engage in meaningful bargaining. Although as a practical matter the decision was made by the middle of April, the employer did not notify the union until the end of May. By that time, the company had already begun to dispose of land and equipment, and permanent terminations in anticipation of the

shutdown in addition to routine seasonal layoffs had decimated the work force. The union was ready to begin bargaining within days of receiving the company's letter, but Holtville Farms negotiator Larry Dawson obtained postponements with the result that on June 30, the day the last employees were terminated, he and the union met for only their second session.

By the delay in giving notice, aggravated by the delays in the initial sessions, the employees were deprived of the opportunity to have their union bargain while their services were still needed and a measure of balanced bargaining power existed. (See Highland Ranch, supra, 5 ALRB No. 54, slip opn. at p. 9, enforced in pertinent part, 29 Cal.3d 848; Van's Packing Plant (1974) 211 NLRB 692, 86 LRRM 1581; Transmarine Navigation Corp. (1968) 170 NLRB 389, 67 LRRM 1419; Royal Plating and Polishing Co. (1966) 160 NLRB 990, 995, 63 LRRM 1045.)

The obligation to bargain embraces the obligation to supply relevant information upon request. (See, e.g., Detroit Edison Co. v. NLRB (1979) 440 U.S. 301, 100 LRRM 2728; NLRB v. Truitt Mfg. Co. (1956) 351 U.S. 149, 38 LRRM 2042; Kawano, Inc. (1981) 7 ALRB No. 16; Masaji Eto (1980) 6 ALRB No. 20; As-H-Ne Farms, Inc. (1980) 6 ALRB No. 9.) Satisfaction of the obligation requires not only that the information be furnished, but also that it be supplied with reasonable promptness. (B.F. Diamond Construction Co. (1967) 163 NLRB 161, 175, 64 LRRM 1333, enforced (5th Cir. 1969) 410 F.2d 462, 71 LRRM 2112, cert. den. 396 U.S. 835, 72 LRRM 2432; Kawano, Inc. (1981) 7 ALRB No. 16.)

Here the employer both failed to provide and delayed in

providing employee wage data and a seniority list, information that it conceded was relevant to effects bargaining. A Holtville seniority list was not furnished until a week after the last bargaining session. Holtville argues that exigent circumstances prevented the company from providing the list, but the only reason given by negotiator Barsamian, that he did not know which list to turn over, is hardly compelling. Late submission is not sufficient where diligent efforts to furnish the information in a timely fashion have not been made. (General Electric Co. (1964) 150 NLRB 192, 261, 57 LRRM 1491.)

Holtville also argues that the union's ability to prepare proposals was unaffected by the lack of a seniority list. Information is not made irrelevant simply because the union is able to continue to negotiate and make proposals without it. As-H-Ne Farms, Inc., supra, 6 ALRB No. 9; NLRB v. Fitzgerald Mills Corp. (2d Cir. 1963) 313 F.2d 260, 52 LRRM 2174, cert. den. (1963) 375 U.S. 834, 54 LRRM 2312. Furthermore, the usefulness of the information here is obvious. The parties were far apart in their severance pay proposals, and part of their disagreement centered on the number of seniority years involved. A seniority list would have assisted the calculation of, not only the number of seniority years, but also the total value of the proposals.

The employer conceded that information about Holtville's future intentions was relevant to effects bargaining, but refused or failed to furnish much specific information, such as its past and anticipated crop production and land leases, the identity of new lessees, and the precise disposition of farm equipment, including

the sale of some to Gilbert Chell. The relevance of information about the disposition of land holdings, crops, and farm equipment is not limited to the decision to close, as the employer contended, but extends to the effects of the decision as well. Given the loss of its bargaining unit and its members'jobs, the union had a legitimate interest in satisfying itself that the company was indeed going out of business as claimed. The union's suspicions might have been allayed by the requested information. The information was also relevant to an evaluation of the prospects for the resumption of operations in the foreseeable future, by Holtville or another entity, which would have a direct effect on employment prospects for the workers. The bare assertions by the company's negotiator that there were no successors or assigns and no present plans to continue or resume operations were insufficient.

For similar reasons, the union had a legitimate interest in obtaining information about the details of Holtville’s relationship to other entities with which a close association was apparent—the alleged joint employer. As is evident from this litigation, such information was pertinent to an informed evaluation of the nature of the employer's action and the scope of the resulting bargaining obligation. It also affected the employer's ability to provide other jobs or reinstatement rights for the displaced workers. Even though ultimately the determination is that no legal obligation existed, as with Gilbert Chell and Kal-Ed, the union was entitled to information that would help it evaluate its own position.

The negotiations that occurred after Barsamian replaced Dawson have the semblance of good faith bargaining. Growers

Exchange joined Holtville at the table because it genuinely desired a settlement. Nonetheless, due to the employer's conduct, serious negotiations did not begin until after the shutdown was complete, when the company had disposed of its land and equipment and terminated its workers, and the union had been deprived of all bargaining strength. See Highland Ranch (1979), supra, 5 ALRB No. 54, slip opn. at p. 9, n. 13. Moreover, throughout the negotiations its approach to providing information can justly be described as cavalier, marred by omissions, misinformation and inexcusable delay, as well as unwarranted refusals. It contributed materially to the failure of the bargaining by exacerbating the mistrust engendered by Holtville's previous refusal to recognize and bargain with the union and by depriving the union of information needed to evaluate the employer's positions and helpful to the formulation of its own proposals.

Furthermore, the continuing refusal to recognize the union or bargain over a contract was another material factor.[82/] The posture did not unlawfully affect the employer's substantive positions at the bargaining table. As a practical matter, it dealt with the union as the legitimate representative of the workers. It also manifested a willingness to acknowledge, in a settlement agreement, an obligation to bargain about a contract in the event

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82. Holtville Farms concedes (post-hearing brief at p. 135) that if the board's decision was upheld by the courts (as it has been), Holtville's bad faith continued until August 16, 1981, the date when, it claims, it agreed to negotiate a contract. I do not find that it did agree then to negotiate a contract. As indicated above, it only indicated its willingness to acknowledge, in a settlement agreement, an obligation to bargain about a contract in the future.

that Holtville resumed operations. This position was not inherently unreasonable, since the employer might reasonably assert that to negotiate a contract for a closed company was an exercise in futility. Nevertheless, the employer's intransigence did nothing to alleviate the union's suspicion that Holtville had not really closed and might reappear in another form, in which event the union would at best be only at the beginning of the bargaining process, and that only if the employer abided by its commitment. When what the situation required was a demonstration of good faith, the employer persisted in its obduracy.

Considered as a whole, the employer's conduct did not represent a substantial break with its past unlawful conduct or the adoption of a course of good faith bargaining. See Joe Maggio, Inc. (1982) 8 ALRB No. 72; McFarland Rose Production (1980) 6 ALRB No. 18. It contributed substantially to the deadlock that ensued, which as a consequence was not a bona fide impasse. I conclude that the employer violated section 1153(e) and, derivatively, section 1153(a).

The Union's Conduct

The employer asserts that any shortcomings on its part are excused or negated by the union's conduct. It correctly points out that the bargaining obligation imposed by section 1155.2 is a mutual one, and the union's failure to bargain in good faith may be a defense to the employer's breach. See, e.g., ALRA section 1154(c); Admiral Packing Co. (1981), 7 ALRB No. 43; Montebello Rose Co., Inc. (1979) 5 ALRB No. 64, affd in pertinent part, (1981) 119 Cal.App.3d

1; O. P. Murphy, supra, 5 ALRB No. 63; As-H-Ne Farms, supra, 6 ALRB No. 9; NLRB v. Stevenson Brick and Block Co., (4th Cir. 1968) 393 F.2d 234, 68 LRRM 2086. The board has also acknowledged that union conduct which does not necessarily amount to bad faith bargaining may nonetheless prevent the emergence of a situation in which the employer's good faith can fairly be tested. Admiral Packing Co., supra; also see NLRB v. Stevenson Brick and Block Co., supra.

One indication of bad faith asserted by Holtville is the union's insistence that the parties bargain about the decision to close. It is true that the union never formally surrendered its position, from the terms of its proposals and the progression of negotiations as a whole, it is clear that the union did not condition an agreement upon the employer's willingness to bargain about the decision. In fact, when Barsamian suggested that he was opening up the topic by asking about the possibility of obtaining a loan through the union, Martinez responded that it was too late to begin decision bargaining.

Holtville argues that it was bad faith for the union to insist upon a contract with entities alleged to be part of the joint employer, specifically Gilbert Chell and Kal-Ed, where the union was not certified, as well as Holtville. The demand for a contract with Holtville was not unreasonable in light of the union's understandable concerns that the company might reopen in another guise. Section 1153(f) prohibits an employer from recognizing, bargaining with, or signing a collective bargaining agreement with a labor organization that is not certified pursuant to the election process, and the union was not the certified representative of Chell

and Kal-Ed employees as such. Yet the union's position was maintained neither in bad faith nor to the point of impasse.

Even though the union's contention that Gilbert Chell and Kal-Ed were a joint employer with Growers Exchange-Holtville Farms has ultimately failed, the position was reasonable. There was evidence that supported it. Its viability had been acknowledged in the settlement agreement of the previous year, in which Gilbert Chell and Kal-Ed agreed to act as though they were joint employers with Holtville Farms. As a legal issue, the board has yet to consider the relationship between section 1153(f)'s prohibition and the various elements of a joint employer or a multi-faceted single employer. There were indications at the time that section 1153(f) was intended to prevent sweetheart contracts and did not necessarily prevent a bargaining obligation under all circumstances involving uncertified unions. See, e.g., Highland Ranch (1979) supra, 5 ALRB No. 54, later affd. in pertinent part, Highland Ranch v. ALRB (1981) 29 Cal.3d 848; Kaplan's Fruit & Produce Co., Inc. (1977) 3 ALRB No. 28. The conclusion reached here, that Holtville Farms was still the primary employer of its employees even when they were paid by Chell or Kal-Ed, has similar consequences, albeit reached by a different route, as the union's position.

Furthermore, the union's persistence must be viewed in light of the employer's refusal to supply it with the information that might have convinced it Chell and Kal-Ed were independent entities. Under the circumstances, the union was not responsible for the deadlock on the issue.

The union was responsible, as Holtville claims, for the

three week break in negotiations between July 21 and August 12, due to the unavailability of its negotiator. The busy schedule of the negotiator, regardless of the importance of other obligations, is no excuse for a party's failure to attend to its collective bargaining obligations with a reasonable degree of diligence and promptness. See Masaji Eto, supra, 6 ALRB No. 20; O.P. Murphy Produce Co., Inc., supra, 5 ALRB No. 63; NLRB v. Exchange Parts Co. (5th Cir. 1965) 339 F.2d 829, 58 LRRM 2097. After this period, however, the union negotiator was fully available for ten days of intense bargaining. Considering the totality of the circumstances, this three week delay did not have a substantial impact on the negotiations (see As-H-Ne Farms, supra, 6 ALRB No. 9). It is insufficient to prove overall bad faith bargaining. See Sam Andrews Sons, Inc. (1982) 8 ALRB No. 64.

The last reason asserted by Holtville for finding the union in bad faith is that it made "economically preposterous" severance pay proposals. The board has been clear, however, that it will not sit in judgment upon the substantive terms of bargaining proposals. See Admiral Packing Co., supra, 7 ALRB No. 43, slip opn. at p. 14; also see, e.g., TMY Farms, Inc. (1983) 9 ALRB No. 10; Dal Porto & Sons, Inc. (1983) 9 ALRB No. 4. Neither the disparity between the proposals of the parties nor the fact that the union's proposals were unreasonably high in the employer's view,[83/] establishes that

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83. Holtville Farms seeks to compare the union's severance pay proposals with the figure of $100 per year of seniority, which it claims is "standard" in California agriculture, but the claim is unsubstantiated in the record. Although Barsamian told Martinez the

(Footnote continued------)

they were made in bad faith. The union did not unreasonably hold to its position, but modified its proposals several times during the course of the negotiations, at times almost immediately after the company negotiator demanded movement. In every instance but one the new figures proposed by the union were reductions over the old.

Around the mid-point of the negotiations, the union changed its severance pay from an immediate payment of $400 per year of seniority to $200 per year payable immediately and an additional $500 per year payable in two years. The new proposal may have been less acceptable than the old, in the view of the employer, but that does not in itself evidence bad faith on the part of the union. (See J.R. Norton Co. (1982) 8 ALRB No. 89, slip opn. at p. 25.) Here the union explained the reasoning behind its change, and its rationale is not patently unreasonable. Where a later proposal is less acceptable than an earlier one, the proposal is not evidence of bad faith if accompanied by a reasonable explanation. (See J.R. Norton Co., supra.)

Nothing in the union's role during negotiations establishes an inherent unwillingness to make reasonable efforts to compose its differences with the employer. The employer has not described any way in which union conduct directly hindered its own ability to

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(Footnote 83 continued----)

same thing in negotiations and claims that Martinez acknowledged the "fact," he himself expresses uncertainty about whether there is "such a thing" as a standard or average severance pay. RT XXXII:119-120. (Acceptance of Holtville's argument might lead one to wonder whether its own severance pay proposal was made in good faith. (Immediately after this statement to Martinez, Barsamian offered only a flat $75—-- total, not per year of seniority—for each employee.)

bargain in good faith, but argues only that certain conduct of the union negotiator "may have affected" its own good faith bargaining.[84/] I conclude that the employer's bad faith bargaining is not excused by union conduct.

Holtville also asserts that the general counsel's role in settlement discussions may have affected the employer's bargaining posture in some manner that effectively precludes a determination of its state of mind. Cf. Admiral Packing Co., supra; slip opn. at p. 11. In theory, conduct of the general counsel could be a factor in the totality of circumstances from which the parties' state of mind toward bargaining is derived, and for that reason evidence of the general counsel's role was admitted.[85/] The burden of showing that it actually has been a factor must fall on the party that asserts the position, however, and counsel points to no particular conduct that in fact affected the parties' positions. On August 12, when the general counsel ceased direct participation in settlement discussions, two major areas of disagreement remained. At the same time, the parties began their most intense period of bargaining, and the settlement agreement was among the topics most discussed by them. Neither condition for General Counsel Chertkov's agreement to a unilateral settlement was met: the union was no longer available for effects bargaining, and agreement had not been achieved on

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84. See Holtville Farms post-hearing brief at page 143.

85. With hindsight, I would now exclude such evidence under Evidence Code section 352 in the absence of an offer of proof tying in the general counsel's conduct.

all other terms of a settlement. Under the circumstances, what further role the general counsel could constructively fill at that time is unclear. Although it desired the unilateral settlement, the employer has not demonstrated that the general counsel's conduct negatively affected its own approach toward bargaining with the union.

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CHANGES IN WORKING CONDITIONS

The Facts

The complaint contains three allegations of unilateral changes in working conditions at Holtville Farms that violate section 1153(e): the termination of the pension plan; a 1980 wage increase; and an increase in hours of work as the company shut down. The respondents assert the six-month statute of limitations, ALRA section 1160.2, as an affirmative defense.

In 1976 Holtville had initiated a pension plan covering all its employees. By letter dated September 26, 1980, Hal Moller notified the administrator of the plan to terminate it as of October 1, 1980. Moller was subsequently advised by the administrator that the termination would be less complicated if made effective November 1, 1979, the anniversary date of the plan, so on November 7, 1980, he sent another letter making the termination effective as of the earlier date.

Similar plans with the same company had covered the employees of Toro Ranches and the non-union employees of Growers Exchange; these plans were terminated at the same time as Holtville[1]s. The pension plan was replaced by a profit sharing program for the Growers Exchange supervisors and non-union employees, but not for the employees of the farming companies. In 1980 no profits were distributed under the new program.

The UFW was not notified of or consulted about the pension plan's termination. The only announcement was an English-language "Notice to Employees," provided by the plan's administrator, that was posted in the Holtville Farms office after the plan was

cancelled. Spanish was the primary language of most, if not all, Holtville fieldworkers. They came into the office only occasionally, and no evidence suggests that they read notices posted there.

On July 21, 1980, Holtville fieldworkers received a wage increase of 40 cents per hour for regular time, and 50 cents per hour for overtime. The last pay raise had been granted in November 1979; the record does not reveal when previous raises were given. Only the July 1980 increase is at issue here.

Hal Moller and Gilbert Chell, the people responsible for setting wages at Holtville, testified that increases were generally granted after they had heard that wages had gone up at similar companies and had reviewed rates in the area. Moller testified that the increases were made on "a rather regular basis, . . . generally yearly" (RT XLIV:97), and Chell said they "usually" occurred sometime during the summer (RT XXXVI:60). Chell also testified that workers were given no guarantees about wages, but were told only that the rates would be reviewed and adjusted once or twice a year. The last two raises brought Holtville's wages in line with the rates in the Sun Harvest "master" contract. As with the pension plan, the union was not notified or consulted about the wage increase.

The general counsel contends that as Holtville was closing and workers were being terminated in the spring of 1981, the work hours of the remaining employees increased. Specifically, irrigators Abundio Sanchez and Miguel Verduzco testified that because of the layoff of four other irrigators, the number of hours they worked in May of 1981 was larger than in previous months of

1981 and larger than in the month of May in previous years.

Three of the four irrigators named by Sanchez and Verduzco were not actually terminated until June 3; nonetheless, weekly time sheets show that in May there were two fewer irrigators and four fewer sprinklers employed than there had been in April. Both irrigators and sprinklers performed general farm labor in addition to their primary jobs. The time sheets also show that even though the number of standard 24-hour irrigation shifts was fewer in May than in April, the remaining irrigators worked more hours than in April; they also worked more hours than they had in May 1980, when there were roughly the same number of 24-hour shifts. The records thus corroborate the irrigators[1] testimony about increased hours;[86/] apparently, the decreasing work force meant more general farm labor for those who remained. Again, the union was not notified or consulted about the change.

Analysis and Conclusions

The Unilateral Changes

It is well settled that in general, regardless of subjective good or bad faith, an employer who changes terms or conditions of employment unilaterally, without first giving the collective bargaining representative of its employees notice and an

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86. Holtville Farms Exhibit 32, containing the "payroll records" (actually the exteriors of personnel file folders) cited by Growers Exchange (reply brief at page 7) to discredit the irrigators[1] testimony, was not admitted into evidence due to foundational shortcomings (see RT XLV:68); in facts, a spot check reveals several discrepancies between the figures there and those in the weekly time sheets relied upon here (GCX 189).

opportunity to bargain, violates the statutory duty to bargain. (See, e.g., NLRB v. Katz (1962), 369 U.S. 736, 50 LRRM 2177; O.P. Murphy Produce Co., Inc. (1979), supra, 5 ALRB No. 63; Montebello Rose Co., Inc. (1979), supra, 5 ALRB No. 64.)

Pension plans, wages and hours of work are all mandatory subjects of bargaining. (See, e.g., Winn-Dixie Stores, Inc. v. NLRB (5th Cir. 1978), 567 F.2d 1343, 97 LRRM 2866 (pension plan, wage increase); O.P. Murphy Produce Co., Inc., supra (wage increase); Weston & Brooker Co. (1965) 154 NLRB 747, 60 LRRM 1015 (increasing and decreasing hours of work).) Economic difficulties do not excuse an employer from bargaining before terminating its pension plan. (See NLRB v. W.R. Grace & Co. (5th Cir. 1978) 571 F.2d 279, 98 LRRM 2001.)

Nor may the employer justify its wage increase on the basis of past practice where, as here, the employer has failed to establish that wage increases were automatically granted at regular times and according to definite guidelines. (Joe Maggio, Inc. (1982), supra, 8 ALRB No. 72; J.R. Norton (1982), supra, 8 ALRB No. 76; Mario Saikhon, Inc. (1982) 8 ALRB No. 88.) Here only the last two increases, eight months apart, are detailed, and their timing contradicts the testimonial claim of regular annual increases. The duration of the claimed practice of matching master contract rates is not established. Moller's and Chell's own testimony reveals that the granting of increases was discretionary in both timing and amount.

Holtville Farms concedes that the wage increase and the pension termination are per se violations, but claims that the

increase in work hours for the irrigators was an inseparable element of the decision to close, since the shutdown necessitated the permanent termination of employees. However, no reason is offered for terminating employees at a rate that caused the hours of work for the remaining employees to increase.

The general counsel contends that the unilateral changes, particularly the termination of the pension plan, violated section 1153(c) as well as section 1153(e), because of the employer's general anti-union animus and because the Growers Exchange employees whose pension plan was terminated at the same time were enrolled in a profit sharing plan, while the Holtville employees were not. But the profit sharing plan was not extended to the employees of Toro Ranches, the non-union farming company, either. Thus, union support or affiliation does not appear to be the reason for the disparate treatment of the different groups of employees. Since no discriminatory motive for the changes has been established, the violations of section 1153(c) are not proved.

The Statute of Limitations

As a defense to the wage increase and the pension plan termination, Holtville Farms relies upon section 1160.2 of the Act, which, like section 10(b) of the NLRA (29 U.S.C. section 160(b)), states in pertinent part, "[n]o complaint shall issue based upon any unfair labor practice occurring more that six months prior to the filing of a charge . . . ."

The earliest of the charges filed in this case, No. 80-CE-245-EC, filed October 22, 1980, contains allegations, inter

alia, of unspecified "changed working conditions of irrigators" and a section 1153(e) violation. This is the only reference to unilateral changes appearing in the charges. In the pleadings, a general allegation of unilateral changes in wages, hours and working conditions first appears in the Second Amended Complaint, issued June 23, 1981. Early in the hearing, in response to a motion for a bill of particulars, the general counsel specified that the changes discussed here were the subject of the general allegation. The specified changes were later incorporated in the Fourth Amended Complaint, filed during the course of the hearing.

In the earlier answers filed by the respondents, section 1160.2 was asserted as a defense without reference to any particular alleged violation, but in their last answers, filed during the hearing in response to the Fourth Amended Complaint, the statute is claimed only with respect to the termination of the pension plan. Its additional applicability to the July 1980 pay raise is first raised in the post-hearing brief filed by Holtville Farms. There the company argues that the union received actual or constructive notice of both changes because they were known to Apolinar Gerardo, the elected president of the ranch committee. No evidence directly indicates when or how the union, Gerardo, or any workers learned of the changes.[87/]

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87. Holtville Farm's assertion (post-hearing brief, p. 181r n. 78) that the wage increase was accompanied by a company wage sheet showing the new pay rates (GCX 31) is incorrect. The document was prepared for office use, and nothing indicates that it was distributed to the workers.

The statutory limitation is not jurisdictional; it must be the subject of an affirmative defense which, if not timely raised, is waived. (See, e.g., George Arakelian Farms (1982) 8 ALRB No. 36; As-H-Ne Farms, Inc. (1980), supra, 6 ALRB No. 9; Shumate v. NLRB (4th Cir. 1971) 452 F.2d 717, 78 LRRM 2905, 2908; Chicago Roll Forming Corp. (1967) 167 NLRB 961, 66 LRRM 1228; McKesson Drug Co. (1981) 257 NLRB 468, 107 LRRM 1509; Taft Broadcasting Co. (1982) 264 NLRB No. 28, 111 LRRM 1340.[88/]) The respondent has the burden of proving that the aggrieved party had actual or constructive notice of the facts constituting the alleged violation more than six months before the charge was filed. (Ruline Nursery (1982) 8 ALRB No. 105; George Arakelian Farms, supra.)

Here, the respondents have waived the statute as a defense to the unilateral wage increase by not asserting it in a timely manner. The general assertion of the statute that appears in the early answers is superseded by the more specific assertion in the answers to the Fourth Amended Complaint (cf. Witkin, California Procedure (2d ed. 1971) sections 338, 1034), and there the defense is claimed only with respect to the pension plan's termination.

The first time the statute is specifically claimed vis-a-vis the wage increase is in Holtville Farms' post-hearing brief. The defense is waived where it is asserted for the first

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88. In Arakelian, our board, citing McKesson Drug Co., supra, noted that despite some confusion, the NLRB has not rejected this interpretation of section 10(b). (George Arakelian Farms, supra, 8 ALRB No. 36, slip opn. at pp. 10-11.) The board's view of the NLRB's position is confirmed by the more recent cases of Taft Broadcasting Co., supra, and Federal Management Co., Inc. (1982) 264 NLRB No. 23, 111 LRRM 1296.

time in a post-hearing brief to the administrative law judge. (Taft Broadcasting Co., supra, 264 NLRB No. 28, 111 NLRR 1340; McKesson Drug Co., supra, 257 NLRB 468, 107 LRRM 1509; also see George Arakelian Farms, supra, 8 ALRB No. 36.) Holtville Farms relies upon a footnote in As-H-Ne Farms, supra, 6 ALRB No. 9, where the board states in part:

> Respondent failed to raise the defense at the hearing, or in its post-hearing brief. Respondent's failure to raise the statutory limitation constituted a waiver of the defense. Shumate v. NLRB, 452 F.2d 717, 78 LRRM 2905, 2908 (4th Cir. 1971), accord, Vitronic Division of Penn Corporation, 239 NLRB 45, 99 LRRM 1661 (1978).[89] (Slip opn. at p. 17, n. 1.)

Even if one assumes that the board intended the obverse proposition respondent would infer, that there is no waiver as long as the defense is raised in the post-hearing brief, it is dictum. In each of the cited cases, including As-H-Ne itself, the statute of limitations was not raised until the case was before the board and the consequence of its first being asserted in the post-hearing brief was not being considered. Where that situation has been considered, as in Taft Broadcasting and McKesson Drug, supra, the result has been consistent with the underlying rationale that the parties are entitled to notice of affirmative defenses.

In any event, for both the wage increase and the pension plan termination, the statutory requirement is satisfied by the

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89. The NLRB's treatment of the section 10(b) issue in Vitronic was specifically approved by a three-judge panel of the Eighth Circuit, NLRB v. Vitronic Division of Penn Corp (8th Cir. 1979) 630 F.2d 561, 102 LRRM 2753, but subsequently an evenly divided court sitting en bane denied enforcement of the board's order without explanation. (Id., 103 LRRM 3105; see George Arakelian Farms, supra, 8 ALRB No. 36, slip opn. at p. 10, n. 5.)

allegations of changed working conditions and a section 1153(e) violation that appear in the charge of October 22, 1980. Although the effective date of the pension plan termination was ultimately set at November 1, 1979, steps to terminate the plan were first taken in September 1980, when Hal Moller first notified the plan's administrator of the company's desire to terminate it. The wage increase at issue was granted in July 1980. Thus, for both changes, the October charge is well within the six-month limitation period.

The charge does not specifically mention either the wage increase or the termination of the pension plan. However, the charge in an unfair labor practice proceeding is not intended to be a detailed pleading or to specify the issues ultimately to be raised before the administrative law judge; its purpose is to instigate an investigative and complaint procedure which the board may not begin on its own initiative. (NLRB v. Alien's I.G.A. Foodliner (6th Cir. 1981) 651 F.2d 438, 107 LRRM 2596, 2598; NLRB v. Central Power & Light Co. (5th Cir. 1970) 425 F.2d 1318, 1320, 74 LRRM 2269; also see Procter & Gamble Mfg. Co. (4th Cir. 1981) 658 F.2d 968 , 108 LRRM 2177, 2189, cert. den. (1982) __ U.S. __, 111 LRRM 2528.)

Consequently, issues may be raised in the complaint and at the hearing that are related to and grow out of the unfair labor practices alleged in the charge, if they are of the same class of violations as those alleged. (Procter & Gamble Mfg. Co. v. NLRB, supra, 108 LRRM at 2189.) The board has broad leeway to found a complaint on events not specified in the charge as long as it does not initiate the proceeding on its own. (Ibid.) Unlike a charge, a complaint need not be filed and served within the six months period.

(Ibid.) Here, the specific unilateral changes that were litigated at the hearing are related to the general claim of changed conditions in the charge and are of the same class of violation.

Furthermore, the conduct complained of here is a continuing violation of the Act. (See George Arakelian Farms, supra, 8 ALRB No. 36; also see Julius Goldman's Egg City (1980) 6 ALRB No. 61; Ron Nunn Farms (1980) 6 ALRB No. 41.) One of the continuing violations found in Arakelian, supra, a wage increase, is identical to one here, and the other found there, the termination of a fuel allowance, is similar to the benefit terminated here, the pension plan. Here, as there, the employer violated sections 1153(e) and (a) throughout and after the six-month limitation period by continuing in effect its unilateral changes while continuing to fail and refuse to bargain with the union about them. (George Arakelian, supra, slip opn. at p. 14.)

For the foregoing reasons, T conclude that section 1160.2 affords the respondents no defense, and the unilateral changes in working conditions violated sections 1153(e) and (a) of the Act.

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SUMMARY AND REMEDY

To recapitulate, I have found that Holtville Farms and Growers Exchange, although nominally separate companies, constitute a single, integrated employer for the purposes of the Act. The UFW was separately certified as the collective bargaining representative for agricultural employees at each of the companies, but separate bargaining units do not run afoul of the Act.

While other nominally separate businesses like Toro Ranches might also be a part of that employer, the remaining respondents here, Gilbert Chell and his equipment company, Kal-Ed, were not sufficiently merged with the Growers Exchange-Holtville Farms entity to be considered an integral part of it. Consequently, they are not legally responsible for any of the unfair labor practices, and the charges against them should be dismissed. Holtville employees regularly worked in Chell's enterprises under circumstances so interconnected with their employment at Holtville, however, that whether they remained on Holtville's payroll or were placed on one of Chell's, their primary employer for the purposes of the Act was Growers Exchange-Holtville Farms.

In the spring of 1981, the three principals of Growers Exchange-Holtville Farms decided to close the farming company and replace its lettuce with lettuce grown under joint deals with other farmers. Even though getting rid of the union in the growing operation was an additional attraction, the primary reason for the decision was economic, not the desire to eliminate employees because of their participation in union activities or board processes or to chill unionism among employees at remaining companies.

Consequently, the shutdown and attendant terminations do not violate sections 1153(c) or 1153(d).

Since Holtville Farms was part of Growers Exchange, and since Growers Exchange planned to remain in the business of cultivating lettuce through its joint deals, the decision to close Holtville and replace its lettuce does not fall within the category of management decisions about which bargaining is permissive as a matter of law. Nevertheless, because the employer's economic difficulties were not amenable to resolution through the collective bargaining process, bargaining about the decision was not mandatory.

The employer still had a duty to bargain in good faith about the effects of its decision upon the workers who were losing their jobs, however. Holtville Farms had already demonstrated bad faith by refusing to recognize the union and bargain about a contract with it. The employer continued to exhibit bad faith by failing to notify the union of its decision to close Holtville or provide an opportunity to bargain at a meaningful time and in a meaningful manner, and by either refusing to provide relevant information or failing to provide it in a timely manner.

Although the employer belatedly entered into an intense period of negotiations, its approach to bargaining did not demonstrate an attitude of cooperation and compromise conducive to reaching an agreement with the union if possible. Its conduct did not mark any substantial break with its past bad faith refusal to bargain and, consequently, continued to violate section 1153(e), and derivatively, section 1153(a). The changes in working conditions instituted at Holtville Farms prior to its closure also constitute

violations of sections 1153(e) and 1153(a) because the union was not given notice or an opportunity to bargain over them.

Having found that Growers Exchange-Holtville Farms failed to bargain in good faith, I shall recommend that it be ordered to bargain with the UFW over the effect of its decision to close Holtville and contract elsewhere for lettuce. A bargaining order cannot serve as an adequate remedy for the unfair labor practice, however, unless the union can now bargain under conditions essentially similar to those that would have obtained had the employer bargained at the time the Act required it to do so, when the union had a measure of economic strength. (See Highland Ranch v. ALRB, supra, 29 Cal.3d 848, affirming 5 ALRB No. 54; John Borchard Farms (1982) 8 ALRB No. 52; Transmarine Navigation Corp., supra, 170 NLRB 389, 67 LRRM 1419; Royal Plating and Polishing Co., Inc., supra, 160 NLRB 990, 997-998, 63 LRRM 1045.)

A limited backpay order serves the two-fold purpose of making whole the employees for losses suffered as a result of the violation and recreating a situation in which the parties' bargaining position is not totally devoid of economic consequences for the employer. (See Highland Ranch v. ALRB, supra, 29 Cal.3d at 864; Transmarine Corp., supra, 170 NLRB at 390.) Back pay shall be due all workers employed by Holtville Farms as of April 15, 1981, the date by which the decision to close Holtville was made.

The employer shall be directed to pay those employees amounts at the rate of their average daily earnings from five days after the issuance of this decision until the occurrence of the earliest of the following conditions: (1) the employer and the UFW

bargain to agreement; (2) they bargain to a bona fide impasse; (3) the UFW fails to commence negotiations within five days after notice of the employer's desire to bargain; or (4) the UFW subsequently fails to bargain in good faith. In no event shall the backpay period for any employee exceed the period of time needed by the employee to obtain equivalent employment,[90/] except that the backpay award shall not be less than the employee would have earned for a two-week period at the rate of his or her usual wages when last in the employer's employ. This has become the standard backpay order for failing to bargain about the effects of a decision to close down an operation. (See, e.g., Borchard Farms, supra; Highland Ranch, supra; J.B. Enterprises (1978) 237 NLRB 383, 99 LRRM 1432; Van's Packing Plant (1974), supra, 211 NLRB 692, 86 LRRM 1581; Walter Pape, Inc. (1973) 205 NLRB 719, 84 LRRM 1005.) Because Growers Exchange-Holtville Farms was the primary employer of Holtville employees even when they worked for Chell or Kal-Ed, the backpay should reflect the wages lost at those companies as well.

Accordingly, pursuant to section 1160.3 of the Act, I recommend the following:

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90. Recent ALRB decisions refer to the time needed to obtain "alternative" employment, not "equivalent" employment. (See, e.g., Borchard Farms, supra; Highland Ranch, supra.) This appears to be a misstatement, however. The NLRB cases in which the remedy originates speak of "equivalent" employment (see Transmarine Navigation, supra, 170 NLRB at 390; Royal Plating and Polishing, supra, 160 NLRB at 998) and the obligation of the employer to make the worker whole does not logically terminate simply because the worker has found another job of any type. The appropriate analogy is to the order in an unlawful discharge case, where the offending employer is directed to pay back wages until the employee is offered reinstatement to the same or an equivalent position.

ORDER

Respondents GROWERS EXCHANGE, INC., and HOLTVILLE FARMS, INC., jointly and severally, and the officers, agents, successors and assigns of each of them, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in section 1155.2(a) of the Act, on request, with the UNITED FARM WORKERS OF AMERICA, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of Holtville Farms, Inc., agricultural employees;

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

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

(d) Failing or refusing to give the UFW notice and, on request, an opportunity to bargain over the effects of the decision to close Holtville Farms and contract out its lettuce growing operation; or

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

2. Take the following affirmative actions 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 Holtville Farms, Inc., agricultural employees regarding the effects of the decision to close Holtville Farms and contract out its lettuce growing operation, and regarding other unilateral changes in their working conditions, and embody any resulting understanding in a signed agreement.

(b) Upon request, provide the UFW with information relevant to collective bargaining about the aforementioned subjects.

(c) Pay to terminated Holtville Farms, Inc., agricultural employees who were employed on or about April 15, 1981, their usual daily wage for the period commencing five (5) days after the issuance of this order and continuing until the occurrence of the earliest of the following conditions: (1) they and the UFW reach an agreement about the effects of the decision to close Holtville Farms and contract out its lettuce growing operation; (2) they and the UFW reach a bona fide impasse in their collective bargaining over that issue; (3) the UFW fails to commence negotiations within five (5) days after notice of the respondents' desire to bargain; or (4) the UFW subsequently fails to meet and bargain collectively in good faith with the respondents.

In no event shall the backpay period for any employee exceed the period needed by the employee to obtain equivalent employment, except that the backpay award to any employee shall not be less than he or she would have earned for a two-week period at the rate of his or her usual wages when last employed by Holtville Farms, Inc., Gilbert Chell, or Kal-Ed, Inc. Awards shall bear interest computed in accordance with the board's decision and order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(d) Preserve and, upon request, make available to the board or its agents, for examination and copying all records relevant and necessary to a determination of the amounts due under the terms of this order.

(e) Sign the attached Notice to Employees and, upon its translation by a board agent into all appropriate languages, reproduce sufficient copies of it in each language for the purposes set forth below.

(f) Post copies of the notice in conspicuous places on their premises for 60 consecutive days, the time and places of posting to be determined by the board's regional director, and exercise due care to replace any notice which is altered, defaced, covered, or removed.

(g) Within 30 days after the issuance of this order, mail copies of the notice in all appropriate languages to all agricultural employees employed by Holtville Farms, Inc., at any time between April 15, 1981, and the date the notice is mailed.

(h) Provide a copy of the attached notice to each agricultural employee hired during the twelve-month period following the date of issuance of this order.

(i) Arrange for a representative of the respondents or the board to distribute and read the notice in all appropriate languages to the assembled employees of respondents on company time and property at times and places to be determined by the board's regional director. Following each reading, a board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employeed may have concerning

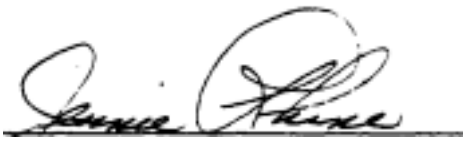
the notice or their rights under the Act. The board's regional director shall determine a reasonable rate of compensation to be paid by the respondents to all non-hourly wage employees to compensate them for time lost at this reading and question-and-answer period.

(j) Notify the board's regional director in writing, within 30 days after the issuance of this order, of the steps which have been taken to comply with it, and upon request of the regional director, notify him or her periodically thereafter in writing of further actions taken to comply with this order.

IT IS FURTHER ORDERED that the certification of the UFW, as the exclusive collective bargaining representative of all agricultural employees of respondent Holtville Farms, Inc., be extended for a period of one year from the date following the issuance of this order on which respondents commence to bargain in good faith with the UFW.

IT IS FURTHER ORDERED that the allegations against respondents GILBERT CHELL and KAL-ED, INC., be, and they hereby are, dismissed.

DATED: May 9, 1983.



JEHNI RHINE
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After charges were made against us by the United Farm Workers of America, AFL-CIO (UFW), and after a hearing was held where each side had an opportunity to present evidence, the Agricultural Labor Relations Board has found that Growers Exchange and Holtville Farms are one and the same employer, and that we violated the law by not bargaining in good faith with the union about our decision to close Holtville Farms and contract out its lettuce growing operation. The Board has ordered us to distribute and post this notice and take the actions listed below.

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

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

Because you have these rights, we promise that:

WE WILL MOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL meet and bargain in good faith with the UFW about the effects of our decision to close Holtville Farms and contract out its lettuce growing operations.

WE WILL NOT refuse to provide the UFW with the information it needs to bargain on your behalf.

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

WE WILL reimburse all agricultural workers employed by Holtville Farms on April 15, 1981, for pay and other economic losses they suffered because of our refusal to bargain in good faith with the union at that time.

DATED:

GROWERS EXCHANGE, INC.

By:_____
(Name) (Title)

HOLTVILLE FARMS, INC.

By:_____
(Name) (Title)

If you have any questions about your rights as farm workers or about this notice, you may contact your union or any office of the Agricultural Labor Relations Board. One office of the board is located at 1629 West Main Street, El Centro, California, with this telephone number: (714) 353-2130.

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

DO NOT REMOVE OR MUTILATE