STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

WEST FOODS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 81-CE-15-OX 82-CE-6-OX 81-CE-15-1-OX 82-CE-8-OX 81-CE-20-OX 82-CE-9-OX 81-CE-22-OX 82-CE-10-OX 82-CE-3-OX 82-CE-11-OX 82-CE-4-OX 82-CE-12-OX 11 ALRB No. 17

DECISION AND ORDER

On June 17, 1983, Administrative Law Judge (ALJ) Stuart A. Wein issued the attached Decision. Thereafter, Respondent West Foods, Inc., General Counsel, and Charging Party, the United Farm Workers of America, AFL-CIO (UFW or Union), all filed timely exceptions to the ALJ ' s Decision with supporting briefs, and the UFW filed a reply brief to Respondent's exceptions

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

From July 1981[1/] through the conclusion of the hearing in this case (April 1982), West Foods and the UFW fruitlessly negotiated towards a collective bargaining agreement for

[1/] All dates refer to 1981, unless otherwise specified.

Respondent's Venture operations. During this period, both parties employed their economic weapons: West Foods began an allegedly unlawful phasedown of its operations on July 15, 1981, and the UFW called a strike on November 19. West Foods is also alleged to have engaged in a variety of acts constituting bad faith bargaining, a number of which the ALJ found. Respondent excepted to each of these conclusions. We first turn to consideration of the legality of Respondent's phasedown of its operations which was found by the ALJ to constitute an unlawful lockout.

LOCKOUT

Respondent grows and packs mushrooms at its Ventura plant on a year-round basis. The mushrooms are grown in cycles so that at any given time some mushrooms are ready for harvest while others are at various earlier stages of growth.

The UFW was certified as the collective bargaining representative of Respondent's agricultural employees on December 4, 1975. Since then, the parties have negotiated two contracts covering the Ventura unit, one from September 6, 1976 to September 6, 1978, and the other from September 6, 1978 to September 6, 1981. During the same period, Respondent also had a contractual relationship with the UFW at another unit in Soquel, California, the history of which also figures in the matter before us. The negotiations which resulted in the 1976-1978 Ventura contract were highlighted by a strike which, although it resulted in a contract, entailed considerable economic loss to Respondent. In the following year's (1977) Soquel negotiations a contract was achieved without economic action.

With its 1976 experience clearly in mind, Respondent decided to approach the Ventura negotiations in 1978 with an eye to avoiding a strike. Company officials approached Cesar Chavez, president of the UFW, to inform him that the Company's fragile financial condition made it necessary to avoid a strike. They told Chavez that if negotiations did not conclude early, the Company would have to consider putting into effect "a crop protection program" under which operations would be phased down so that the Company would be completely shut down by the expiration date of the contract. When, in response, the Union suggested extending the contract with its "no-strike, no lockout' provision, Respondent replied there was ample time to reach an agreement before the expiration date. Negotiations commenced in mid-July and were in mid-stream when, on August 18, 1978, Respondent began its phasedown by ceasing to prepare compost, which is the first step in its production cycle. A new contract was reached on August 24, 1978.

Negotiations for the next Soquel agreement followed the same pattern. With the agreement due to expire on April 2, 1979, Company officials once again pushed the Union for an early settlement. At the start of formal negotiations in March, 1979 Respondent advised the Union that if a contract was not reached quickly, it would implement its crop protection program by March 30. When negotiations were still stalled on March 15, the Union agreed to a two-week extension of the contract. Agreement was finally reached on March 30, the day the crop protection program was to have begun.

The Ventura negotiations which are the subject of this case took place not only against this backdrop, but also against a background of hostility which was apparently peculiar to the Ventura unit itself. On the one hand, the Union perceived Respondent as having undermined the contract, and, on the other, Respondent perceived the Union as willing to attack it economically. As the ALJ has detailed, each side received, relied upon, and, in the case of Respondent, solicited reports of the other side's hostility and willingness to resort to their respective weapons and counter-measures. As was true of the approach to the 1978 Ventura and 1979 Soquel negotiations, Respondent again determined to press for an early settlement and to make the Union aware that, should the parties fail to achieve one, Respondent would resort to a phasedown. Unlike the earlier negotiations, however, when Respondent threatened resort to crop protection only a few weeks or a few days before the contract was due to expire, Respondent decided to implement the crop protection program much earlier than in any of the previous negotiations. According to Respondent's witnesses, the added lead time for a phasedown in 198] was made necessary because Respondent's high production levels made it all the more critical to avoid a strike.[2/]

In May 1981, Respondent's negotiators met with Chavez

[2/] Respondent's witnesses also testified that one other factor figured in their decision to implement the crop protection program so early during these negotiations, namely, the length of the mushroom growing cycle. Since this was apparently invariant between 1976 and 1981, it is hard to understand how this factor helped change Respondent's mind about when to begin the phasedown.

at La Paz, California to inform him of the plan to phasedown operations if an early settlement was not reached. Chavez told Company representatives that the Union had not yet appointed its negotiator for the Venture region and that he could not discuss the matter. On June 17, 1981, UFW negotiator Roberto de la Cruz and the Ranch Committee met with George Horne, the Company's negotiator, at Respondent's offices. Horne told the Union that the Company wanted a contract before July 15, 1981 or a 30-day extension, or it would shut down after that date. As the Company had refused to consider an extension during the 1978 Ventura negotiations, de la Cruz now refused to consider one on the grounds that there still was plenty of time to negotiate. Two days later, the Union submitted a request for information and scheduled a negotiation session for July 6, 1981, a little more than a week before the phasedown was scheduled to commence. The Company responded on June 25, 1981 by providing some information, by offering to make other information available and, finally, by telling the Union it already possessed still other information.

On July 6, both parties presented complete language, but not economic proposals. When Horne again emphasized the Company wanted either a new contract by July 15 or an extension of the existing one, de la Cruz again replied there was still time to negotiate. Horne supplied more information on July 7, but still failed to provide information relating to tools, equipment and protective garments; the cost of various benefit items (with the exception of vacations); production by grades;

and picker records for all but a four-week period. The Union conceded, as Respondent had earlier insisted, that it had some of the other information it had requested.

On July 7 the parties discussed the Hiring article, changes in the Grievance and Arbitration language and Maintenance of Standards. The Company again asked for a 30-day contract extension; the Union again refused to consider it.

On July 13, more written proposals were exchanged and discussion continued on the Hiring, Grievance and Arbitration, and Maintenance of Standards articles. The Union rejected the idea of a 30-day extension, once again saying there was plenty of time to negotiate. The Company requested a 60-day strike notice; de la Cruz said the Union had no intention of striking. On July 14 the Company requested discussion of implementation of the crop protection program, but de la Cruz refused to discuss it, contending that it was illegal. He told the Company he could better spend his time preparing an economic package, which he apparently did because he presented one the following day, along with language on other articles. The Company expressed disappointment in the proposals and told de la Cruz it would implement the crop protection program the next day if the Union did not agree to a 30-day extension of the contract or a 60-day strike notice.

On July 16, Horne wrote the employees that the Company was implementing the crop protection program:

> ...as an economic requirement to protect the mushroom crop and [its] business and customers' needs if we seem to be heading for a serious labor dispute. Our

extension proposals were an effort to take the pressure off for one more month so that the union could get ready to negotiate and we would have time to reach an agreement.

Implementation of the program resulted in the demotions, reassignment of work and intermittent layoff of employees which are described in the accompanying ALJ Decision.

Treating the phasedown as a "lockout", the ALJ found that it was violative of Labor Code section 1153(e) because it was an integral part of Respondent's bargaining strategy, in bad faith and inherently prejudicial to employee interests. Respondent vigorously objects to this conclusion, arguing that the phasedown was not a "lockout" but a lawful "defensive" measure undertaken to protect its business. We affirm the conclusion of the ALJ that Respondent unlawfully "locked out" its employees in violation of Labor Code section 1153(e) prior to the expiration date of the contract; while we adopt the ALJ's analysis as an additional basis for finding a violation of section 1153(e), we rely upon our own analysis of the intent of the Legislature in enacting section 1155.3(a). Since we affirm his finding that Respondent was guilty of overall bad faith bargaining, we also affirm the ALJ's conclusion that so far as the lockout continued past the expiration date of the contract, it was also violative of the Act.

Because the shutdown in this case took place within the 60-day period preceding expiration of a collective bargaining agreement, the starting point for analysis must be Labor Code section 1155.3(a) which states:

> 1155. 3(a) Where there is in effect a collective-bargaining contract covering agricultural employees, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification does all of the following:
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> (1) Serves a written notice upon the other party to the contract of the proposed termination or modification not less than 60 days prior to the expiration date thereof, or, in the event such contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification.
>
> * * *
>
> (4) Continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract, for a period of 60 days after such notice is given, or until the expiration date of such contract, whichever occurs later.

On its face, then, section 1155. 3(a) clearly proscribes "lockouts" within the very period in which Respondent implemented its phasedown. Accordingly, it follows that if the "phasedown" was a "lockout" within the meaning of section 1155.3(a), Respondent's action was, by definition, a refusal to bargain. However, relying principally on Royal Packing Co. (1972) 198 NLRB 1060 [81 LRRM 1059], American Brake Shoe v. NLRB (7th Cir. 1957) 244 F. 2d 489 [40 LRRM 2043], Betts Cadillac-Olds, Inc. (1951) 96 NLRB 269 [28 LRRM 1509], and Link Belt (1940) 26 NLRB 227 [6 LRRM 565], Respondent argues that the phasedown of its operations from July 15, 1981 forward was not a "lockout," but was, instead, a lawful measure to protect itself from the

hardship of a strike.[3/]

Fewer concepts in labor law have created such definitional problems as that of the lockout. Although used by employers long before passage of labor legislation, Millis and Montgomery, Organized Labor, p. 554, debate still continues about its essential nature, see Denbo, Is the Lockout the Corrollary of the Strike, 14 Labor Law Journal 400 (1963); NLRB v. Truck Drivers, Local 449 (Buffalo Linen Supply Co.) (1957) 353 U.S. 87, 93 [39 LRRM 2603], Although the term is utilized in the NLRA, it is nowhere defined by that Act[4/] nor has it been consistently

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[3/] Respondent also argues that it instituted the crop protection program in order to protect the health of its employees, many of whom became sick after the mushroom houses became contaminated after the 1976 strike. To the extent that Respondent relies on this concern as a reason to engage in its crop protection program during the time period covered by section 1155.3(a), we think that concern is included, and hence subsumed, by Respondent's similar concerns about the effects of a possible strike on its business after expiration of its contract.

[4/] See Kheel, Labor Law § 334.01[1]. As the Trial Examiner noted in Betts Cadillac-Olds, Inc., supra, 96 NLRB 268, 282-83:

> Though the term has been often used in Federal legislation since the early 1930's, it has never been statutorily defined. See, for example, the first Senate draft of the Wagner Act, subsequently amended, S. 2926, 73rd Congress, 2d Session, original Senate print, which prohibited lockouts and testimony in the Senate hearings thereon, reprinted in Legislative History, p. 2392; and see references to "lockouts" in Executive Order 9017, establishing the National War Labor Board in World War II, January 12, 1944; the War Labor Disputes (Smith-Connelly) Act of June 25, 1943; and Sections 8(d), 203, 206, and 208 of the Taft-Hartley Act.
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> Whether the term "lockout" as employed in those contexts embraced the common law definition of the term, or instead was used generically to describe all voluntary closedowns, other than strike action, consequent upon

(Fn. 4 cont. on p. 10--)

used by the National Labor Relations Board. (Betts Cadillac-Olds, Inc., supra, 96 NLRB at 283.) Nevertheless, because it is clear that under the circumstances of this case, a "lockout" will contravene section 1155.3(a)(4), determination of what that section aims to prevent will outline the area of our inquiry into the lawfulness of Respondent's actions.

Section 1155.3(a)(4) is the analog to section 8(d)(4) of the Taft-Hartley Act, 29 U.S.C. 158(d)(4); Levy, The Agricultural Labor Relations Act of 1975 - La Esperanza de California Para El Futuro (1966) 15 Santa Clara Lawyer 783, p. 792. This section was added by Congress to the NLRA:

> ... to assure that, once parties have stabilized their bargaining relationship by entering into a contract, the stability achieved will not be placed in jeopardy by strikes or lockouts. It is for this reason that the section provides for a waiting period before strike or lockout action by the parties. Clearly, Congress was interested in establishing an orderly procedure for contract negotations and in preventing the industrial unrest that is the natural consequence of the failure of the parties to abide by their collective bargaining agreement.
> (Lion Oil Company (1954) 109 NLRB 680, 681-82 [34 LRRM 1410] enforced NLRB v. Lion Oil Company (1957) 352 U.S. 282.)

Accordingly, section 8(d) "seeks, during this natural renegotiation period, to relieve the parties from the economic pressure of a strike or lockout in relation to the subject of negotiation."

(Fn. 4 cont.)

> a labor dispute, or was confined to shutdowns for economic or operative reasons, is not immediately evident in all instances, and is probably not necessary, for reasons to be adverted to, to decide here. The significant point is that the term is not statutorily defined, though statutorily used ....

(Mastro Plastics v. NLRB (1956) 350 U.S. 270, 286.) (Emphasis added.)[5] And if it is true that a lockout in aid of an employer's bargaining strategy during the "cooling off" period violates 1153(e), it must be all the more true that a lockout which is the centerpiece of an overall strategy of bad faith bargaining by an employer, as the ALJ found Respondent's bargaining to be, will also violate 1153(e).

Preliminarily we note that Respondent's implementation of its crop protection program under the facts of this case constituted economic action within the meaning of the term "lockout" under section 1155.3(a). Morris, The Developing Labor Law, 2nd Edition, Volume II (1983), p. 1034, defines a lockout as "the withholding of employment by an employer from his employees for the purpose of resisting their demands or gaining a concession from them." There is no question that by implementing its crop protection program, Respondent withheld employment it normally would have given its employees. As we shall discuss, we find that the crop protection program plan was also an integral part of Respondent's bargaining strategy.

As was true in previous contract negotiations between Respondent and the Union, the phasedown and the July 15, 1981 date for its implementation was formulated well in advance of

[5] Gorman Basic Text on Labor Law, 1976, p. 424:

> The obvious purpose of [section 8(d)(4), the analog of section 1155.3(a)] — which operates against lockouts as well -- is to give the parties a period of at least sixty days within which to exert all good faith efforts to reach a settlement through peaceful negotiations and not by economic force.

negotiations. While one of the stated purposes of the crop protection plan was to avoid the effects of a potential strike occurring after the expiration of the contract, other stated purposes were to force the UFW, prior to the expiration of the contract, to agree to a contract, to extend the current contract beyond its expiration date, or to give a sixty-day notice of any future strike. As the crop protection program constituted action designed to put economic pressure on the Union to agree to an early contract <u>or to make concessions regarding the Company's proposals,</u> it falls within the meaning of the term "lockout." Inasmuch as such economic pressure was applied on the Union during negotiations[6/] after notice to terminate or modify the contract was given, but before expiration of the contract, the implementation of the crop protection program was at odds with the purpose of section 1155.3(a)(4).[7/]

Nothing in the authorities urged upon us by Respondent alters our conclusion in this regard. For example, <u>Link-Belt</u>, <u>supra</u>, 26 NLRB 227 does not even purport to distinguish between an "economically justified" lockout and one in aid of an employer's

[6/] Respondent in this case sought to have the Union agree to concessions in two specific mandatory subjects of bargaining. By attempting to have the Union agree to an extension of the existing contract or to give a sixty-day advance notice of a strike, Respondent sought to pressure the union to make concessions as to the duration of a contract and as to a no-strike/no-lockout provision. (See Morris, The Developing Labor Law (1983) Second Edition, p. 801, 815.)

[7/] Section 1155.3(a)(3) requires the party desiring to terminate or modify the collective bargaining agreement to notify the Conciliation Service of the State of California of the existence of a dispute. There is no evidence in the record whether Respondent fullfilled this obligation.

bargaining strategy, but only determines whether Respondent's action in that case, which is referred to as both a lock-out and a layoff, was discriminatory.[8/] Accordingly, to the extent that case is at all instructive for present purposes, it makes the inquiry into Respondent's motive, which we undertake in this case, critical. Similarly, although Betts Cadillac-Olds, Inc., supra, 96 NLRB 269, did not involve accommodating the tensions between 8(d)(4) and the right of an employer to defend itself, the Trial Examiner in that case also specifically focused his inquiry on whether the motive of the Respondents was "defensive" or "offensive." (96 NLRB at 271, 287-290.) In American Brake Shoe v. NLRB, supra, 244 F.2d 489, a case which did involve "defensive" action during the "cooling off" period, the Board conceded that the company "was motivated solely by foreseeable operative and economic difficulties as a result of its apprehension of a possible strike." (244 F.2d at 492.) Finally, in Royal Packing Co.,

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8/ Thus, the Board concluded:

> We find, on the basis of the foregoing, that the respondent closed the heat-treat department on the morning of November 19, 1938, for lawful reasons and in order to protect its legitimate interests.
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> We find that the respondent did not lock out and lay off Louis Albrecht, James Gaughan, Connell Haymaker, Russell Hopper, William Lukins, Boris Palachoff, William Proctor, Curtis Reynolds, Clyde Rodenberg, Conrad Schroeppel, Louis Scott, and David Thomas on or about November 18, 1938, because of their union activities. (Emphasis added. 26 NLRB at 264-265.)

9/ Indeed, the Court conceded it was not facing the "rather vexing problem of determining ... whether a shutdown by an employer for the purpose of exerting bargaining pressure" was permissible, a question which, in our opinion, has been answered by section 8(d)(4) and 1155.3.

supra, 198 NLRB 1060, the only other case which we have found to consider shutdowns during the "cooling-off" period, the distinction we have adopted as controlling our consideration of this case was once again observed; the national board not only found Respondent's motive to be purely economic, but also specifically rejected the Trial Examiner's finding that the shutdown was even partially attributable to bargaining strategy.[10/]

We recognize that our inquiry into the interplay between the proscriptions of 1155.3(a)(4) and an employer's economic defense revitalizes the distinction between offensive and defensive

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[10/] Thus, the Board in a footnote noted:

> Although the Trial Examiner finds that the overall shutdown was in part for an object of pressuring the union into contract concessions we specifically note that there is absolutely no evidence or basis for inferring that the layoffs ... were for any objective other than [economic defense]. (198 NLRB at 1061 n. 4.)

It is clear that in holding that the cutback in operations in Royal Packing did not come within the prohibition of section 8(d) (4), the NLRB considered not only the special nature of the respondents' operation, i.e., that a shutdown would be effectuated over a period of time, but also that the employers faced an actual and explicit threat of a strike upon the expiration of the contract. Thus, the NLRB focused upon the considerable losses the employers stood to sustain if they were not allowed to cut back operations prior to the expiration of the contract and, equally important for our purposes, specifically pointed out in the above-quoted footnote that there was no evidence that any part of the purpose of the cutback in operations was to pressure the union to make contract concessions. As our discussion of the intent behind 8(d)(4) reveals if the cutback in operations before the contract expired was even partly intended to pressure the union into contract concessions, it would have fallen within the intent of the prohibition of section 8(d)(4). However, as the phasedown in Royal Packing was in response to an explicit threat of a strike that would materialize after the expiration of the contract, the NLRB was able to distinguish the phasedown in that case from economic action used to force a party into making contract concessions.

lockouts which, in the wake of American Shipbuilding v. NLRB (1965 380 U.S. 300 [58 LRRM 2672], and NLRB v. Brown (1965) 380 U.S. 278 [58 LRRM 2663], no longer applies outside the waiting period. However, in view of the tension between the clear purpose of the "cooling off" period and the continued vitality of the economic defense, there is no way to avoid such a result. Our task, then, is to accomodate the tension between these two competing interests. In seeking to strike an appropriate balance, we are aware that:

> [a] loose application of the economic defense to ... lockouts [within the cooling-off period] would involve the risk of eroding the statutory moratorium. On the other hand, an absolute proscription of employer-initiated shutdowns during the moratorium period would involve the risk of inflicting extraordinary losses on employers including losses from physical damage to plant and raw materials, losses, which [in the past] have produced the best case for economically privileged lockouts.
> (Meltzer, Lockouts Under the LMRA [sic]: New Shadows on an Old Terrain, 28 Univ. of Chicago Law Review, (1961) 614, 626-627.)

Our task is all the more delicate because, unlike the NLRB which regulates a broad range of industries not all of which could plausibly claim the need to protect a perishable product, almost all of the industry we regulate produces quickly perishable commodities. We do not believe the legislature, in incorporating the "cooling off" period into our statute, intended to permit it to be easily ignored by the merest claim of economic necessity. Since crops cannot be shut down on a single day, a too facile application of the economic defense would permit a phasedown of operations by an employer at the very outset of the growing cycle, regardless of when in the production cycle the contract expires.

This result would render section 1155.3(a) meaningless since in almost all instances, an employer could shut down well in advance of the expiration of its contract if that expiration date encompassed any point in the production cycle. Instead, the intent of the Legislature is clear: parties should have the statutorily prescribed period of time in which to use good faith efforts to negotiate a new contract without resort to economic weapons to force concessions from the other party.[11/]

Our conclusion that Respondent's motives were not "defensive" is reinforced by our finding that Respondent's fear of an imminent strike was not reasonable. The only cases which find phasedowns lawful within the cooling-off period turn on specific findings that fear of a strike was justified. Thus, in considering the reach of Royal Packing, supra, 186 NLRB 1060 and American Brake Shoe v. NLRB, supra, 244 F.2d 489, we think it necessary to distinguish between showing, as Respondent did here, that it reasonably believed that if a strike were to occur it would suffer severe economic loss and, showing, as the ALJ concluded that Respondent did not, that it reasonably believed a strike would occur. We believe a case of economic necessity

[11/] The dissent argues that the reality is that only a limited number of employers in a limited set of circumstances would be able to avail themselves of any phasedown defense to a strike. If such is the case, then clearly the dissent's characterization of our holding as requiring agricultural employers to be faced with a Hobson's choice is pure exaggeration, for few labor disputes would be impacted by our holding or that proposed by the dissent. However, the dissent has completely missed the point. To the extent we prohibit the use of a phasedown/lockout as a bargaining tactic during the time period 60 days prior to expiration of an existing contract, the policy decision behind such prohibition was made by the Legislature when it enacted section 1155.3(a).

is made out only in the situation where an employer has reasonable grounds for believing that a strike will occur because if, in the classic metaphor from Betts Cadillac-Olds, "the pedestrian need not wait to be struck before leaping for the curb," this Board need not treat evasive action as necessary in the absence of evidence of an onrushing vehicle. Both Royal Packing and American Brake Shoe v. NLRB confirm this distinction.

For example, in Royal Packing the Trial Examiner found that a strike threat was specifically made by union representatives on October 12, 1970 when they sought to obtain signatures on a Memorandum of Agreement to certain wage and benefit rates the respondents were then refusing to pay:

> The fact that Local 545 sought the signatures of the smaller area packers on such a "blank check" agreement at this stage of the negotiations with the Association is of considerable significance, in my opinion. This was an unprecedented step for Local 545 to take. The only advantage accruing to any employer signing the Memorandum of Agreement which I can perceive is the implied assurance that his operations could continue without interruption due to a strike of Local 545 members. The implication almost inevitably flowing from a refusal to sign the Memorandum of Agreement is that such assurance of unhampered continued operations would not be available in such cases. In other words, the continued operations of any employers refusing to sign the Memorandum of Agreement would be vulnerable to strike action on the part of Local 545. In my opinion, in the cases of Tarpoff and Wuestling, Barrett and Coyne merely made explicit the threat which was implicit in Local 545's action in seeking signatures on the Memorandum of Agreement at this time. (198 NLRB at 1064.)

In upholding the lawfulness of the respondents' action in that case, the Board emphasized the Examiner's finding that respondents "had good reason to believe the union would strike upon expiration

of the contract."

In American Brake Shoe Co. v. NLRB, supra, 244 F.2d 489, the facts show once again that the respondent had reason to fear a strike would actually occur, rather than merely reason to fear it would suffer losses if a strike were to occur. The respondent's contract with the union was due to expire on February 28, 1954. In two previous contract negotiations, that of 1948 and 1951, the respondent had been struck for a significant period of time; moreover, the same union had struck at another of the respondent's plants in 1953. As a result, respondent's customers advised it that they would not tolerate similar disruption again. It is against this background, which once again contains evidence of reasonable fear that a strike would occur, that the court viewed the respondent's actions.

In this case, the only strike Respondent had experienced was in 1976. Since then Respondent had negotiated other contracts with the Union without any threat of a strike: the 1977 Soquel agreement and the 1978 Ventura agreement. The ALJ concluded that there was no record evidence of work stoppages during the term of the 1978-1981 Ventura contract which would support Respondent's fear that a strike was imminent in 1981. The ALJ also rejected Respondent's contention that UFW members, agents and representatives threatened a strike. Indeed, to the extent either party threatened economic action, it was Respondent which had incorporated not only the threat, but also the use of economic action into its negotiating position. Although the Union obviously resisted giving Respondent any assurance that it would seek to

achieve an early contract, for its part Respondent showed no alacrity in providing the information the Union requested to formulate its proposals. We find it odd for Respondent to make the Union's lack of diligence a fault where it plainly showed itself to be less than diligent.

Respondent's contention that the UFW refused to give any assurances that it would not strike is false. The record is replete with testimony from UFW negotiators, as well as Company negotiators Jim Kahl and George Horne, that the Union repeatedly told the Company at the negotiation sessions in July and August that it would not strike.

Having found that Respondent did not have a reasonable fear that a strike was imminent, and that the crop protection program was in fact economic action designed to apply pressure for contractual concessions upon the Union during the time period specified in section 1155.3(a), we conclude that the crop protection program was a lockout prohibited by section 1155.3(a) and hence unlawful.[12/]

The ALJ analysis of the legality of the crop protection program is based upon application of the NLRB lockout cases. We have carefully reviewed the ALJ's Decision in light of the

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[12/] We note that our dissenting colleagues do not expressly attack our conclusion that the intent behind section 1155.3(a) prohibits the use of a lockout (or "phasedown") as a bargaining tactic, as opposed to a legitimate defensive measure by an employer to protect itself from economic harm resulting from a strike. We differ, however, from our dissenting members in two respects. First, we believe that before an employer may legitimately remove itself from the prohibition of section 1155.3(a), it must be clear

(Fn. 12 cont. on p. 20.)

exceptions filed and adopt his findings and conclusions as a further basis for finding Respondent's crop protection program to be in violation of section 1153(e).

SURFACE BARGAINING

Section 1153(e) of the Act requires an agricultural employer to bargain in good faith with its employees' certified collective bargaining representative towards a bargaining agreement. This duty to bargain in good faith requires that, while the parties need not agree, they must negotiate with the view of reaching an agreement if possible. (As-H-Ne Farms (1980) 6 ALRB No. 9; Martori Brothers Distributing (1982) 8 ALRB No. 23; Arakelian Farms (1983) 9 ALRB No. 25.) To determine whether a party has bargained in good faith requires an assessment of all the factors in light of the totality of the circumstances. (McFarland Rose Production (1980) 6 ALRB No. 18; Masiji Eto, et a1. (1980) 6 ALRB No. 20; NLRB v. Virginia Electric and Power Co. (1941) 314 U.S. 469 [9 LRRM 405].)

The ALJ concluded that Respondent unlawfully engaged in bad faith bargaining with the UFW in violation of section 1153(e) and (a) of the Act. The ALJ based this

(Fn. 12 cont.)

that in fact the action is defensive in that there is a reasonable fear that a strike is imminent. Our dissenting colleagues seem to believe that no showing by an employer that a strike is imminent is required. In this regard, the dissent ignores the fact that in Royal Packing, supra, 198 NLRB 1069, the employer had good reason to believe a strike was imminent and the NLRB acknowledged that the employer's phasedown was not for the objective of applying pressure on the union to make concessions in negotiations. Second, we disagree with the dissent that Respondent in this case showed it had such a reasonable fear of a strike.

determination on the totality of Respondent's bargaining conduct including the following: Respondent's lockout of its employees in the absence of a union concession regarding an extension of the contract or a written no-strike guarantee despite the no-lockout provision of the then current contract; Respondent's initial economic proposal offering less than what many employees were earning under the existing contract; Respondent's overeagerness to declare impasse as early as August, and repeatedly thereafter until it ultimately declared impasse in December; Respondent's dilatory responses to the UFW's information requests; Respondent's continued insistence to impasse that it needed a 90-day cushion to avoid the relationship problems which it had encountered in the past; and its advancement of a proposal in January 1982 which withdrew previously agreed upon articles.

We fully adopt the ALJ's reasoning and holding on this issue and find that Respondent failed and refused to bargain collectively in good faith with the UFW,[13] in violation of section 1153(e) and (a).

We note that the record supports the ALJ's conclusion that the parties were not at impasse when Respondent unilaterally implemented a wage increase on December 18, and that Respondent exhibited an overeagerness to declare impasse. In fact, we find that Respondent repeatedly attempted to get the UFW to agree that the parties were deadlocked. This finding is supported by the

[13] Like the ALJ, we do not rely on Respondent's direct communications with its employees to reach this result and do not determine whether those communications constitute indicia of bad faith.

testimony of both George Horne and Roberto de la Cruz and by some of the parties' correspondence (i.e., see General Counsel Exhibits 47 and 58).

In its exceptions brief, Respondent argues that the issue of wages was the single major unresolved stumbling block that was the cause of a stalemate. The record does establish that late in the negotiations the parties were far apart on the issue of wages for the mushroom pickers. However, the ALJ found that Respondent had not provided the information requested by the UFW pertaining to the pickers' wages. In the first place, Respondent cannot rely on a stalemate attributable to its own dilatoriness to prove impasse. Furthermore, the record does not support Respondent's contention that the parties' differences over the wage issue was what led to a deadlock. Throughout the negotiations, Company negotiators kept insisting that duration of the contract was the single major issue. Respondent indicated that it would move on other issues if the Union moved on duration. In late November, the UFW did in fact make a major concession on duration. Even after this concession, Respondent was unwilling to change any of its previous positions, but merely kept insisting that duration was the major issue.

Not only would the Union's movement on duration, which had all along been declared the major issue, have broken impasse, (German, p. 449) but also Respondent's present contention that wages were the major stumbling block reveals that impasse could not have been reached in the first place because major mandatory subjects of bargaining had not been thoroughly explored. This

was not a situation where a "single issue looms so large that a stalemate as to it may fairly be said to cripple the prospects of any agreement" so that the parties are excused from bargaining over less important issues before declaring a bona fide impasse. (Carl Joseph Maggio, Inc. v. ALRB (1984) 154 Cal.App.3d 40.)

CROP AUGMENTATION

Respondent excepts to the ALJ's conclusion that Respondent engaged in an unlawful unilateral change by "subcontracting" its mushroom packing operation without prior notice to and bargaining with the Union. We find merit .in the exception.

In November 1980 and October 1981, Respondent purchased mushrooms from East Coast growers to be packed and shipped by employees at its Ventura operation, but failed to notify the UFW of its decision until after the change had been implemented. While an employer has a duty to notify the Union and afford it an opportunity to bargain about proposed changes in employees' terms and conditions of employment, we conclude that Respondent's importation of mushrooms cannot properly be characterized as "subcontracting" since that terminology, as generally used in a labor context, refers to the taking away of work that normally would have been performed by unit employees. Here, however, Respondent augmented its supply of mushrooms and thereby provided unit employees with work which otherwise would not have been available to them. We find, moreover, that the practice did not have a significant detrimental impact on the bargaining unit in

order to require negotiation with the UFW. (See Cattle Valley Farms (1982) 8 ALRB No. 59.)

BENEFITS TO NONSTRIKING EMPLOYEES

Respondent excepts to the ALJ's conclusion that it violated section 1153(e) and (a) by unilaterally instituting special services and benefits to nonstriking employees (namely, Company sponsored housing and free transportation to and from the work site) without first giving the Union notice and an opportunity to bargain on the subject. We find no merit in the exception.

In Bartlett-Collins Co. (1977) 230 NLRB 144 [96 LRRM 1581], the NLRB held that the granting of benefits (free work gloves) to nonstrikers without first consulting with the union constituted a unilateral change in employees' terms and conditions of employment in violation of NLRA section 8(a)(5) (correspondingly, ALRA section 1153(e)). Respondent there had failed to justify its action on the basis of an emergency which might have served to suspend the duty to bargain. Similarly, in Aero-Motive Manufacturing Co., (1972) 195 NLRB 790 [79 LRRM 1496] enforced (6th Cir. 1973) 475 F.2d 27 [82 LRRM 3052], cert. den. 414 U.S. 922, an employer who paid nonstriking employees a special cash bonus as compensation for the risks they took in working in the face of strike violence violated section 8(a)(5) by failing to advise the union and to bargain with it concerning the payments. On similar facts in S & W Motor Line, Inc. (1978) 236 NLRB 938 [98 LRRM 1488], the NLRB held that the employer's failure to advise and bargain with the union before paying

nonstriking over-the-road drivers a bonus for "driving under conditions of harassment by picketers" constituted an unlawful unilateral change.

Respondent contends that it was not under a duty to notify and bargain with the Union before implementing the practices described above because: (1) it was not Respondent, but the labor contractor, who provided striker replacements with room and board; and, (2) Respondent was obliged to provide transportation as a means of securing workers safe passage through a potentially violent picket line. We reject both contentions.

It is well established that employees hired through a labor contractor are the employees of the employer who engaged the services of the contractor. Contrary to the ALJ, we rely only on section 1165.4 to find an agency relationship between Respondent and the labor contractor whom Respondent hired and who made the housing arrangements for Respondent's employees.

Respondent's concern that violence may occur on the picket line does not establish an emergency situation which required Respondent to furnish free transportation. (Bartlett-Collins Co., supra, 230 NLRB 144.) Respondent's reliance on Pilot Freight Carriers, Inc. (1976) 223 NLRB 286 [92 LRRM 1246] is misplaced. In that case, it was shown that drivers who wished to return to work during the strike were fearful that their own equipment would be damaged as a result of actual picket-line violence and agreed to resume work only if permitted to use company equipment. Here, picket-line violence occurred substantially after Respondent instituted the transportation service and there

is no showing that workers would not otherwise have accepted Respondent's offer of employment.

There is no question that Respondent's provision to striker replacements of room and board, although at cost, as well as free transportation to and from the work site, constituted changes from previously existing working conditions. Absent a showing of emergency, or other exigent circumstances, Respondent was obligated to notify and bargain with the Union before implementing such changes.[14/]

STRIKE ACCESS

We also find merit in Respondent's exception to the ALJ's conclusion that the temporary suspension of strike access violated the Act.

In December 1981, Respondent permitted strike access to its premises in accordance with our guidelines in Bruce Church, Inc. (1981) 7 ALRB No. 20. However, on February 1, 1982, Respondent temporarily refused to permit further access because

[14/] Absent exception by any party, we adopt pro forma the ALJ's further finding that the changes did not violate section 1153(c) as they were not intended to nor did they have the effect of serving as economic inducements to strikers to abandon the strike. As it was neither alleged by General Counsel, nor found by the ALJ, that the conduct herein tended to interfere with employees' section 1152 right to strike in violation of section 1153(a), the issue is not before the Board in that context. However, had the question been presented to us in that manner, we would be compelled to examine, on the basis of the NLRB authorities discussed below, whether the granting of benefits such as free transportation could, under an objective standard, constitute an independent violation of section 1153(a). See, generally, Aero-Motive Mfg. Co., supra, 195 NLRB 790; S & W Motor Line, Inc., supra, 236 NLRB 938, wherein the NLRB found that bonus payments to nonstrikers to compensate them for working under strike conditions tended to interfere with employees' right to strike.

of a number of incidents of picket-line violence, including picketers pounding on and throwing objects at the cars of entering replacement workers and damaging the windows of several vehicles. In view of these incidents of violence, Respondent suspended the granting of strike access until March 12, 1982, when, the violence having abated, it once again permitted the Union to take lunchtime access.

Relying on language in Bruce Church, supra, 7 ALRB No. 20, indicating that an employer must demonstrate a nexus between the acts of violence and the taking of strike access before strike access can be denied, the ALJ found that Respondent had failed to establish any such connection. However, access, whether it be organizational, post-certification, or during a strike, should be free from coercion or intimidation. When violence at a picket line is directed towards replacement workers, and is attributable to the union by agency, ratification, incitement or other form of participation, its intimidating effect is not removed merely because the union, in taking strike access, now faces replacement workers at the work site rather than at the picket line. Such union picket-line violence defeats the main purposes for which strike access in Bruce Church, supra, 7 ALRB No. 20 was provided, namely, an opportunity for free and uncoerced communication between strikers and replacement workers and the reduction of the tensions associated with a strike when

such means of communication are lacking.[15]

While it is preferrable that such picket-line violence be curbed through appropriate injunctive relief, it cannot be said that a ban on strike access in response to actual (not just suspected) violence that is clearly attributable to the union is an unfair labor practice. Once the union takes effective measures to remove the intimidating effects of the violence by disavowing or repudiating the violence and by preventing the violence from re-occurring, there would be no further justification for such a ban and continued refusal to provide strike access which is otherwise required would be an unfair labor practice.

In Grower's Exchange, Inc. (1982) 8 ALRB No. 7, this Board noted that, "[w]e have the power to deny access where an atmosphere of coercion has resulted from repeated and aggravated violent acts." However, we also noted, as the ALJ correctly observed, that the determination as to whether:

> ...any form of communication has become so identified with noxious conduct as to have lost its protection as an appeal to reason is a question that calls for the most scrupulous judgment rather than a simple reflex which automatically equates contemporaneous unlawful activity with protected activity. (Id. at p. 9.)

Relying on those principles, we concluded that since the two incidents of field-rushing by Union representatives which were at issue in that case were not such that they would preclude rational communication, Respondent's total ban on strike access

[15] To the extent that Bruce Church, supra, 7 ALRB No. 20 requires a showing that violence must be directly attributable to the taking of access before strike access may be denied, it is hereby overruled.

was violative of the Act.[16] Here, on the other hand, we examine a temporary denial of strike access in response to numerous acts of serious picket-line misconduct which was specifically directed toward certain nonstriking employees and reach a contrary result.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Labor Code section 1153(c), (e), and (a), we will direct that Respondent cease and desist from engaging in such conduct and that it take certain affirmative actions which we deem necessary to further the purposes and policies of the Act.

Specifically, Respondent has been found to have violated section 1153(e) and (a) of the Act by failing or refusing to engage in good faith negotiations with the UFW. We shall order that Respondent make its employees whole for their injury suffered by this conduct. (J. R. Norton, Inc. (1983) 10 ALRB No. 42.) Respondent has been found to have further violated section 1153(e) and (a) through its unilateral actions with respect to: changes in the wage rates of John Lopez and Francisco Sandoval in, respectively, September 1978 and September 1980; an increase in wages for the case crew in May 1979; changes in the wage rates of the sweepers beginning in August 1980; discontinuance of the four-hour minimum pay for workers called to report to the work

[16] In Grower's Exchange, supra, 8 ALRB No. 7, Respondent did not attempt to justify its denial of access on the basis of violence and we found that Respondent's stated reason for denying access was insufficient. Nevertheless, we took into account record evidence establishing that violence had occurred.

site but not given work, beginning in September 1981; and adjusting incentive wage rates on December 18, 1981. We also find that the latter change constituted an independent violation of section 1153(c) for the reasons found by the ALJ. As a remedy for Respondent's unlawful actions, described above, we shall order that, upon request of the Union, Respondent rescind such unilateral changes heretofore made in its employees' wages and other terms and conditions of employment. We shall also order that Respondent make affected employees whole for any losses that they may have suffered as a result of Respondent's unilateral changes, particularly all employees affected by the discontinuance of the four-hour minimum guarantee, with interest computed in accordance with established Board precedent.

Finally, we have found that Respondent violated section 1153(e) and (a) in two other respects; namely, by its unilateral action in providing strike replacement workers with temporary housing facilities as well as transportation services. We shall require that Respondent cease and desist from implementing such changes without first consulting with the Union and affording it an opportunity to bargain. Additionally, in order to remedy the effect of the disparate treatment of employees on the basis of whether they chose to engage in or to refrain from protected concerted activity, we shall order that Respondent make whole its striking employees for any losses they may have suffered as a result of the grant of special benefits to strike replacement workers.

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ORDER

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

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith as defined in Labor Code section 1155.2(a) with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of Respondent's agricultural employees; and in particular by unilaterally changing employees wages or terms or conditions of work, implementing a crop protection program (or lockout); and/or failing or refusing to provide relevant information requested by the Union for the purpose of conducting negotiations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or refrain from forming or joining a labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to refrain from any and all such activities.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Agricultural Labor Relations Act (Act):

(a) Upon request, meet and bargain collectively

in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to such employees' rates of pay, wages, hours, and other terms of employment, provide such relevant information as requested by the UFW to conduct the negotiations, and if an agreement is reached, embody such agreement in a signed contract.

(b) If the UFW so requests, rescind the unilateral changes in wage rates, and other terms and conditions of employment, determined to be a violation herein, and make whole the affected employees for any economic losses suffered as a result of such unilateral changes in working conditions in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Make whole its present and former agricultural employees, including employees who went out on strike on November 19, 1981, for any economic losses they suffered as a result of Respondent's failure or refusal to bargain in good faith, said makewhole amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55. The period of said obligation shall extend from September 6, 1981 until January 18, 1982, and thereafter until Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse. The economic losses for which an employee who went on strike is to be made whole shall not include wages or benefits for the period from

the commencement of the strike to the date such employee unconditionally offered or offers to return to work, but shall include the difference between what such employee would have earned by working for Respondent during the period from November 19, 1981, or such later date as the employee went on strike, to the date of the employee's unconditional offer to return to work, and what the employee would have earned by working during the same period at rates of payment had Respondent been bargaining in good faith, computed in accordance with established Board precedents. (See Bruce Church, Inc. (1983) 9 ALRB No. 74.) Those employees who did not join the strike shall be made whole for economic losses they suffered as a result of Respondent's bad faith bargaining during the applicable periods of their employment with Respondent in accordance with established Board precedent, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55. Employees who joined the strike and then returned to work are to be made whole in the same manner as the above strikers during the period they were on strike and as the above nonstrikers during the period they were working. Employees hired after November 19, 1981 as temporary replacements for strikers are not included in this makewhole award.

(d) Make whole all employees affected by Respondent's crop protection program, either through layoffs, reductions in number of hours, or transfers to more onerous duties, as well as by Respondent's discontinuance of the four-hour minimum guarantee, for all losses of pay and other economic losses they -have suffered as a result of such conduct, such amounts as to

be computed in accordance with established Board precedent, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

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

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

(g) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent any time during the period from May 1979 to January 18, 1982 and thereafter until Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

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

(i) Provide a copy of the attached Notice to each

employee hired by Respondent during the twelve-month period following the date of issuance of this Order.

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

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

Dated: July 17, 1985

JORGE CARRILLO, Member[17/]

[17/] Members Waldie and Henning concur in this opinion in all respects except on the strike access issue. (See their separate opinions.) Chairperson Massengale and Member McCarthy concur in all respects except on the lockout and bad faith bargaining issues. (See their joint opinion.)

MEMBER HENNING, Concurring and Dissenting:

I concur with the majority's analysis and conclusion that Respondent unlawfully locked out its employees and engaged in bad faith bargaining. Section 1155.3(a) is definitional in nature. In defining the duty to bargain collectively, its intent in allowing good faith negotiations to proceed without resort to economic pressure is clear. It follows that resort to a lockout prohibited by section 1155.3(a) is in contravention of the duty to bargain in good faith in violation of sections 1153(e and (a).

I also agree with the majority's analysis and conclusions regarding Respondent's unlawful unilateral changes. However, I disagree with the majority's disposition of the crop augmentation issue. The ALJ was careful not to label the importation of East Coast mushrooms as "subcontracting" because, as the majority states, that term usually refers to the taking away of work normally performed by unit employees. However,

I reject the reasoning that Respondent's action did not have a significant detrimental impact on the bargaining unit to require negotiation with the UFW. While some employer unilateral actions may actually inure to the benefit of bargaining unit employees (i.e., wage increases) they are nonetheless unlawful since they disparage the collective bargaining process and the union's statutory authority to negotiate over wages and other conditions of employment. (See NLRB v. Katz (1962) 369 U.S. 736.)

Before discussing my dissenting views on the undermining of the recently adopted strike access rulings by the majority opinion, I find it necessary to comment briefly on the dissenting and concurring opinion of Member McCarthy and Chairperson Massengale.

The dissenters primarily rely upon their conclusion that Respondent harbored a reasonable fear of an imminent strike for their finding that Respondent's lockout was not unlawful. This reasonable fear of a strike is premised on a perceived "new attitude" on the part of the Union, a lack of concern on the Union's part for Respondent's negotiating time tables. The "changed circumstance" is apparent to my colleagues through the Union's rejection of Respondent's bargaining proposal for a contract extension and the Union's refusal to discuss Respondent's "crop protection" bargaining proposal at midterm contract modification. These "actions" by the Union, in the view of my colleagues, present Respondent with sufficient justification for implementing a lockout of its employees prior to the contract expiration, a clear violation of the existing contract's no

lockout provision and an obvious violation of section 1155.3(a) of the Act.

In the present instance, Respondent harbored no reasonable fear of an imminent strike. Respondent pointed to the following testimony from supervisors who testified that specific West Foods employees predicted a strike:

January 1981: Antonio Diaz, UFW member and supporter comments to supervisor Julio Perez.
February 1981: Edmundo Garcia, UFW crew steward comments to supervisor Antonio Perez.
March or April 1981: Victor Becerra, Ranch Committee President comments to supervisor Jim Nichols.
Between February and June 1981: Ricardo Olavarietta, UFW crew steward comments to supervisor Antonio Perez.
May 1981: Alfedo Lara, UFW Grievance Committee member comments to supervisor Jose Arambula.
June or July 1981: Victor Becerra comments to supervisor Jose Arambula.
June 1981: Augustin Villanueva, UFW member comment to supervisor Julio Perez.

Each of these employees, called to the stand for General Counsel's rebuttal, specifically denied making the statements attributed to them by Respondent's witnesses. In addition, another fifteen to twenty employee witnesses from different crews all testified that they did not hear workers, or UFW agents or representatives talk about striking, either to each other or to supervisors.

The ALJ chose not to resolve the credibility of the above witnesses, instead finding that even if the remarks of Respondent's supervisors were true, Respondent's objective criteria of a strike threat was limited to the "meager communications" from some (no more than five) employees. He concluded that Respondent did not have sufficient objective reason to believe that the Union would strike upon termination of the contract,

or that the legitimate fear of such action compelled the shutdown or economic layoffs.

Even if the testimony of Respondent's supervisors is accepted as true, it does not amount to the level of objective facts giving rise to a reasonable belief that a strike was threatened. In the NLRB lockout cases discussed in the majority and dissenting opinions, the employers there relied on specific unequivocal statements from union representatives that the union would strike. In addition, it is interesting to note that in this matter, the contract in effect in 1981 was due to expire in September, and yet most of the statements allegedly made by UFW members and representatives were made in January, February, and March of 1981. Hence it is quite unlikely that these statements, allegedly made early in the year, would lead Respondent to reasonably believe the Union would stike once the contract expired, six to eight months later.

The dissent ignores this record evidence and instead finds objective facts in the refusal of the Union to agree to specific contract proposals regarding contract extension or face a mid-contract lockout.[1/] It also finds that these negotiation proposals by Respondent for post-contract expiration extensions are in keeping with the "intent" of section 1155.3(a). I am at a loss to understand how the lockout of employees in clear violation of an express contractual provision, designed to force

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[1/] The dissent faults the Union for its lack of concern for the Respondent's negotiating time tables. Yet it characterizes the Union's concerns regarding contract extension and strike notice as merely "non-substantive in nature."

acceptance of specific contract proposals favorable to Respondent, could be in keeping with the plain statutory requirement in our Act requiring maintenance of contract terms for a designated cooling-off period. (See section 1155.3(a).)

Finally, the dissent misstates the current NLRB standard for determining the legality of a lockout. It neglects to mention that a lockout will also be deemed unlawful if the employer is motivated by a desire to evade its duty to bargain collectively or absent any unlawful motivation, if the lockout is so inherently prejudicial to union interests and so devoid of significant economic justification that no evidence of intent is necessary. (American Ship Building Company v. NLRB (1965) 380 U.S. 300 [58 LRRM 2672]; Darling and Company (1968) 171 NLRB 801 [68 LRRM 1133], affirmed sub nom., Lane v. NLRB (1969 D.C. Cir.) 418 F.2d 1208 [72 LRRM 2439].) I agree with the ALJ that the lockout herein was an integral part of Respondent's bargaining strategy, in bad faith, and inherently prejudicial to employee interests. In addition, however, I conclude that Respondent's ultimatum in setting an arbitrary deadline by when a contract had to be agreed to or the lockout would be instituted, is indicative of its desire to evade its bargaining obligation. As such, the lockout was unlawful under the NLRB standard set forth above.

STRIKE ACCESS

In two Decisions of this Board, Bruce Church, Inc. (1981) 7 ALRB No. 20 and Growers Exchange, Inc. (1982) 8 ALRB No. 7, it was held, inter alia, that if the employer can demonstrate

that picket-line violence is caused by strike access, he has a right to deny such access to the labor union. If there is no such demonstrable evidence, the employer has no right to deny its employees the right to receive information. Thus, a nexus must be proven to abridge the right of strike access.

The majority opinion here undermines the Board's previous access holdings by finding that a denial of access is not violative of the Act where picket-line violence unrelated to the taking of strike access but attributable to the union occurs. A similar argument was rejected in Bruce Church, Inc., supra, 7 ALRB No. 20 and Growers Exchange, Inc., supra, 8 ALRB No. 7. I dissent from this precipitous overuling of recent case authority.

While the majority purportedly will require the incidents of violence to be attributable to the Union before it finds that that violence excuses the denial of strike access, it has eliminated any need to prove the violence was connected with the access. Further, it has not applied that requirement to the facts herein. The majority refers to the incidents of picket-line violence but makes no reference whatsoever to that misconduct being actually attributable to the UFW.

Dated: July 17, 1985

PATRICK W. HENNING, Member

MEMBER WALDIE, Concurring and Dissenting:

I concur in the majority's views on the lockout and surface bargaining issues. I further concur with Member Henning in his separate opinion, but would like to express some additional opinions regarding the issue of strike access.

The majority's new holding seriously erodes the right of strike access granted farmworkers by this Board in Bruce Church, Inc. (1981) 7 ALRB No. 20 and Growers Exchange, Inc. (1982) 8 ALRB No. 7. Employers will now be able to deny strike access at the first sign of any picket-line misconduct and argue that the misconduct was attributable to the union. If and when the issue is litigated a year or more down the road, depending on the ultimate conclusion as to whether the misconduct was in fact attributable to the Union, at most, the Employer will be ordered to cease and desist from denying strike access. In the intervening time, the strike will have ended and the workers will have been denied their rights to freely and intelligently

choose whether to participate in or refrain from participating in Union or other concerted activity directed at their Employer. While the Act spells out the policy of the State of California to encourage farmworkers to fully exercise their rights of association, self-organization and free choice (Labor Code section 1140.2), the majority today is actually delivering a serious blow to those rights. The right of "free choice" is a hollow one without the availability of facts and information which enable an employee to review his or her options and exercise the unfettered liberty to choose among them. (See Growers Exchange, Inc., supra, 8 ALRB No. 7.)

While I in no way condone picket-line misconduct, the majority seems to ignore the unrefuted testimony before us in Growers Exchange, Inc., supra, 8 ALRB No. 7, that the implementation of strike access actually reduced the incidents of violence that prevailed prior to strike access being granted. I can only fear that as employers deny strike access based on this decision, tensions on the picket line will increase and lead to more, not fewer, incidents of violence.

Dated: July 17, 1985

JEROME R. WALDIE, Member

CHAIRPERSON MASSENGALE and MEMBER McCARTHY dissenting in part:

We dissent from the majority's findings that the phasedown of the employer's operations was an unlawful lockout and that it was the "centerpiece" of a bad faith bargaining strategy. In labeling the phasedown as a lockout in violation of Labor Code section 1155.3(a),[1] the majority fashions a requirement than an employer maximize its vulnerability to loss in event of a strike. Properly viewed, the phasedown was a legitimate action taken by the employer both to protect itself against inordinate economic losses resulting from an inability to halt an ongoing production cycle and to maintain the option of using a lockout once the contract has expired.

As a producer of mushrooms, Respondent can be in production throughout the year. However, production takes place in a succession of cycles which must culminate in harvest at a

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

certain time or the crop will be lost. There is no way for Respondent to put its production on hold in the event of a strike, as is typically done by employers in the industrial sector. Nor could Respondent weather a strike by "stockpiling" its product, as could an industrial employer who accelerates production and augments inventories as a means of continuing business during the strike. Because of the perishability of its product, Respondent's only option was to phase down production if it had any reason to fear a strike.[2/] Then, if a strike occurred, Respondent could have at least avoided the unconscionable losses that result from having invested large sums of money in production of a crop that now lies rotting in painstakingly prepared soils. At that point Respondent would be more or less on an equal footing with the industrial producer who, for some reason, was not able to stockpile, but at least had the foresight to mothball or dispose of its work in progress.

The majority contends that section 1155.3(a) prohibits the precautionary measure taken by Respondent because that action constitutes a lockout, and, when either party seeks to terminate or modify the existing collective bargaining agreement, the initiating party is not permitted to resort to a strike or lockout during the last 60 days prior to the expiration of the agreement. However, the National Labor Relations Board (NLRB) has recognized the predicament that employers such as Respondent find themselves

[2/] This action is of course something that Respondent cannot blithely undertake since a slowdown or eventual halt in production entails a considerable cost in terms of lost sales.

in and has held that, under the federal analogue of our section 1155.3(a) (29 U.S.C. § 158(d)), phasedowns of the type used here are not to be deemed unlawful lockouts. In Royal Packing Co. (1972) 198 NLRB 1060, the respondent employers operated meat packing plants whose operations were subject to a collective bargaining agreement that was due to expire on October 27, 1970. The respondents feared that a strike might be called upon expiration of the contract, and, if that were to occur with inventories (slaughtered beef) at their normal level, the respondents would sustain serious financial loss. Shortly before expiration of the contract, and during negotiations for a new agreement, the employers began laying off employees and, by October 27, 1970, had completely shut down operations. The board noted that the respondent employers had a legitimate right to completely shut down their operations as of the expiration date of the contract and that the only practical way they could utilize that right was to phase out operations in advance of that date so that the perishable inventories could be eliminated. In the board's view, these circumstances necessitated layoffs, as first the slaughtering work and then the processing work were phased out. Thus, the board did not consider the layoffs to be a lockout within the meaning of section 8(d)(4), but rather viewed them as "legitimate economic layoffs resulting from an unavailability of work."[3/]

[3/] The majority appears to have some difficulty in understanding that the employer's actions here, as in Royal Packing, were not a lockout in and of themselves but were rather a set of precautionary measures designed to prevent the loss of inventories and to preserve the option of using an actual lockout once the contract had expired.

(198 NLRB at 1061.) The board concluded its analysis with the following observation.

> To view this case otherwise, would require Respondents to either bear the risk of inventory loss or retain employees on payroll status even after the phase out of operations eliminated work available to them. Neither Section 8(d)(4) nor any other statutory prohibition requires an employer to choose between such alternatives as the price for asserting a lawful right to lock out employees during contract negotiations. (Id.)

The employer here was in the same situation as that of the respondents in Royal Packing. Without the right to make significant work force changes in anticipation of a strike, it could either continue operations as usual and bear the risk of total crop loss or it could keep paying employees for work that no longer existed. Contrary to applicable NLRB precedent, the majority has left the employer with this Hobson's choice. However, perhaps in recognition of the harshness of its ruling, the majority has created a small safety valve. Lockouts that it deems purely defensive are no longer to be considered lockouts and suddenly become something different for purposes of section 1155.3(a). This is nothing short of a revival of the offensive-defensive distinction that has not been seen since 1965, when, in American Shipbuilding Co. v. NLRB (1965) 380 U.S. 30 [58 LRRM 2672], the Supreme Court rejected that distinction in finding lockouts of any type to be lawful as long as they are not motivated by an intent to discourage union membership or otherwise discriminate against the union.[4/]

[4/] There is no suggestion that the phase-down in this case was so motivated.

The majority allows that it might have found the "lockout" in this case to be purely defensive (i.e., lawful) if Respondent had had a "reasonable fear of an imminent strike" and if the phasedown had not been in fact an "economic action designed to apply pressure for contractual concessions upon the Union during the time period specified in section 1155.3(a)." While setting forth a reasonably detailed account of the relationship of the parties extending back to 1975, the majority, quite incredibly, gives little or no weight to two critical factors in an assessment of whether Respondent needed to worry about a strike during the 1981 contract negotiations. First, during the negotiations for the 1976-1978 agreement covering the same unit as that involved herein, the Union initiated a strike which, to use the words of the majority, "entailed considerable economic loss to Respondent." Second, the Union adopted a much different stance in 1981 than it had in previous negotiations. Using the "crop protection program" or phasedown for the first time, Respondent successfully concluded negotiations for a 1978-1981 agreement without being struck. Going into the 1981 negotiations for the unit, the parties had thus had a checkered bargaining history and, given the hostility that the majority acknowledges was peculiar to that unit, anything was apt to happen. The Union was given early notice of Respondent's intent to employ the phasedown if necessary, but this time, unlike the 1978 negotiations when it requested an extension of the contract in order to obviate the need for a phasedown, the Union acted as if it were not particularly concerned about Respondent's time table for negotiations. This new attitude began surfacing when, after

initial contact from Respondent, the Union waited for over a month before sending a representative to meet with Respondent. The changed circumstances became increasingly clear as the Union rejected four separate requests from Respondent for a thirty-day extension of the contract. Finally, the Union flatly refused Respondent's invitation to discuss implementation of the crop protection program, contending that the phasedown was illegal. At this point Respondent could not help but have serious misgivings about the Union's intentions, notwithstanding the Union's protestations that it was not planning to strike. As is so often the case in other contexts, the actions here spoke louder than words. Contrary to the majority's assertion, Respondent did indeed have reasonable grounds to believe that the Union was looking toward a strike in July of 1981.[5/]

With Respondent having a reasonable belief that a strike was looming and a first-hand knowledge of the extraordinary losses that can be incurred when a strike is not preceded by a phasedown, it strains credulity for the majority to say, in effect, that the

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[5/] The majority speaks of a strike having to be "imminent" before the employer can undertake a phasedown during the period specified in section 1155.3(a). This kind of standard leads to instability in labor relations as it forces the employer to guess at what the Board considers a sufficiently threatening situation. If the employer guesses wrong the result is either a loss of investment or a staggering makewhole order.

The majority, quoting the metaphor from Bett's Cadillac-Olds, Inc. (1951) 96 NLRB 268, recognizes that "the pedestrian need not wait to be struck before leaping for the curb," but finds, using its own words, that there was an "absence of evidence of an onrushing vehicle [in this case]." We would hope that our colleagues in the majority do a better job of looking for traffic when they themselves cross a street.

phasedown would not have occurred but for a desire by Respondent to gain the upper-hand at the bargaining table. Even if the majority is contending that a phasedown might have occurred in any event, but that Respondent used the phasedown procedure in a manner designed to aid its bargaining strategy, the majority would still be wrong. At no time did Respondent make the continuation of normal operations contingent on the Union's acceptance of any substantive contract proposals.[6/]

The only "concessions" the employer sought were in return for giving up the ability to use a lockout upon expiration of the contract and were non-substantive in nature: a thirty-day extension of the contract or a sixty-day strike notice.[7/] Both of these requests are in concert with the intent behind section 1155.3(a):

> The intent of § 8(d)(4) [Federal counterpart of 1155.3(a)] is obviously to extend the term of the contract, reflecting a legislative conclusion that the maintenance of normalcy in industrial operations is conducive to the rapid settlement of disputes.
> (NLRB v. Painting and Decorating Contractors (1974) 500 F.2d 54, 58 [86 LRRM 2914).)

Unfortunately, the Union flatly rejected both requests and the employer was thus rebuffed in its attempt to maintain normalcy. Rather than continue to be kept on tenterhooks by the Union, Respondent then chose the only prudent course of action it could take: a phasedown of its operations. Those circumstances do not,

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[6/] At the time the phasedown began, there was not yet an economic proposal from the employer on the table.

[7/] These requests may not even amount to the demands for modification or termination that are contemplated by section 115.3(a) since the employer was simply asking that the contract be extended and there was already a no-strike provision in effect.

as the majority would have us believe, bespeak a cynical bargaining strategy on the part of the employer.

As further justification for its severe interpretation of section 1155.3(a), the majority raises the spectre of agricultural employers using the phasedown or crop protection program on a wholesale basis as a means of obtaining a bargaining advantage. Agricultural employers, it is said, will shut down to avoid beginning a production cycle that encompasses the expiration date of the then-existing contract. This prospect has no basis in reality. For most agricultural employers, there are but one or two times during the year when their crop can be planted. If the requisite planting time is missed, the employer is deprived of his source of revenue for all or most of the rest of the year. It is absurd to believe that an employer would choose not to initiate his source of revenue for the sake of obtaining some speculative advantage at the bargaining table. It is true that the employer here grows the kind of crop that permits him to start up at any time during the year, but that provides no basis for saying that agricultural employers generally would unduly benefit from "a too facile application of the economic defense." For all practical purposes, the phasedown defense to a strike would be available to a limited member of employers in a limited set of circumstances.[8/] Even then it is no more significant than the

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[8/] Most agricultural employers cannot avail themselves of a phasedown technique because they are engaged in production cycles that span entire seasons. The period of greatest vulnerability to a strike is generally confined to the very end of a lengthy

(fn. 8 cont. on p. 52)

previously mentioned ability of many industrial producers to stockpile their goods in anticipation of a strike.

Conclusion

Section 1155.3(a) in effect adds further requirements to the duty to bargain collectively in good faith that is set forth in section 1155.2(a). As previously indicated, those requirements include a proscription against the use of a lockout or strike during the last 60 days of an existing collective bargaining unit by the party seeking to terminate or modify that agreement. Where, as here, the employer is not shown to have been motivated by an intent to discourage union membership or otherwise discriminate against the union and can demonstrate that a winding down of operations was necessary to avoid a loss of crops in the event of a strike, the layoffs that result from the winding down of operations should not be construed as being in violation of section 1155.3(a).

(American Shipbuilding, supra; Royal Packing, supra.)

(fn. 8 cont.)

season, when the crop is being harvested or is about to be harvested. Here, by contrast, the employer is vulnerable to a strike throughout its short and overlapping production cycles, but does have the ability to prepare itself for that eventuality by phasing down its operations. In finding the exercise of Respondent's phasedown ability to be unlawful during the 60 days prior to expiration of an existing contract, the majority has indeed placed employers like Respondent in an untenable situation. By acting they become subject to substantial makewhole liability. By not acting they set themselves up for inordinate crop losses. The majority cannot convince us that section 1155.3 was intended to have such a result.

[9/] Under the holding of Royal Packing, supra, this standard is not predicated on the existence of any belief that a strike is likely to occur. It need only be shown that the winding down of operations is necessary for the preservation of the lockout option

(fn. 9 cont. on p. 53)

Since Respondent's phase down of operations was a lawful economic layoff, and not a lockout within the meaning of section 1155.3(a), it carries no bad faith bargaining implications. Therefore, it can hardly be deemed "a lockout which is the centerpiece of an overall strategy of bad faith bargaining," a finding that is central to the majority's determination that Respondent was engaged in surface bargaining.[10] In the absence of such a finding, the totality of circumstances do not reflect a failure by Respondent to bargain collectively in good faith with the UFW.

We would find no violation of the Act in either Respondent's phase down procedure or its bargaining conduct.

Dated: July 17, 1985

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

(fn. 9 cont.)

(i.e., a lockout could not be used until there are no longer perishable products on hand). A reasonable belief in the imminency of a strike is a condition that has been erroneously injected by the majority. Nonetheless, even if such a condition were part of the standard, it has been met by the Respondent in this case.

[10] We note that the majority engages in a type of reasoning that assumes the conclusion when they use the "lockout" to find "an overall strategy of bad faith bargaining" and then proceed to use that finding as evidence that the "lockout" itself is a form of bad faith bargaining.

Faulty logic also seems to have been employed when the majority implies that Respondent should have modified its position in response to the Union's "major concession" on the duration issue in late November. What may have seemed major to the Union from its perspective may not have been sufficient to provide Respondent with the degree of stability that it sought. It is thus erroneous to infer bad faith from the fact that Respondent continued to regard duration as the major issue after the Union made some movement toward Respondent's position on that issue.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Oxnard Regional Office of the Agricultural Labor Relations Board (Board) by the United Farm Workers of America, AFL-CIO (UFW), the certified bargaining representative of our employees, the General Counsel of the Board issued a complaint which alleged that we, West Foods, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by locking out our agricultural employees, failing to provide relevant information requested by the UFW for the purpose of conducting negotiations, by changing wage rates and other terms and conditions of employment, including the granting of benefits (such as transportation) to striker replacements, without first negotiating with the UFW, and by bargaining in bad faith with the UFW about the terms and conditions of employment of our workers.

The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

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

WE WILL NOT lockout our agricultural employees during the 60-day cooling off period prior to expiration of a contract.

WE WILL NOT fail or refuse to bargain in good faith with the UFW about the terms and conditions of employment of our workers.

WE WILL NOT make any changes in your wages, hours or conditions of employment without negotiating with the UFW.

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

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

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW and of the implementation of a crop protection program, and of the discontinuance of the four-hour minimum guarantee.

DATED: WEST FOODS, INC.

By: ______________________________
Representative Title

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 528 South A Street, Oxnard, California 93030. The telephone number is (805) 486-4775.

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

WEST FOODS, INC. 11 ALRB No. 17
UFW Case Nos. 82-CE-15-OX et. al.

ALJ DECISION

The ALJ concluded that Respondent violated section 1153(e) and (a) of the Act by implementing its crop protection program (lockout) and by failing and refusing to bargain in good faith with the employees' certified bargaining representative, the United Farm Workers of America, AFL-CIO (UFW). In addition, the ALJ found that Respondent violated section 1153(e) and (a) of the Act by: failing to timely provide accurate and complete information upon request of the UFW; altering the wage rates of maintenance employees John Lopez and Francisco Sandoval; increasing the wage rate of the case crew in May 1979; making changes in the wage/fringe benefit schedule of the sweepers between January 1981 and November 1981; discontinuing an established four-hour minimum pay schedule to employees who were called to work but given less than four hours of work; unilaterally "subcontracting" its mushroom packing operation by importing mushrooms from the East Coast to be packed in Venture; and by unilaterally providing strike replacement workers with temporary housing facilities and free transportation. In addition, the ALJ found that Respondent unilaterally increased and decreased the incentive-crew wage rates on December 18, 198], in violation of section 1153(e) as well as 1153(c). Finally, the ALJ found that Respondent unlawfully denied strike access to the UFW from February 1, 1982, to March 12, 1982, in violation of section 1153(a).

BOARD DECISION

The Board affirmed the ALJ's Decision as to all of the unilateral violations except for the importation of mushrooms from the East Coast. On this issue the Board reasoned that no subcontracting had occurred since Respondent's action actually provided more work instead of decreasing the work available. The Board also found that the practice did not have a significant detrimental impact on the bargaining unit so as to require negotiation with the UFW.

On the lockout issue, the majority affirmed the ALJ's analysis and conclusions. In addition, the majority found that an analysis and application of section 1155.3(a) was necessary since Respondent instituted the lockout within the 60-day period preceding expiration of the parties' then-current collective bargaining agreement. The majority's analysis lead to the conclusion that section 1155.3(a) was intended to relieve the parties from the economic pressure of a strike or lockout in relation to a subject of negotiation. Further, the majority found that the lockout was the centerpiece of Respondent's overall

strategy of bad faith bargaining. The majority also rejected Respondent's contention that the lockout was defensive in nature after finding that Respondent did not harbor a reasonable fear that the UFW would call a strike. Thus this case is distinguishable from NLRB cases where respondents lockout out employees based on a reasonable belief that a strike would occur and that they would suffer severe economic losses if it did occur. The majority concluded that Respondent had no reasonable fear of an imminent strike, that the lockout constituted economic action designed to apply pressure for contractual concessions upon the union during the time period specified in section 1155.3(a), and thus that the lockout was prohibited by that section and was unlawful.

The Board majority fully adopted the ALJ's analysis and conclusions regarding the allegation that Respondent failed and refused to bargain in good faith with the UFW in violation of section 1153(e) and (a). The majority also agreed with the ALJ that the parties were not at impasse when Respondent unilaterally implemented a wage increase in December 1981.

The majority concluded that Respondent violated section 1153(e) and (a) by unilaterally instituting special services and benefits to striker replacements without first giving the Union notice and an opportunity to bargain on the subject. Respondent's actions resulted in changes from previously existing working conditions and, absent a showing of emergency or other exigent circumstances, Respondent was obligated to notify and bargain with the Union before implementing such changes.

Finally, the majority concluded that Respondent had not violated the Act by temporarily refusing to allow the UFW to take strike access. The majority reasoned that picket-line violence has an intimidating effect on replacement workers. It concluded that Respondent's denial of strike access in response to serious picket-line misconduct directed at nonstriking employees was not unlawful. The majority overruled the Board's previous strike access Decision, Bruce Church, Inc. (1981) 7 ALRB No. 20, to the extent that it required a showing that acts of violence must be directly attributable to the taking of access before such access could be denied.

MEMBER HENNING, Concurring and Dissenting

Member Henning concurred with the majority decision in all respects except regarding strike access. Member Henning criticizes the majority's decision to remove the nexus requirement between picket-line violence and strike access, noting that this had been rejected by the Board previously. In addition, he points out that while the majority purportedly will require the incidents of violence to be attributable to the union before an employer is justified in denying strike access, the majority has hot applied that requirement to the facts herein.

Member Henning also commented on the dissenting and concurring opinion of Members McCarthy and Massengale.

MEMBER WALDIE, Concurring and Dissenting

Member Waldie concurred in the majority's decision in all respects, but dissented on the issue of strike access. Member Waldie stated that the majority's decision delivers a serious blow to the right of farmworkers to exercise their free choice in selecting a bargaining representative as farmworkers will be denied access to facts and information which would have enabled them to review their options concerning union representation.

MEMBER MCCARTHY AND CHAIRPERSON MASSENGALE, Dissenting in Part

Members McCarthy and Chairperson Massengale dissented from the majority's conclusion that Respondent's lockout was unlawful and that it engaged in bad faith bargaining. Initially, the dissent disagrees with the majority's characterization of Respondent's action as a lockout. Instead, it finds the phasedown of operations to be a legitimate economic action taken by Respondent to protect itself against the possibility of a loss of crops in the event of a strike. Further, as Respondent was not motivated by an intent to discourage union membership or otherwise discriminate against the union, its phasedown of operations does not fall within the proscription of section 1155.3(a) against the use of a lockout or strike during the last 60 days of an existing collective bargaining agreement. In addition, the dissent concludes that Respondent indeed harbored a reasonable fear that a strike was imminent. This fear was premised on the Union's failure to accept Respondent's proposals for a contract extension or strike notice. Finding the lockout was not unlawful, the dissent also concludes that the totality of circumstances do not support a finding of failure to bargain in good faith.

* * *

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

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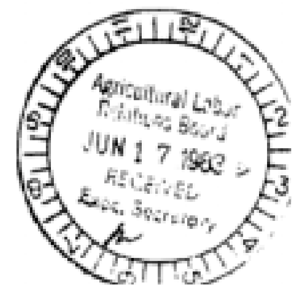

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATION BOARD

In the Matter of: WEST FOODS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 31-CE-15-OX 81-CE-15-1-OX 81-CE-20-OX 81-CE-22-OX 82-CE-3-OX 82-CE-4-OX 82-CE-6-OX 82-CE-8-OX 82-CE-9-OX 82-CE-10-OX 82-CE-11-OX 82-CE-12-OX

Appearances:

Judy Weissberg
Sylvia Lopez
of Oxnard, California
for the General Counsel

Robert K. Carrol
Patricia M. Kelly
Kevin K. Cholakian
Littler, Mendelson, Fastiffs, Tichy
of San Francisco, California
for the Respondent

Ellen Eggers
Ira Gottlieb
of Keene, California
for the Charging Party

Before: Stuart A. Wein
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

STUART A. WEIN, Administrative Law judge: This case was heard by me over thirty-four hearing dates between January 18, 1982 and April 6, 1982. By order of the Agricultural Labor Relations Board[1/] of June 11, 1982, an additional hearing session was held on 16 June 1982 for the limited purpose of receiving evidence regarding the off-the-record/on-the-record nature of several negotiation sessions.

A Complaint based on three charges (81-CE-15-OX, 81-CE-15-1-OX, and 81-CE-20-OX) filed by the United Farm. Workers of America, AFL-CIO (hereafter the "UFW" or "union") and served respectively on the Respondent on 7/24/81, 8/4/81, and 9/30/81, issued on 16 October 1981 (GCX 1-D).[2/] Respondent answered said Complaint on 28 October 1981. (GCX 1-F.) Pursuant to section 20244 of the Board's regulations, a First Amended Consolidated Complaint including charge 81-CE-22-OX (filed and served on Respondent on November 2, 1981} issued on 13 November 1981 (GCX 1-I). Respondent answered same on 25 November 1981 (GCX 1-L). A Second Amended Consolidated Complaint based on the same charges issued 13 November 1981 and was answered by Respondent on 5 December 1981 (GCX 1-K, 1-M). Following the 6 January 1982 pre-hearing conference, a Third Amended Consolidated Complaint based on identical charges issued on

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1. Hereinafter "Board" or "ALRB".

2. References to exhibits shall be as follows: "GCX" (General Counsel Exhibits); "RX" (Respondent Exhibits); and "RX" (Joint Exhibits).

12 January 1982. Thereafter, charges relating to this Third Amended Consolidated Complaint (82-CE-3-OX, and 82-CE-4-OX) were filed (GCX 1-V, 1-W) and served upon Respondent on 15 January 1982. Charges 82-CE-6-OX, 82-CE-8-OX and 82-CE-9-OX, were filed and served on Respondent on 26 January 1982 (GCX 1-DD, 1-EE, 1-FF). Charge number 82-CE-10-OX was filed and served 27 January 1982 (GCX 1-GG); charge number 82-CE-11-OX was filed and served 28 January 1982 (GCx 1-HH). General Counsel's Motion to Amend Third Amended Consolidated Complaint incorporating these later charges—i.e. its Fourth Amended Complaint—was granted at the status conference of 5 February 1981 (GCX 1-JJ). Charge number 81-CE-12-OX was filed and served on Respondent on 4 February 1982 (GCX 1-LL) and was incorporated into General Counsel's Motion to Amend the Fourth Amended Consolidated Complaint--i.e., the Fifth Amended Complaint dated 16 February 1982 (GCX 1-MM). At the close of its case on 15 March 1982, General Counsel moved to amend the Fifth Amended Complaint—a Sixth Amended Complaint to conform the pleadings to the proof presented (GCX 1-NN).[3/]

The Sixth Amended Complaint alleges that the Respondent committed various violations of the Agricultural Labor Relations Act (hereafter referred to as the "Act").

The General Counsel, Respondent, and Charging Party

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3. Because Respondent was afforded ample time—from 22 January through 17 February 1982 to "meet and confer" with General Counsel and/or prepare its defense regarding the additional surface bargaining issues and alleged unilateral changes, I denied Respondent's motion to strike the third amended complaint, which ruling was affirmed by order of the Executive Secretary dated 26 January 1982. (See discussion, infra.)

(Intervenor) were represented at the hearing and were given a full opportunity to participate in the proceedings. All filed briefs after the close of the hearing. Based on the entire record, including my observations of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS

I. Jurisdiction

Respondent West Foods, Inc., is engaged in agricultural operations—specifically the growing and harvesting of mushrooms in Ventura, California, as was admitted by Respondent. Accordingly, I find that Repondent is an agricultural employer within the meaning of section 1140.4(c) of the Act.

I further find that the UFW is a labor organization within the meaning of section 1140.4(f) of the Act, as was also admitted by the Respondent.

II. The Alleged Unfair Labor Practices

The Sixth Amended Consolidated Complaint charges Respondent with violations of sections 1153(a), (c), (e) and 1155.3(a)(4) of the Act by its unilateral implementation of a reduction in operations on July 15, 1981—an illegal "lockout"--of bargaining unit employees, resulting in discriminatory demotions, transfers to more onerous work, layoffs, and reductions in work hours. Respondent is further charged with violation of section 1153(a), (c), and (e) by its direct written communications to bargaining unit employees on 15 July, 21 August, 14 October, 15 October, 22 October,

19 November, 20 November, 2 December, and 18 December 1981—which allegedly constituted attempts to bypass, and undermine the UFW as the exclusive collective bargaining representative of Respondent's bargaining unit employees; by its unilateral transferral of bargaining unit work to non-bargaining members on or about 19 November 1981; and by various unilateral changes in wages, hours, and working conditions of the bargaining unit employees, commencing in October 1979. Finally, Respondent is charged with violations of section 1153(a) and (e) by its bad faith bargaining at the bargaining table, commencing in March 1981; by its regressive bargaining proposal of 13 January 1982; by its denial of/or frustration of attempts by the UFW to take reasonable post-strike access beginning on 1 December 1981; by its solicitation of replacement workers without first informing the latter that the UFW was on strike at Respondent's plant; and by various threatening statements made by various agents and/or supervisory personnel to the effect that Respondent would close down if the UFW did not sign a collective bargaining agreement.

The Respondent denies that it violated the Act in any respect. Specifically, Respondent contends that its "Crop Protection Program" constituted a reasonable (and lawful) means by which to protect itself from the harmful consequences of a potential strike. It further contends that its communications to employees were protected by Respondent's right to free expression; that the alleged changes instituted either did not occur, were not unilateral, were tacitly approved by the union's failure to act (e.g., the "waiver" defense); or should have been arbitrated as

contractual violations. Its post-hearing conduct was justified following impasse at the bargaining table, and there was no denial of access contrary to the Act. Finally, Respondent contends that it bargained in good faith throughout the negotiations, and that it was the union that had engaged in surface bargaining both at the commencement thereof and at crucial points throughout the pendency of the negotiations.

III. Motions

A. Administrative Malfeasance

Respondent has requested that I reconsider its motion to dismiss the complaint for administrative malfeasance which motion was denied at the hearing. I have reviewed the parties' positions in this regard, and decline to reverse my earlier ruling for the reasons aforecited--to wit, under National Labor Relations Board precedent, defenses based on agency misconduct during investigation have been stricken as not material or relevant to the case. See Illinois Electric Porcelain Company (1941) 31 NLRB 101 [8 LRRM 127]; U.S Tool and Cutter Company (1964) 148 NLRB 20 [56 LRRM 1493] and Kellow-Brown Printing Company (1953) 105 NLRB 28 [32 LRRM 1263]. Further, any prejudice to Respondent by the filing of the Third Amended Complaint has been cured by the Executive Secretary's order allowing Respondent an additional four-plus weeks to prepare its case and meet and confer with the Regional Director.

B. Deferral

Respondent has contended that several of the issues involving alleged unilateral changes, as well as the implementation

of the crop protection program (lockout) should more properly have been deferred to arbitration. On this basis it moved to dismiss various portions of the complaint at the first prehearing on 6 January 1982, and has raised the "deferral" argument as a defense to various of the charges litigated. I denied this motion (and thereby reject this proffered defense) on the following basis:

The National Labor Relations Board enunciated various principals for prearbitral deferral in Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931]. Deferral to existing grievance-abritration procedures would be appropriate where (1) the dispute arose "within the confines of a long and productive collective bargaining relationship" and there was no claim of "enmity by the employer to the employees' exercise of protected rights"; (2) "respondent has asserted its willingness to resort to arbitration; (3) "the contract lies at the center of the dispute". See Morris, The Developing Labor Law, Cumulative Supplement, 1971-75, pp. 2-71-272.

In 1977 the NLRB contracted the scope of Collyer in General American Transportation Corp. (1977) 228 NLRB No. 102 [94 LRRM 1483], and Roy Robinson, Inc., d/b/a Roy Robinson Chevrolet (1977) 228 NLRB No. 103 [94 LRRM 1474]. In recent decisions, the Board has not deferred where the employer dealt directly with employees over changes in starting times (Texaco, Inc. (1977) 233 NLRB No. 43 [96 LRRM 1534]); or where the employer refused to pay wage increases and holiday benefits provided for any labor contract (Fairfield Nursing Home (1977) 228 NLRB No. 165 [96 LRRM 1180]). And the expiration of the contract has been found to be a factor precluding deferral.

(Meilman Food, Industries, Inc. (1978) 234 NLRB No. 94 [97 LRRM 1372].).

In the instant case, the parties' relationship was neither lengthy nor stable. See discussion infra. While Respondent has indicated some willingness to resort to arbitration, the contract has long since expired, and indeed had terminated prior to several of the alleged unilateral actions taken by Respondent, e.g., discontinuance of the four hour minimum (standby time), and importation of East Coast grown mushrooms. Nor is it entirely clear that the real underlying dispute -- the implementation of the crop protection program on 15 July 1981 -- rests entirely on interpretation of the collective bargaining contract. While it is true that the "no strike-no lockout" provisions in the contract impact upon the ultimate resolution of the legality of this action (see discussion, infra), the ultimate question is whether or not Respondent's conduct is violative of sections 1153(a), (c), (e) and 1155.3(a)(4) of the Act, which is, of course, more appropriately determined in this forum than in arbitration. At the first prehearing, I thus denied Respondent's motion to dismiss, and reiterate this conclusion with respect to the deferral defense raised by Respondent to the various charges of alleged unilateral conduct as well as implementation of the crop protection program.

IV. Background

West Foods, Inc., a division of Castle and Cooke, Inc., is a corporation which consists of three mushroom farms located in Ventura (Respondent), California, Soquel, California, and Salem,

Oregon.[4] Respondent produces and packs only mushrooms. Its operations are year round, full time and nonseasonal. At full production, Respondent employs approximately 350 persons, only one of whom is part-time.

The growing of mushrooms is primarily done in windowless houses, as the mushrooms are extremely sensitive to humidity and temperature, and it is easier to control the environment without sunlight. Steam heat and air conditioning provide control over the environment in the growing houses.

Within the houses, mushrooms are grown in beds. The beds are arranged in sets of eight vertical levels with two sets per growing room. The beds are usually about eight to ten inches deep, four to six wide, and about 100 feet in length. The beds are filled with eight to ten inches of specially prepared compost before the mushroom spawns[5] can be planted.

The growing of mushrooms is done in stages:

Phase 1, Preparation of Compost:

Compost—the growing medium for the mushrooms—is a mixture of horse manure and/or straw, grain residues and water. During the two to three weeks that the compost is being prepared, it must be turned and watered enough times to insure proper mixing. This work is done by compost operators who are hourly paid members of the

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4. The information regarding the company operations is derived from a stipulation introduced by the parties (see R.T., Vol IV, pp. 114-118).

5. Spawn is a grain that has been denatured by sterilization and innoculated with the mushroom spore.

bargaining unit.

Phase 2, Filling Rooms with Compost:

The houses are then filled with the prepared compost. This work is done by the fill crew which is paid on a per room incentive basis with assistance from Class A equipment operators. After the beds have been filled with the compost, the house is closed up with little ventilation, the temperature is allowed to rise (as a result of the heat generated by the compost, assisted with live steam) until it reaches 140 degrees Fahrenheit. Normally, this process takes eight to twelve days, and is necessary to control harmful fungi, insects, and nematodes, as well as help assure a consistently high yield.

Phase 3, Spawning:

The house is ventilated after pasteurization to bring the temperature down to 75 degrees Fahrenheit—suitable for planting grains of spawn. The spawning is done by the spawn crew which is paid on a per room incentive basis.

Phase 4, Casing:

Two weeks after planting, the spawn has spread like thread throughout the compost. The compost is then covered with about one inch of pasteurized soil. The soil is prepared by the soil preparation crew which consists of one "A" and one "B" equipment operator, paid on a per room incentive basis. The casing operation itself—covering the compost with the prepared soil—is done by the case crew with the assistance of an hourly paid equipment operator. The case crew is paid on a per room incentive basis.

Phase 5, Picking:

Approximately three weeks after casing, the first mushrooms will appear on the surface of the beds. At this time, the growing room temperature is about 60 degrees fahrenheit. The mushrooms appear in flushes (breaks) at intervals of about one week. Harvesting of the crop is a continuous operation performed by the mushroom pickers who are paid on a piece rate basis. Mushrooms will continue to develop from four to five weeks at which time they have used up all nutrition in the compost.

Phase 6, Dumping;

The compost is dumped from the beds by the dump crew. This crew is paid on a per room incentive basis. The room is again pasteurized while it is empty. The process is then repeated.

Post-picking operations: The mushrooms which are picked by the pickers are placed in picking baskets which are left in the picking rooms. The product pick-up crew (paid hourly) collects the baskets of picked mushrooms and removes them from the rooms. The picked baskets of mushrooms are transported to the packing shed; the mushrooms are placed in cold storage, sorted, graded and packed for shipping. The packing shed workers are also hourly employees. The gob crew collects the baskets with the mushroom stubs from inside the rooms and loads them on a truck for removal.

In addition to the above processes, the following support operations are employed at the Ventura farm:

Disease control crew or "bubble" crew is an hourly paid crew which removes diseased mushrooms from growing beds, isolates diseased portions of beds, and disinfects beds as well as removes

trash from growing houses. Irrigation crew members water the mushroom beds throughout the growing period and are paid on an hourly basis. Chemical applicators and spray truck drivers apply pesticides to growing beds and to growing houses and are paid on a daily incentive basis. Motor pool employees maintain and service company vehicles and equipment (hourly work). Boiler tenders maintain and tend boilers which produce steam for cleaning and sterilizing the growing houses (hourly work). Plant maintenance crew members perform construction, repair, and other general maintenance at the farm (hourly workers). Area maintenance crew members do general maintenance around the farm, including cleaning streets, digging ditches, and other outside work (hourly work). Clean-up crews clean up growing houses after the pickers have harvested the mushrooms, including sweeping and hosing down rooms (hourly workers). Laboratory employees perform various lab work, but are non-bargaining unit employees. Truckers perform over-the-road hauling operations, and are also non-bargaining unit employees. Crew leaders are paid on an hourly or incentive per room basis depending upon which crew is involved. These bargaining unit employees receive higher pay than crew members, but are not supervisors.[6/]

The entire production cycle -- from formation of compost to dumping of compost from the growing house -- is approximately 100 days. On any given day, various "lines"[7/] would be in different

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6. Unless otherwise indicated, all identified categories are members of the bargaining unit represented by the UFW.

7. Groups of mushroom houses.

phases of the cycle -- so that mushroom production was continuous throughout the year.

On or about 4 December 1975 the UFW was certified by the ALRB as the collective bargaining representative of Respondent's agricultural employees. Since the certification, Respondent and Charging Party have entered into two consecutive collective bargaining agreements -- one in effect from 6 September 1976 to 6 September 1978 and the second from 6 September 1978 to 6 September 1981. The history of the 1976 and 1978 negotiations, and to a lesser extent the 1977 and 1979 Soquel negotiations impacted upon the 1981 bargaining at Ventura, which was the focal point of this litigation. As the "lockout" allegation is inextricably linked with the negotiations, I shall discuss those issues first, and then turn to the away-from-the-table conduct (e.g., alleged unilateral changes, and post-strike issues).

V. The Crop Protection Plan (Lockout) and the Bargaining

A. Findings of Fact

1. Background to the 1981 Ventura Negotiations

a. Previous Negotiations

The 1976 Ventura negotiations were highlighted by a one-week strike in late August-early September after some 20 negotiation sessions. The Respondent was at full production at the time and efforts to recruit volunteers to keep the operation viable were unsuccessful. Mushrooms went unpicked for eight days, thus becoming flat and sporulating. Disease-causing fungi grew among the mushrooms causing an atrocious sight and smell to some 30 to 40

diseased mushroom houses (approximately 300 mushroom beds) over 250,000 square feet.

When the strike concluded upon the negotiation of a contract, the returning workers raked the production houses, and disposed of the diseased material in sealed plastic bags. Some 200 tons of waste product material was carried away during the two-to-five day period following the signing of the contract. Concurrent with this phase of the cleanup, the two-week compost manufacturing operation recommenced. The next phase was to unload the mushroom houses (physically removing the "spent compost" from the houses)-- a physically tedious task which took an eight to ten member crew approximately six hours per house. As Respondent was limited by equipment availability (the number of conveyors, dump trucks, etc.), no more than one to two houses could be unloaded per day.

Several weeks into the unloading operation, members of the unloading crew developed bloody noses, irritated throats, blisters around the eyes, pus-filled scabs on the neck and hands, and other maladies[8/] arising from the workers' exposure to either the product or spent compost unattended during the strike. There was recontamination of some of the original houses filled after the strike, and production at the farm hovered around 25% for some seven

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8. According to Respondent's expert Dr. Leon R. Kneebone, the disease problems were to be expected "because unattended mushroom houses are overcome by six or so pests (flies, mites, nematodes, etc.) which cause allergic responses in workers; some 30 fungi, competitors and pathogens which are insidious and cause allergic responses and reduce the farm to a state of poor sanitation." (RX 7).

months following the strike. The company suffered an estimated financial loss of $750,000. (R.T., Vol. XXV, p. 114, 11. 22-29.)

In the 1977 Soquel negotiations, the parties reached agreement on a contract without strike by the union or crop protection program by the company.

In 1978 (Ventura), the company decided to approach the union at the national level well in advance of the contract deadline date to inform them of the "sorry state" of the mushroom business, the contemplated expansion at the Ventura farm and the necessity of a phase down to avoid the exposure of a full crop on 6 September 1978. Company negotiator George Horne, farm manager Tony Ashe, vice president of production (mushroom division) Bill Chalkley, executive vice president of the mushroom division Charlie Mumow, and Dick Lowe of personnel met with UFW president Cesar Chavez and Gilbert Padilla at the union's La Paz headquarters. Horne notified Chavez that Respondent would have to consider alternatives such as a phase down of the crop -- to wit, the "crop protection program" — if no early settlement was obtainable. When the union requested extending the contract, the company resisted, stating that there was "ample time to reach an agreement by the contract expiration date". (GCx 125.) The negotiations commenced in mid-July, and following some 12 meetings and numerous phone calls between the negotiators, crop protection was implemented on 18 August. (RX 4.) A settlement of the contract was reached on 24 August. During the six-day interim period, the company ceased making compost of the pre-wet slab[9/] --

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9. A cement area where raw compost is placed and wet down.

the first stage of the mushroom process. No unfair labor practice charge or grievance was filed by the UFW, as no job losses (layoffs, changes in job classification, or reduced hours) were caused by the program.

In 1979, the UFW-Soquel contract was due to expire on 2 April 1979 (GCX 77). In February 1979, the Respondent negotiating team (Mssrs. Horne, Kahl, Mumow, and Chalkley) met to discuss its goals for the upcoming sessions: They wanted to meet early with the UFW — preferably at union headquarters in La Paz — to achieve an early resolution of the contract and thus avoid implementation of a crop protection program. (R.T., Vol III, p. 104, 11. 9-16.) Negotiations commenced in early March and the company indicated that a crop protection program would be necessary if a contract were not reached by a certain (early) time. On March 15, 1979, approximately two weeks prior to the expiration of the contract, the union agreed to a two-week extension. Final agreement was reached on 30 March[10/] -- the date crop protection was to have begun. As no phase down was implemented, the union did not file any grievances or unfair labor practice charges regarding the imminent "lockout". (R.T., Vol. XV, P. 45.)

The 1982 Soquel negotiations were settled on 30 March 1982 without incident. No strike occurred; no phase down was implemented.

b. Relationship Problems (Ventura)

Personnel from the UFW legal department described the west

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10. There was no strike during these negotiations

Foods Ventura-UFW contractual relationship difficulties as the "worst in the State". (R.T., Vol. XI, p. 44, 11. 18-23)—specifying problems in arbitration and compliance, including more (grievance) activity with West Foods Ventura then with the entire vegetable industry combined (R.T., Vol XI, p. 45, 11. 11-27). In contrast, the UFW-West Foods Soquel relationship had been relatively tranquil.

Union representative (and assistant negotiator) Karl Lawson detailed various occasions on which the UFW perceived the company to have undermined the grievance and arbitration process including failure on the part of supervisors to respond to stewards at the first step of the grievance process (GCX 100, 105; R.T., Vol. XII, pp. 67-68); failure of Respondent to respond in writing to second step grievances as required by Article 5 of the contract (GCX 98, 145, R.T., Vol. XII, pp. 68-69, 84-90); delays in responding to grievances following second step meetings (R.T., Vol. XII, pp. 69-85), failure of the company to provide supporting witnesses and evidence at the second step meeting (GCX 92, 100, R.T., Vol. XII, pp. 69, 79-84, 90-95); failure to provide a representative at the second step with authority to resolve the grievances (GCX 101, R.T., Vol. XII, pp. 95-96A). The union perceived the hiring hall provisions of the contract to be subverted on occasions when Respondent hired on its own, or unilaterally imposed job requirements not part of the contract (GCX 106, 108, 109, 110, 111, 112, 113, 138; R.T., Vol. XII, pp. 24, 25, 31-34, 36-47). Lawson also alluded to alleged employer obstruction of the seniority provision by the latter's failure to post for higher rated jobs, failure to notify of layoffs, and/or failure to provide seniority

lists on a periodic basis (R.T., Vol. XII, pp. 57-61, 63-65).

The company, on the other hand, perceived the union as having a history of staging strikes and work stoppages at Respondent's farms since 1978 (see Respondent Brief p. 274). It referred to two work stoppages in 1977, and several grievance matters involving work stoppages that were resolved in 1978. While the employer, of course, did not share the union's view that the company was the principal source of the problem, all were in agreement that the brief contractual relationship had been a difficult one from the outset.

c. Alleged Threats and Imminency of Strike [11/]

The mutual distrust between the two parties was graphically demonstrated in the proffered versions of sundry threats allegedly made by each side. The workers categorically denied making any statements predicting or threatening a strike prior to November 19, 1981, and instead attributed such remarks to supervisors. Thus, workers would quote various company personnel as follows:

Supervisor Julio Perez to Blanca Gonzales in July 1981 -- "If the [workers] went out on strike, the union had very little to

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11. I have not considered these alleged threats as independent violations of the Act. General Counsel has not amended its pleading to allege separate violations in this regard, and although it refers to violations of 1153(a) in its post-hearing brief (G.C. brief, p. 109-111), no specific threat is alleged to be violative of the Act. Consistent with General Counsel's theory that these statements were background to Respondent's conduct, I decline to recommend that these allegations be treated as independent violations of the Act. While they have in a sense been "fully litigated" (Respondent supervisorial personnel uniformly denied all such remarks), there has never been notice that any particular incident constituted a separate ground for violation of the Act. (See Harry Carian Sales (1980) 6 ALRB No. 55.)

give, just rice and beans — $40 and rice and beans". (R.T., Vol. XIV, p. 130, 11. 19-21.)

Supervisor Julio Perez to various pickers in the months of July and August 1981: "When are the workers going to go out on strike?" (R.T., Vol. XIX, p. 35, 11. 3-11.)

Supervisor Julio Perez to Teodoro Diaz in-mid-August 1981: "By September 3 the contract will be over and the strike will begin." (R.T., Vol. XIV, p. 58, 11. 13-14.)

Supervisor Antonio Perez to worker Leonel Carrillo in September 1981: "I'll bet you $10 there will be a strike." (R.T., Vol. XV, p. 135, 11. 15-19.)

Supervisor Antonio Perez to worker Leonor Ballesteros: "If you don't accept what the company offered and went on strike they could do the work themselves." (R.T., Vol. XV, p. 174, 11. 15-16.)

Supervisor Jim Nichols to Victor Becerra in May 1981 asking for the latter's union cap: Victor Becerra: '" You mean the one that has the eagle?" Jim Nichols: "No, it's not an eagle. It's a vulture. Why don't you use it when you go out on strike." (R.T., Vol. XXXI, p. 165, 11. 11-17.

Supervisor Rafael Guillen (wearing a yellow helmet) to worker Zenaida Garcia in November 1981: "The reason I'm wearing this helmet is because I'm waiting and expecting the fucking strike so that I can withstand all the rocks that you throw at me. (R.T., Vol. XX, p. 154, 11. 15-23.)

Supervisor Juan Martinez to worker Ricardo Olavarrieta (second week of September 1981): "What happened to the strike? Weren't you guys to go out on strike?" (R.T., Vol. XX, p. 170, 11.

15-16.)

Grower Salvador Soils to irrigator Cruz Rodriguez in August 1981: "If there is no agreement, the company will close and the loser will be you, not us, because we'll just go to another plant." (R.T., Vol. XVII, p. 88, 11. 22-25.)

Supervisor Luis Partida to Jose Jimenez Final in August 1981: "That if we don't come to agreement with the union, the company was going to close the plant the same as they had done in one they had over in New York." (R.T., vol. XVII, p. 103, 11. 21-23.)

Supervisor Jose Arambula to Rafael Gallardo in August 1981: "If we did not sign a contract, then they were going to close down." (R.T., Vol. XIV, p. 90, 11. 21-22.)

Supervisor Luis Partida to a group of pickers as overheard by Ricardo Olavarrieta in July 1981: "... that if they (the pickers) didn't get smart and make a good contract, that the company had already closed down a plant in another strike and that likewise, this one was also going to close." (R.T., Vol. XX, p. 169, 11. 9-12.)

Supervisor Luis Partida to Severiano Martinez in August 1981: "They're going to close down the plant and move it to Mexicali." (R.T., Vol. XV, p. 12, 11. 19-24.)

Supervisor Antonio Perez to Erasto Alcantar two to three months before the expiration of the contract: "That what the company was offering was sufficient and that if we didn't sign the contract, the company was going to close down the plant." (R.T., Vol. XV, p. 152, 11. 15-17.)

Employee Juan Medina described a conversation he had with supervisor Jose Arambula in June or July 1981 while mixing the dry grass. Arambula stated that he knew that the company was not going to sign a contract because they were trying to prolong the negotiations. "The company lawyers were investigating to wreck the union". Arambula proceeded to inquire as to when the workers would go out on strike. (R.T., Vol. XIX, p. 102, 11. 17-19.)

Finally, Teodoro Diaz described a conversation which he had with supervisor Luis Partida in the Fed Mart Shopping Center in the summer of 1981. When Partida asked about negotiations, Diaz replied that there was as yet no contract. Partida told Diaz that the company would shut down and fire everybody if there was no contract and then open again three months later with new people, thus ridding itself of the union. (R.T., Vol. XIV, p. 49, 11. 18-27.)

The company witnesses denied all such remarks, and attributed strike-threatening comments to the workers as follows:

Supervisor Julio Perez quoted crew leader Antonio Diaz in January 1981 to the effect that the latter would not buy a new vehicle in 1981 because he was saving up for the strike. (R.T., Vol. XXVIII, p. 62, 11. 1-3.)

Supervisor Antonio Perez quoted UFW steward Edmundo Garcia to the effect that the workers were not happy with the present contract, and "that they were going to strike the next contract and fuck the company." (R.T., Vol. XXVIII, p. 26, 11. 5-13.)

Supervisor Jim Nichols quoted union ranch president victor Becerra as indicating that the union had just settled elsewhere and was going to strike at West Foods (April 1981). (R.T., Vol. XXX, p.

67, 11. 6-10.)

Antonio Perez quoted crew steward Ricardo Olavarietta to the effect that the workers were not happy with the contract and that they were going to go out on strike (before June 1981). (R.T., Vol. XXVIII, p. 30, 11. 4-10.)

Alfredo Lara (grievance committee member) to supervisor Jose Arambula in May 1981: "Disciplinary letters would be removed from workers records when the contract expired because the workers were going out on strike and not returning until the letters were removed." (R.T., Vol. XXVI, p. 203, 11. 3-4.)

Agustin Villanueva to Julio Perez in June 1981 that: "[i]f the union continued to push as hard as they were pushing the negotiations, that there was a possibility of a strike, and that he (Villanueva) wasn't going to be able to make it in case of a strike." (R.T. Vol. XXVIII, p. 62, 11. 18-21.)

These statements were reported to management personnel (Hank Knaust and Jim Kahl) pursuant to their previous instructions to the supervisors in December 1980 which were repeated in February 1981 by Mr. Kahl. At various supervisorial meetings during the early part of 1981, Knaust would query supervisory personnel regarding such statements and thereafter continued to do so at various meetings of the supervisors.

Without evaluating the individual recollection of each witness[12/] in this regard there emerges a sense that the workers

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12. I find that specific evaluation of each alleged statement is not helpful to reaching an ultimate decision in this case. As no specific violations are alleged in this regard, the general impressions of each side seem to be more significant indicators of Respondent's ultimate motivation during the period in question.

were acutely concerned about the status of negotiations and the company's willingness to negotiate in good faith. The Respondent, for its part, was concerned about the possibility of a strike, and its perceived vulnerability should such economic action occur at full capacity. These perceptions affected the entire course of bargaining during the 1981 Ventura negotiations.

2. The 1981 Ventura Negotiations

Some 32 formal sessions were held between 7 July 1931 and 13 January 1982. The company was led by chief negotiator George Horne. Roberto de la Cruz (the Oxnard Field Office director) was the union's chief spokesperson, and was assisted by UFW representative Karl Lawson. On a few occasions, the negotiations were conducted by union president Cesar Chavez, as well as regional representative Art Mendoza, and Richard Chavez.

For clarity, I have grouped the 1981 Ventura negotiations chronologically: Early meetings; formal negotiations through 15 July 1981; post-crop protection sessions from 15 July through 22 October 1981; critical— ' negotiations of 31 October through 3 November 1981; post-strike sessions from 19 November 1981.[14/]

a. Early Meetings

In early 1981, key company personnel (Jim Kahl -- farm

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13. I have so designated these meetings as they appeared to represent the last real efforts to resolve the parties' differences.

14. As required under applicable NLRB and ALRB precedent, however, I have considered the negotiations in their entirety in reaching my ultimate conclusions. See Masaji Eto (dba Eto Farms) (1980) 6 ALRB No. 20; N.L.R.B. v. Stevenson Brick and Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 2086].

manager, Jack Buffington -- executive vice president of mushroom division) met to discuss the upcoming negotiations and the future of the Ventura farm. Respondent's first priority was to get a contract which was competitive in the industry. Secondly, the management team desired early commencement and conclusion of negotiations to avoid the devastation of a strike or, alternatively, implementation of a crop protection program. (R.T., Vol. III, p. 128-129.) Considering the lengthy mushroom growing cycle, lack of assurances that there would be no strike, and current production levels, it was decided that the date of implementation of crop protection would have to be "backed up". That is, the crop protection program would have to be initiated earlier than in 1978. Once having established the strategy, chief negotiator George Horne requested a meeting with UFW president Cesar Chavez in La Paz.

On 1 May 1981, the parties met at the UFW's La Paz headquarters. The company spoke generally of conditions in the mushroom industry. Company personnel made it clear that they were interested in commencing negotiations early. Cesar Chavez stated that Art Mendoza was the head of the Ventura County region and that a negotiator would be appointed as soon as the union was able to do so.[15/]

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15. There is a factual dispute as to whether the possibility of the crop protection program was mentioned at this meeting. The company witnesses (Horne and Kahl) recalled that this issue was indeed discussed at the May 1 meeting. The UFW (Chavez and Mendoza) denied that any discussion of the risks of a strike were discussed at this early date. (Roberto de la Cruz recalled discussing the matter with Art Mendoza as soon as he learned of the threatened crop protection program after the June session at

(Footnote continued---)

On 17 June 1981, Roberto de la Cruz, union representative Manuel Rodriguez and the ranch committee attended a meeting[16/] at the company office. George Horne stated the company's position that there be an early settlement of the contract — by 15 July 1981 — or there would be a shutdown of the plant. Alternatively, Respondent requested that the union provide a 30-day extension of the existing contract — until 6 October. Mr. de la Cruz explained that no negotiating committee had been set up as he was still busy with other negotiations. He suggested that it was premature for either crop protection or the contract extension, that the contract would not expire until 6 September, and that there was still ample time to negotiate. (GCX 3.)

The UFW submitted a request for information by letter of 19 June 1981 (GCX 3), selected its negotiating committee, and arranged with the company the first bargaining session for 6 July 1981. The

(Footnote 15 continued----)

Respondent's premises. However, a company letter addressed to Mr. de la Cruz dated 19 May raised the possibility of crop protection (although no tentative date had been articulated) and "reiterated" the need for early negotiations. (GCX 2) Mr. de la Cruz did not recall receiving this letter until later that summer. (R.T., vol. VIII, p. 9, 11. 14-24.) As there is no evidence that the date on the letter had been altered, and Mr. de la Cruz testified to being extremely busy during this period with the citrus negotiations, I find that the company communicated its position at the earlier date. In any event, it was clear that the union was informed of the possibility of a crop protection program by the next "meeting" on 17 June (see discussion, infra). Therefore, the company made known — and the union was certainly aware of — the possibility of the early lockout prior to the union's selection of its negotiating team.

16. The company, but not the union, considered this to be a formal negotiation session.

information request sought data on the Respondent's organization (date and state of incorporation; names and addresses of officers; agent for service of process; principal place of business); number of acres; description of tools, equipment, and protective garments provided in 1978-80; general cost of various benefits (witness and jury duty pay; bereavement pay; overtime; cost of holidays; vacation pay); total quantity of mushrooms produced by grade 1978 through 1980; pickers' hours 1978 through 1980; and contributions to the Juan de la Cruz pension fund.

Kahl responded for the company by letter of 25 June 1981 (GCX 4) stating that the union already knew most of the information requested. The total contributions to the pension fund, and costs of the various benefits were reputed to be available from the company's periodic reports to the union. The total number of mushrooms picked per year (but not by grade) was given as "between 10,000,000 and 13,000,000 pounds"). The pickers' hourly work information could be obtained from company payroll records which would be made available to the union during normal business hours if the union prepaid a minimum of $150.00 deposit to cover costs. No other information was provided at that time.

b. Formal Negotiations (through 15 July 1981)

At the formal negotiation session of 6 July, the Union presented its complete language proposal — but not an economic proposal — claiming it did not have the (previously requested) information necessary to compile an intelligent "package". (GCX 5, R.T., Vol. VIII, p. 37, 11. 7-9). The company responded with its own language proposal. (GCX 6.) George Horne again suggested the

need for contract resolution by 15 July, or in the alternative, extension of the contract through 6 October. The union responded that it was premature to discuss contract extensions, as there was still ample time to negotiate.

Horne informed the union that there had been no change in the information from the previous negotiations with respect to the form of the Respondent's organization (Item #1). The information regarding the acreage (Item #2) was turned over to the union on the following day — July 7. The Union never received the information pertaining to tools, equipment and protective garments as requested in Item #3. Information regarding costs of various benefit items (Item #4(a-e)) was provided on 7 July only with respect to vacation pay (GCX7). The information regarding annual poundage of mushrooms was rounded off to the nearest hundred-thousand and no breakdown by grade was provided the union.[17/] While the union was given an opportunity to review picker earnings records for two selected period between May and July 1981,[18/] information for other periods of time was not made available. Finally, the Union conceded that it was able to calculate the pension fund contributions (Item #7) through contact with its membership department.

On 7 July, the parties discussed Article III -- Hiring. The company wanted to delete the entire provision, stating that it preferred to hire experienced pickers. Proposed company language

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17. It was not until an October session that the company provided information regarding the breakdown of mushrooms by grade.

18. A four-week period of time.

changes with respect to arbitration and grievances were also discussed, as well as maintenance of standards. In the latter regard, the company contended that there was no need for such a provision since the contract had been in effect for five years. The union voiced its view that the clause was important in case of changes in individual working conditions or rates of pay.[19]

Again, the company proposed a 30-day extension of the contract with retroactivity to avoid implementation of the crop protection program. The union still insisted that there was ample time to negotiate through 6 September. By the end of the session, agreement had been reached on some 16 language articles including union label, management rights, no-strike clause, subcontracting, modification, and right of access. (GCX 8.)

At the 13 July session, the union and company exchanged written proposals (GCX 9 and 10) regarding hiring and seniority. The company did not alter its position regarding hiring, grievance and arbitration, and maintenance of standards. The union rejected the company's request for extending the contract, stating that there was still ample time to negotiate. The company requested a 60-day strike notice. Roberto de la Cruz replied that the workers wanted a contract, that they had no intention of striking, and that there was still ample time to negotiate.

Horne expressed the company's wish to discuss the

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19. E.g., if an employee listed in the contract in a job category with wages of $5.00 per hour and the worker was actually earning $6.00 per hour because of some type of job differential, the higher wage rate would be protected under the maintenance of standards clause.

implementation of the crop protection program (lockout) the following day, but de la Cruz insisted that the lockout was illegal, that the company follow the- terms of the contract regarding layoffs, and that the union would spend its time formulating an economic proposal.

On 15 July, the union presented its complete economic proposal and response to language articles (GCX 11 and 13). The company countered with a hiring hall proposal which allowed it to determine which jobs required skilled and/or experienced workers (GCX 12). The company expressed disappointment in the union proposals and stated that the crop protection program would be implemented in the absence of agreement on the alternatives previously proposed (e.g., extension of contract; 60-day strike notice). Horne indicated that the company would advise the employees by letter of the implemention of the crop protection program and the status of negotiations (GCX 14A, GCX 14B).

On 16 July, the company sent a letter to the union enclosing a copy of the employee letter which had been previously distributed. (GCX 15.) The letter outlined the 1981 bargaining history and suggested the union's inability (or unwillingness) to engage in early negotiations or accept an alternative to the crop protection program. It described the need of the crop protection program as "an economic requirement to protect the mushroom crop and our business and customers' needs if we seem to be heading for a serious labor dispute. Our extension proposals were an effort to take the pressure off for one more month so that the union could get ready to negotiate and we would have time to reach an agreement."

(GCX 14A.) The union was alleged to have "forced" the Respondent into said action.

As implemented, Respondent's crop protection program resulted in demotions (from Equipment Operator "A" or Fill Crew to Picker or Case Crew) for seven employees during the period 17 July and 3 August 1981. Six employees were transferred from fill crew to dump crew on July 30, 1981. Intermittent layoffs of approximately 190 employees in various job categories occurred between 29 July and 14 October 1981, as did intermittent layoffs of some 18 packing shed employees commencing August 28, 1981, again in October 14, 1981, and thereafter until the 19 November strike. There were also intermittent layoffs of some 49 pickers beginning on September 10, 1981, and reduction in work hours of 18 employees from the beginning of August 1981 until the 19 November strike. (GCX 1-NN; GCX 144.)

The layoffs were of such magnitude that by the time of the November 19 strike, only 16 of the approximately 60 packing employees were working 40-hour weeks; only some 26 of the approximately 140 pickers were fully employed at this same time period (GCX 144). Similar reductions in the other (smaller) crews characterized the implementation of this program.

c. Post-Crop Protection Program Sessions: 21 July through 22 October

At the 21 July meeting, the company reiterated its decision to commence crop protection. The union retorted that said actions were premature, and protested the 15 July letter to employees. The company rejected the latest union economic proposal as "exceeding the realm of any reasonable possibility for settlement" and responded with a 3-year counterproposal of its own (GCX 17)

including its first proposal on economics.[22/] (R.T., Vol. XXIX, p. 84; 11. 12-21.) The parties thereafter discussed the company economic proposal.

On 28 July, the UFW submitted a counterproposal (economics and language) — modifying its wage request and extending the category of experienced workers to irrigators under Article III: Hiring (GCX 20). The proposal was discussed and both sides agreed to meet the following day.

On 29 July, chief company negotiator Horne was not present, but discussion of the union proposal of the previous day was led by Mssrs. Kahl (company) and de la Cruz (union).

On 3 August, neither Horne nor Kahl were present as the air controllers' strike prohibited their return to the Ventura area. In their stead, personnel manager John Merle received the union's proposal (language and economics) in response to the previous discussions (GCX 21). The union moved further on hiring — adding chemical sprayers to the group of job classifications for which experience could be required — but not on wages.

The union received the company's language counterproposal on 4 August (GCX 22) and its economic proposal at the meeting of 7 August (GCX 24). Further discussion was held regarding the

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20. The wage package proposed no increase for pickers during the first year, followed by one-half cent raises for each of the following two years. Hourly employees were offered a five-cent increase each year. Incentive crews were offered no raises, and the crew leader positions were eliminated, thus resulting in a pay decrease to these employees.

implementation of the crop protection program,[21] and the union submitted a written proposal for various job descriptions under the incentive pay scale.

An informal session was held on 11 August in Bakersfield between Kahl, Horne, de la Cruz, Richard Chavez, and David Burciaga (union negotiator during the 1978 Ventura bargaining) "to get the negotiations off dead center" (R.T., XXIX, p. 99, ll. 23-28). The company was discouraged by the slow progress — feeling that the wages were the number one issue in light of the vast differences in the parties' positions.[22] The union was perturbed by what it perceived to be the company's precipitous resort to "lockout".

On 13 August, the union submitted a revised language and one-year economic proposal to the company (GCX 26), and Respondent countered with a three-year proposal of its own (GCX 27). Lengthy discussions were held on economic issues, duration, and the mushroom industry in general. Richard Chavez suggested the possibility of industry-wide negotiations at some time in the future. The parties were still far apart on wages, and problems existed regarding maintenance of standards, vacations, pensions, paid union representative, and bereavement pay. No date was set for further negotiations. Horne suggested that the further into crop protection the company ventured the more likely that its position might harden.

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21. The parties continuously "sparred" over exactly how layoffs were to be conducted. The union pointed to the contract (no bumping); the company suggested repeating the methodology agreed to in February when Line 3 was closed down for economic reasons.

22. Duration was still a major problem in that Respondent was insisting upon a three-year contract and the union wanted a one-year settlement.

On 20 August, the union submitted a language proposal to Respondent covering hiring, seniority, grievances and arbitration, disclipline, leave of absence, and health and safety. (GCx 28.)

On 21 August, the company sent another "For All Employees" letter detailing the union's unavailability to meet and predicting a greater effect on workers' earnings as the program continued, and blaming the UFW for the crop protection program.[23] The employees were urged to keep informed through their union (GCX 29A and GCX 29B). By letter of 27 August, the union prepared a revised economic proposal and requested another negotiation session (GCX 30).

At the meeting of 2 September, Horne expressed the company's concern that the 6 September expiration date of the contract was rapidly approaching. The Union articulated its disappointment after having learned that incentive (fill) crews were reporting to work earlier than scheduled but not received pay for their additional hours.[24] De la Cruz also discussed two sweepers who were allegedly being paid for 9 hours of work although working 11 to 12 hours on the job. Respondent presented an economic proposal and a language proposal on job descriptions. The company suggested that the union wanted to strike. The union denied this intention, proposing first a week extension of the contract, and

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23. "We truly regret being forced into the crop protection program because of the UFW's unwillingness to settle or give us any assurance that there would be a settlement prior to the expiration of the contract, but we have no other choice."

24. Roberto de la Cruz recalled that this was the case crew. Employee Rafael Gallardo testified that it was the fill crew which commonly reported for work some one to two hours prior to actual check-in time.

then a day-to-day extension. The Union requested time to review the Respondent's last proposals, and a further session was scheduled for 3 September.

On 3 September the union submitted a counter (one-year) economic proposal (GCX 33), which the company received with "grave disappointment". The union was equally distressed — reviewing what it perceived to be "unilateral deals" that the company had been entering into with the workers without the consent of the union.[25/] After a caucus, the UFW proposed a three-year contract with economic reopeners and the right to strike after one year (GCx 34). Horne insisted the company would "not be caught with its pants down" as in previous years. De la Cruz insisted that there would be no strike. The session broke for the weekend of September 4-6 as De la Cruz attended the UFW convention in Fresno, leaving his Fresno phone number to help alleviate the company's fears of an impending strike.

The next negotiation session was held on September 11. The union submitted a complete three-year proposal[26/] resubmitting the language issues from its August 20 proposal and increasing its economic demands (GCX 35). Horne again expressed disappointment with the Union's position. De la Cruz became upset after having attempted to meet Respondent's request for a three-year contract and accused Respondent of attempting to create an impasse. A lengthy

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25. See discussion of the various alleged unilateral changes, infra.

26. The Union omitted an incentive proposal for the chemical applicators because of its understanding that Respondent had recently changed that job classification wage. See discussion, infra.

discussion regarding the operations of Respondent's competitors -- Campbell Soup, Monterey Mushrooms, Ralston Purina (Steak-Mate), and Del Norte Mushrooms — ensued. Each side accused the other of not really wanting a contract.

On 14 September, the company presented its response to the Union's three-year proposal (GCX 36). Discussion of the proposal followed and the company reiterated its position that it considered the union's paid representative proposal an illegal subject of bargaining. It also rejected the union's cost-of-living proposals. Horne suggested that the parties might be at impasse if the union was unable to counter.

On 15 September, Richard Chavez was the chief union spokesman in Roberto de la Cruz' absence. The union submitted a revised three-year economic proposal (GCX 38). Horne commented upon "the lack of significant movement in the proposal". The parties agreed to meet the following day and Respondent resubmitted its proposal of 14 September. According to Horne, the company felt negotiations were at impasse. Chavez indicated that the union still had more movement — although they were approaching the bottom line. (R.T., Vol. XIII, p. 28, 11. 24-28; Vol. XIII, p. 30, 11. 1.)

On 22 September, the Company presented the union with a counterproposal which it reserved the right to withdraw if not accepted within 24 hours in an effort to "resolve" the negotiations (GCX 39). Grievances and arbitration were discussed, as were pickers' duties and wages at other (competitive) operations. The meeting ended with the union stating that it would call when ready to meet again. The following day, the union rejected the company's

proposal. The parties exchanged angry telegrams (GCX 40; RX 16) and a meeting was arranged for 5 October. On that occasion, the Union presented a language and economic proposal resubmitting its September 15 proposal with changes in seniority, medical plan, cost of living and wages (GCX 41). A discussion of the existing proposals ensued particularly with respect to the Union paid representative proposal, vacations, and the "competitiveness" of the company proposal in comparison to the Campbell Soup contract. Each side queried the other regarding possible movement.

On 9 October, the company submitted another counterproposal (GCX 42). Rectangular boxes were drawn around particular clauses which had been agreed upon pending settlement of the entire contract. At issue remained hiring, seniority, grievance and arbitration, leave of absence, maintenance of standards, supervisors, health and safety, hours of work, reporting and standby, rest periods, vacations, holidays, records and pay records, medical plan and pension plan, payroll reporting and deductions, duration, various supplemental agreements, wages, fringes and job descriptions. Discussion was held regarding changes in the incentive crews and vacations. The company opined that in light of the fact that there had been no strike for one month following the expiration of the contract, there was some basis for assurance that there would be no strike. Consequently, it initiated a gradual building up of operations and had started composting again (to wit, a "phase down of the phase down"). Horne then explained that the company had brought in an experimental supply of mushrooms from the East Coast to give some work opportunities to the fresh pack people.

Roberto de la Cruz responded that he would have to verify the Union's legal position through the legal department on this "subcontracting". See discussion, infra.

On 10 Ocotber, de la Cruz indicated that the union legal department was still researching the subcontracting issue. The UFW submitted another proposal (GCX 43) which it categorized as "not a final proposal" but "in the ballpark". The parties then discussed union security and bankruptcy, hiring, seniority, supervisors, grievance and arbitration, vacation, and wages for various classifications. The next meeting was to be scheduled by telephone.

On 14 October, Respondent transmitted another "All Employees Letter" to inform the workers of the status of negotiations (GCX 44A & GCX 44B). The company pointed out its continued payments to the medical, pension and Martin Luther King funds following expiration of the contract and the company's latest wage proposal ($5 an hour for general hourly rate). On 15 October, the company sent a letter to its employees advising them of the procedure to follow if they no longer desired to have their union dues deducted from their paychecks or if they wanted to resign from the union (GCX 45A). A form was provided for the employee to notify the union of these actions.

On 16 October, the Union sent by telegram its opposition to the process of packing mushrooms not grown at the Ventura Farm. Additionally, the union demanded that the company cease use of the Union label on all items produced at the farm. The company replied by letter of 21 October that it would comply with the union's

request "as a good-faith step to bring us close to a new contract ..." (OCX 43.)

On 22 October, the company sent another "All Employees Letter" stating its position regarding the processing of non-farm grown mushrooms and the union's objection to this operation. (GCX 50A and GCX 50B.) The company described its actions as an effort to provide additional work for its employees; the UFW was responsible for the cessation of this opportunity. Packing shed workers received this communication in their paychecks handed out on the premises (RT Vol. II, p. 162; Vol. III, pp. 15-17, 32.). At the negotiation session of 22 October, De la Cruz expressed the union's displeasure with the company's direct communications with the membership. The company submitted a counterproposal (GCX 49) which made some concessions to the union on seniority, but deleted the (previously agreed upon) union label article, based on the union's 16 October telegram. No change was made in the company's economic proposal, as it considered the union's last offer "prohibitive". The parties (Kahl and de la Cruz) debated the union label issue — specifically the company's interpretation of the union's request to cease use of the union label to mean deletion of the article in the proposed contract.

Horne thereafter telephoned Richard Chavez to discuss the "seriousness" of the situation and the parties agreed to meet at UFW headquarters in La Paz.

d. The Critical Negotiation Sessions: 30 October through 8 November

Prior to the session of 30 October, union personnel met with president Cesar Chavez to explain the history of problems at

the Ventura Farm -- particularly with respect to discipline, grievance and arbitration, and personal relationships between supervisors and the work force. Following this meeting and immediately prior to the commencement of the formal negotiation session, Horne and Chavez had a conversation outside of hearing distance of the other members of the negotiating team. Chavez stated that the company did not deserve a contract because "400 people had been fired the previous year." Horne denied the accusation, and waved over company members to join the conversation in an attempt to "clear the air". (R.T., in camera proceeding re October 30, 1981, p. 2, 11. 12-24.) Chavez declined further commentary, suggesting that he wanted to speak with his people further on the issue, and the pair entered the negotiation room.

The parties discussed resolution of the Ralston-Purina strike, and the differences in the parties' positions on duration and fringe benefits. A lengthy discussion ensued over relationship problems between the workers, the company, and the union. Chavez suggested that the parties divide up and list out the problems they perceived with each other. The parties did so, and discussed discipline and discharge, arbitration and grievances, leave of absence and attendance-related issues, and immigration problems. The parties agreed to deal with the outstanding issues in principal, subject to working out contract language at a later time.

The union proposed to reduce the time that it would take to process cases through arbitration, and suggested a labor management committee to resolve problems short of arbitration. The company agreed to the establishment of a committee and the insertion of

another step in the grievance procedure as suggested by the union. The company rejected the paid union representative proposal and suggested a 30-day leave of absence with a vacation tag on the end to meet the union's concern that the 30-day leave was inadequate. As both sides agreed that some movement was being made, the parties consented to meet the following day to continue the discussions of non-economic issues.

On 31 October, Horne proposed a three-day personal leave, except for emergencies, if the workers gave prior notice. The union proposed maintaining a hiring hall list of experienced mushroom people with a 14-day probationary period for general workers and 21-day probation for pickers. The union withdrew its demand to have a steward present when disciplinary tickets issued, but it insisted that the steward be present for suspension and discharge. Chavez proposed that all disciplinary records be wiped clean after six months. Horne demurred, stating that a small number of employees had serious problems in their records and were just short of discharge. The Union insisted on the maintenance of standards clause, and submitted a written counterproposal regarding supervisors (GCX 51). The Union label issue was again discussed. Chavez clarified that the union's position related to the subcontracting of mushrooms: Since the company ceased the subcontracting and had continued to contribute to the various benefit funds, the label could be maintained. The Union dropped its proposal regarding reporting language for fringe benefits and questioned the Respondent's proposal regarding job descriptions. Chavez said that still pending were health and safety, seniority,

and local issues, and that all other open language issues had been addressed. Horne responded that the maintenance of standards clause was not a major issue to the Respondent, but wanted to assure that all data regarding workers' wages, hours, working conditions, etc. was in the contract.

After a break, there was further discussion of leave of absence. Concessions were made by both sides regarding grievance and arbitration. The company agreed with the union proposal for the presence of stewards at suspension and/or discharge. It countered with cleaning the records of attendance matters after 12 months. Horne agreed to maintenance of standards, reinstatement of the union's label clause, and made an oral counterproposal regarding supervisors. After another break, the union made an oral proposal regarding seniority.

On 1 November, Chavez stated that he thought there was agreement in principal on hiring, discipline and discharge, reporting, dues and contributions, and that the parties were close on job descriptions. The Union awaited the Respondent's response on seniority; health and safety and local issues were pending. Of the 40-50 articles previously opened, the parties had reduced their differences to 21.

Respondent' agreed to the Union's seniority/bumping proposal but requested specific language defining job eliminations. Pickers' wages and duties were again discussed with focus on differences between Respondent's operations and the competition. There was discussion of health and safety, letters of understanding, assignment of pickers, and injury and illness pay. The union

accepted the company proposal regarding injury and illness pay, and a status check was taken. Articles which remained open included hiring, maternity, health and safety, one supplemental agreement (No. 7), picking procedures, and job descriptions.

Horne restated the company's concern that the union consider the different job duties performed by pickers at the competition in evaluating its economic proposal;[27/] and stressed the seriousness of the duration issue. At this point in time, he was optimistic: the major contract language issues were settled and the written embodiment of these agreements was to be prepared for the next session (GCX 52).

On 5 November, there was a brief discussion of outstanding language issues, and the Respondent handed out its written proposals — incorporating the matters previously discussed including leave of absence and good standing (union security). Discussion of these issues ensued. Cesar Chavez compared the absence of relationship problems at Campbell and Monterey. Horne recalled and Chavez denied reference to the Steak-Mate negotiations where Chavez suggested that the union had demanded the removal of the company's personnel manager to settle that contract.[28/]

Economic issues were then discussed with particular emphasis on the pickers. A comparison was made of picking standards

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27. Horne explained that pickers at Campbell Soup and Ralston-Purina performed functions carried out by crew leaders, product pickup persons, control disease crews and/or clean up personnel at West Foods Ventura.

28. This issue was to surface at later sessions when two of Respondent's supervisors were allegedly singled out by Mr. Chavez for discharge. See discussion, <u>infra.</u>

at Campbell and Steak-Mate. The union explained the problems it had with respect to a three-year contract and suggested that a one year agreement would put the company even with other mushroom companies — e.g., Monterey and Ralston-Purina.

Chavez opened the meeting of November 6 by listing the particular language agreements reached by the parties — including provisions regarding hiring, seniority, maternity leave, grievance and arbitration, maintenance of standards, leave of absence, supervisors, health and safety, union label, reporting and standby time, records and pay periods, reporting of payroll deductions and fringe benefits, portions of duration, discipline and discharge, and labor management committee. The parties caucused for approximately six hours to allow the union to present its economic proposal. Upon returning to the negotiation room, the union made various inquiries regarding economic concerns and picker productivity. Another break was taken, and the union submitted a written economic proposal (RX 58) to Horne as a "package" to resolve the contractual dispute. If accepted by the company, the parties had a contract; if rejected in part, the total proposal would become a nullity.

On 7 November, the parties met throughout the day and into the evening to discuss the Union's proposal. The company had serious difficulties with pickers' wages and duration. There was discussion of comparative picking costs, and the Union suggested resuming the meeting the following morning after checking the company's calculations.

The 8 November session lasted from 11 a.m. to 8:30 p.m. The union presented its information regarding comparative costs at

Respondent's competitors. Contrary to Respondent's contentions of the previous day, the union calculated Respondent's costs as less than those of major competitors Campbell Soup and Steak-Mate. The company questioned the applicability of the data and pointed out differences in the operations of the various companies.

The company submitted an oral counterproposal on the disputed issues (including incentive crew leaders, hourly crew leaders, overtime, rest periods, vacations, bereavement, discipline/discharge, holidays, and legal matters) and a written proposal on picking procedures. The company specifically proposed a three-year contract with a reopener in November 1982 on economic items with a right to strike from February 1983. Horne indicated that the company would agree to retroactive benefits if the parties reached agreement prior to February 8, 1983, and urged the 90-day "cushion" to allow the union to negotiate with other companies without taking away its (the union's) right to strike.

The union returned from caucus stating that they were pretty much in agreement with picking procedures, recording of standby time, rest periods, paid union representative (withdrawing its previous demand), overtime, and legal matters. There was disagreement over crew leaders, and the union made a counterproposal regarding overtime, vacation, Robert F. Kennedy Fund and Martin Luther King Fund. The union proposed a two-year contract (from 1 September 1981 to 1 September 1983) with reopener in September 1982 with right to strike after 1 November 1982 and a 30-day notice to strike. Attendance-related discipline would be null and void after seven months; all other discipline would be wiped clean after 18

months, and all legal matters (e.g., pending proceedings) would be resolved. New wages were to be effective 8 November 1981 with increases on 4/1/82.

Chavez indicated that the union was close to what it needed to reach agreement. The company caucused and counterproposed on crew leaders-, overtime, vacation, holidays, Robert F. Kennedy Medical Plan, Martin Luther King Fund, and a two-year proposal with economic reopeners after one year with an additional 90-day no strike period to enable the parties to work out details and wages. Horne indicated that the company was close to where it had to be, and was offering comparable wages even though it had not been successfully operating for some time because of the crop protection program. It proposed invalidating absences and tardinesses after one year, with other disciplinary infractions to be left to an arbitrator's discretion. The union supplied language regarding picker show-up times (RX 51) and the parties split into separate areas. Written proposals were exchanged thereafter (GCX 54, 55, 55, RX 53)[29/] (between 8:30 p.m. and 12:45 a.m.) and the session adjourned as the principals (Horne and Chavez) spoke by telephone the following morning. Horne suggested that there did not appear to be any more movement at that point. Chavez stated that he didn't see anything else that could be done (R.T., Vol. XXXII, p. 106, 11. 9-17).

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29. The written UFW proposal provided for a two-year contract with reopener on economics on September 1, 1982, with right to economic action from November 1, 1982, and 30-day strike notice. (GCX 54.) The company proposal provided for a November 8, 1982, reopener with right to economic action from February 8, 1983 (GCX 55).

Two days later, the workers voted to strike with the union's authorization. Telephone calls and correspondence were exchanged between Roberto de la Cruz and Jim Kahl — each accusing the other of bad faith and unwillingness to negotiate. The strike commenced on the morning of 19 November. The company issued another "To Our Employee's" letter (GCX 59A and GCX 59B) communicating the major economic terms of the company's last proposal and indicating that the workers would be allowed to work during the strike (as far as the Respondent was concerned) so long as replacements had not been hired. It was suggested that the employees check with the union to find out if they would be fined for working during the strike.

e. Post-Strike Sessions — 19 November 1981 Through 29 January 1982

The parties met at 9:00 p.m. on November 19. Horne and de la Cruz stated that their respective proposals from 3 November remained on the table. Horne pointed out that some 11 issues remained unresolved, including crew leaders, overtime, vacation, medical leave, discipline and discharge, legal proceedings, and a few wage issues. Horne insisted that duration was one of the most critical issues remaining. While there were significant economic problems, the parties "weren't that far apart on some of the money issues". (RT Vol. XXXIII, p. 15, ll. 9-14.) Horne stated that the union request for the September reopener would place the company at an economic disadvantage with other mushroom companies whose contracts expired in November. The parties caucused and the union returned with a proposal dropping the retroactivity reopener (that is, reopener on November 1, 1982). Horne then spoke about the

relationship problems and the company's feeling that the three-month no-strike period (until 1 February 1983) would give them a one-time cushion so that the union could solve their negotations with the company's competition. Horne then listed the open issues, cautioned the union to pay particular attention to duration, and the parties broke again with neither side changing positions. Horne stated that the parties were "very close in some ways and so very far apart in other ways". (R.T. Vol. VI, p. 176, 11. 20-22; Vol. XXXIII, p. 14, 11. 6-13.) The company still had a very big problem with duration. Horne opined that it seemed as though the negotiations were deadlocked. Art Mendoza requested the company's response to the union's concession. The parties both agreed to meet the next day to take "one more shot at it".

On 20 November, Horne reiterated that duration was still a major problem. Both parties failed to modify their pending proposals. Horne stated that the company felt that the parties were at impasse. Mendoza disagreed. Horne stated that the company felt the workers had the right to information on the company's positions during negotiations and would direct letters in that regard (GCX 60A and GCX 60B.) Mendoza protested. The meeting adjourned after one-and-one-half hours.

The parties met again on 27 November in La Paz. Horne repeated the importance of duration. He indicated that the company had flexibility on some of the issues, but felt that the union did not. Chavez discussed relationship problem as the rallying point of the workers. Horne agreed to wipe the slate clean on attendance-related disciplinary tickets which had been outstanding

longer than six months if a contract was signed. Chavez retorted that there would not be a contract with the disciplinary problems which existed, that the company was not offering a paid union representative, and was not doing anything on tickets: "The problem could be turned around in three months if two supervisors were fired, there was a paid union steward, and someone was assigned full-time to work with the union." He frankly did not know what could be done. (R.T. Vol. XXXIII, pp. 28-29.) Horne replied that trust was the problem, but that the company would not fire supervisors. Chavez replied that he was not suggesting that anyone be fired, but that two supervisors were 50% of the problem.[30/] The company pointed to the labor-management committee and the streamlining of the grievance procedure as its solution to the relationship problems. The meeting was then adjourned without movement from either party.

On 1 December 1981[31/] Kahl wrote de la Cruz itemizing "outstanding unresolved issues over which there appears to be no room for movement by either the company or the union . . .": discipline/discharge; duration; certain wages; crew leaders; paid

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30. At the hearing, Horne vigorously maintained that Chavez suggested the firing of two supervisors as the means to resolve the parties' deadlock. Chavez adamantly denied making such remark and was angered by Horne's attribution of such statements to him. As it was clear to all concerned that Chavez promptly disavowed any intention to require the discharge of the supervisors as a precondition to settlement (see R.T., Vol. XXXIII, p. 31; JX 48 (p. 8), any further analysis of Chavez' remarks in this regard are irrelevant to resolution of the issues litigated at hearing.

31. The letter was postmarked 3 December 1981. An identical telegram was sent on 3 December 1981 at 6:00 p.m. Eastern Standard Time.

union representative; certain job descriptions; shift differential for boiler tenders and irrigators; overtime; firing two supervisors; vacations; Robert F. Kennedy Medical Plan contribution rate. The letter concluded that if there was no union reply by 4 December 1981 to schedule a further meeting, the company would consider that the parties were at impasse over these issues (GCx 62).

Another "To Our Employees" letter was distributed 2 December 1981 describing the status of negotiations and reiterating that the company offer of 8-9 November was still on the table (GCX 63A and GCX 63B).

On 7 December, de la Cruz sent by telegram the union's disagreement with the company's characterization of the outstanding unresolved issues and promised a full written response within the following week. On 11 December, Kahl wired de la Cruz that the company would consider the negotiations at impasse if it did not hear from the union by 5:00 p.m. the following day.

On 11 December, de la Cruz telephoned Kahl to arrange a meeting to clarify the points raised in the previous letters.

On 14 December, Horne commenced the negotiation session with discussion of Kahl's December 1 letter, and resubmission of the company's November 8-9 proposal (GCX 67). De la Cruz stated that at no time did Cesar Chavez request at the table that two supervisors be fired. Horne retorted that Chavez had specifically proposed the firing on the record and then off the record named the

supervisors.[32] De la Cruz denied that the union had ever made such demand or taken the position that there would be no contract in its absence. De la Cruz stated that the paid union representative proposal had been withdrawn on 8 November. Neither side changed positions from its early November proposals. De la Cruz requested time to verify that the document submitted at the December 14 session was identical to the November 9 proposal. Horne stated that the company was "prepared to move now. We're prepared to negotiate now. . . . ." (R.T., Vol. XXXIII, p. 63, 11. 10-11.) De la Cruz stated that he would call Kahl if the union had any movement. The meeting lasted a little over one hour.

On 18 December Kahl wrote to de la Cruz notifying the union of the implementation of wage increases "as both sides indicated they had no room for movement on the unresolved issues." (GCX 68.) A copy of the letter, attached wage rates, and a "To All Our Employees" letter was sent to the workers. (GCX 69A & GCx 69B.)

On 4 January, 1982, Kahl wired de la Cruz that effective immediately, the company was withdrawing its November 9, 1981 offer from the bargaining table, and preparing a new proposal. (GCx 70.)

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32. The Board has ruled that off-the-record discussions are per se inadmissible in unfair labor practice hearings. See Order Partially Denying General Counsel's and Charging Party's Interim Appeal; Order Partially Reversing ALO's Findings and Recommended Order of June 11, 1982. I therefore make no finding regarding certain off-the-record remarks made between Chavez and Horne on 27 November. However, Horne's at-the-table reference to these remarks made at the 14 December session render further inquiry into the 27 November off-the-record comments moot. And, as was discussed previously, the union disavowed any intention to require the firing of two supervisors as a precondition to resolution of the contract on 27 November, which disavowal was reiterated on 14 December.

De la Cruz responded by letter of January 8 denying impasse and suggesting possible meeting dates.

On 13 January 1982, Horne presented the company's counterproposal (GCX 72) — to move the negotiations off "dead center", stating that everything was negotiable. Horne explained some of the changes from previous proposals, the parties caucused, and the union stated that they would get back to the company after studying the proposal. The entire meeting lasted 25 minutes.

The union considered the proposal regressive in a variety of areas — including union security, seniority, hiring, grievance and arbitration, right to access, leave of absence, maintenance of standards, union label, rest periods, holidays, pension fund, and various letters of understanding.[33/] Cesar Chavez wired a protest of the company's regressive bargaining, requested the company to cease use of the union label, and informed Respondent's corporate headquarters that a national boycott of Dole products would be undertaken (GCX 87 and GCX 88).

Horne and Chavez arranged a meeting for 29 January in Oxnard. When Chavez did not appear, Horne asked his whereabouts. De la Cruz expressed the union's view that the latest company proposal was a step backward. Horne responded that the proposal was not regressive. Rather, the company had every intention of paying

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33. E.g., the newly proposed union security article limited the union's discretion re membership qualification and created a religious-belief exception from union membership. The hiring article was eliminated, as was maintenance of standards. Optional (company) pension and medical plans also appeared for the first time in the 13 January document. (Compare GCX 67 with GCX 72.)

competitive wages and fringe benefits, but because of the crop protection program and the strike, it needed relief elsewhere. The session lasted a little over one hour.

The union submitted a written one-year counterproposal on 15 February 1982 (GCX 127),[34/] and by letter of 8 March, de la Cruz requested another negotiation session. The next session was scheduled for 7 April 1982.[35/]

B. ANALYSIS AND CONCLUSIONS

1. Crop Protection Program/Lockout

General Counsel contends that Respondent by implementation of its crop protection program on 15 July 1981 discriminatorily locked out employees in violation of section 1153(a), (c) and (e) of the Act, and additionally committed a per se violation of section 1155.3(a)(4) by failing to provide a sixty (60) day notice prior to the institution of the lockout.[36/]

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34. The proposal identified 34 articles previously agreed upon, and included the union's latest offers on discipline and discharge, hours of work, overtime and wages, vacations, medical plan, duration, wages, and job descriptions.

35. The formal hearing — with the exception of one session to receive evidence re certain alleged off-the-record meetings — concluded on 6 April 1982.

36. Labor Code section 1153(a) provides that it shall be an unfair labor practice for an Agricultural Labor employer "(t)o interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in section 1152."

Labor code section 1153(c) provides that it shall be an unfair labor practice for an employer "(b)y discrimination in regard to the hiring or tenure of employment or any term or condition of employment, to encourage or discourage membership in an labor organization."

(Footnote 36 continued----)

Respondent denies violating the Act in any respect, contending that it has the right to protect itself from the harmful economic consequences of a-strike by reasonable measures and that it reasonably believed the UFW would strike at the expiration of the 1978-81 contract.

As defined in Morris, Developing Labor Law (1971) p. 539, a lockout is "(t)he withholding of employment by an employer from his employees for the purpose of resisting their demands or gaining a concession from them." Until recently, the NLRB has held that this "traditional" lockout was illegal under the NLRA except in two narrow categories.[37/] Layoffs undertaken for purposes not related to labor relations would not be considered lockouts — e.g., layoffs due to adverse climactic, physical, or economic conditions.

In 1965, the United States Supreme Court held there to be no violation of section 8(a)(1) or 8(a)(3) of the NLRA when a company utilized temporary layoffs of employees solely as a measure

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(Footnote 36 continued---)

Labor code section 1153(e) makes it unlawful for an employer "[t]o refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of [The Act]."

Labor Code section 1155.3(a)(4) defines the duty to bargain where there is in effect a collective bargaining agreement to require "that no party to such contract shall terminate or modify the contract, unless the party desiring such a termination or modification . . . (c)ontinues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of 60 days after such notice is given, or until the experation date of such contract, which ever occurs later."

37. Certain "justifiable" single-employer economic lockouts, and certain permissible multi-employer lockouts used to defend against whipsaw strikes. Morris, supra, page 542.

for economic pressure in support of the company's bargaining position after an impasse had been reached. (American Shipbuilding Co. v. N.L.R.B. (1965) 380 U.S. 300 [58 LRRM 2672].) The Court concluded that where the employer's intention was merely to bring about the settlement of a labor dispute on favorable contract terms, and there was no evidence that the employer was actuated by desire to discourage membership in a union, no violation of section 8(a)(1) or 8(a)(3) was shown. In Darling and Company (1968) 171 NLRB No. 95 (68 LRRM 1133) enforced sub, nom., Lane v. N.L.R.B. (D.C. Cir. 1967) 418 F.2d 1208 [72 LRRM 2439], the National Labor Relations Board held that a preimpasse lockout occurring during negotiations was not necessarily unlawful, where the parties engaged in extensive good faith bargaining, the union had discussed striking at a time of its own choosing, and the respondent's business was highly seasonal.

In Royal Packing Company (1972) 198 NLRB 1060, enf'd 495 F.2d 1075 (D.C. Cir. 1974), the National Labor Relations Board concluded that respondent's layoffs prior (11 days) to the expiration of a contract did not constitute a lockout, and were not unlawful where the employer had good reason to believe that the union would strike upon contract expiration and the company bore the risk of serious financial loss by deferring a shutdown to the date of expiration. The NLRB found "absolutely no basis for infering that the layoffs . . . were for the object of pressuring the union to make contractual concessions". (Royal Packing Company, supra, footnote 4 page 1061.)

In the only lockout case decided under the ALRA, this Board has ruled impermissible a lockout which discriminatorily retaliated

against strikers for engaging in union activity. (Mario Saikhon (1982) 8 ALRB No. 88.)

In the instant case, Respondent has contended that its crop protection program was purely the product of necessity — its legitimate fear of a strike and the potentially devastating effect of such a strike if the company was at full production. Thus, it suggests that the economic action taken was not a lockout, and that the traditional "lockout" decisions are inapplicable to this litigation. However, I find that the crop protection program was unmistakably an integral part of Respondent's bargaining strategy. It was developed prior to the negotiations, and indeed, was contingent upon the "flow" of those negotiations throughout the summer of 1981. In the words of chief negotiator George Horne, the company "was not going to be caught with its pants down" (as had occurred in 1976).[38/] Although Horne denied that the implementation of the crop protection program was part of the company's effort to enhance its bargaining position, I am unable to distinguish the avoidance of a weakened bargaining position from an effort to achieve a bargaining advantage. At the very least, the crop protection program cannot accurately be categorized as simple economic action related to crop, weather, etc. As the layoffs were contingent upon the negotiations -- and even preceded the 1981 negotations -- I believe that NLRB and ALRB "lockout" decisions are

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38. R.T. Vol. VIII, p. 150, 11. 17-28.

applicable precedent.[39/]

What must be asked then is whether the record contains evidence that the employer was guided in its conduct by a motive to discourage union activity or to evade bargaining, or absent such evidence, whether it inherently prejudiced union interests and was devoid of significant economic justification. (See Mario Saikhon, 8 ALRB No. 88, fn. 5, p. 19, citing Darling and Co., supra; Carlson Roofing Company, Inc. (1979) 245 NLRB 13, 16-18 [102 LRRM 1532]; German, Basic Text on Labor Law (1977) pp. 358-360.)

In the first instance, the crop protection program was not discriminatory in the sense that it disproportionately affected pro-union adherents. No contention is made that the layoffs, transfers, and reductions in hours entailed disparate treatment of

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39. While General Counsel and Respondent agree that reference to applicable NLRB precedent is appropriate pursuant to section 1148 of the Act, Charging Party has suggested that this Board should impose a per se pre-impasse ban on lockouts as the rule best able to effectuate the policies of the Act. Charging Party contends that to require the parties to bargain to impasse before implementation of a lockout will serve the goal of resolution of differencs through negotiation which is central to the policies of the Act. it would have the advantage of "obliging the parties to focus on bargaining" as well as provide much needed certainty regarding the legality of the use of powerful economic weapons. (Charging Party Brief, p.13.) While there is a compelling logic that a rule of certainty would be advantageous in a setting of seasonal agricultural change and a transitory work force in order to encourage bargaining between the parties, who may not have had any extended mutual bargaining history, these factors are not present in the instant case. To wit, the UFW and the company had executed two prior collective bargaining agreements and had a five-year (albeit stormy) relationship. Furthermore, the mushroom growth processes and required work force are stable throughout the year. While different stages of the growing process may dictate different staffing needs, the general work force can expect permanent year-round employment. It appears therefore that applicable NLRB doctrine (as opposed to a novel rule geared to the agricultural setting) is appropriate in the instant case.

the very active union employees. On the contrary, the evidence suggests that the entire work force was vocally pro-union.

Coining, as it did, at the earliest stages of the bargaining (the parties had not exchanged economic proposals), however, the crop protection program seriously impacted upon the negotiation process. Prior to the submission of the initial proposals, the union was faced with an ultimatum — extend the contract or commit itself to a no-strike clause. Either variation would constitute a concession from the union's point of view since the existing contract had already called for a no-strike/no-lockout clause effective through September 6. Thus, the union would have had to bargain away its current "duration" rights to avoid the impending layoffs.[40/]

When coupled with the lack of alacrity with which the company responded to the Union's information requests, certain direct communications between Respondent and employees which at times cast doubt upon the union's willingness and/or ability to fairly represent its members (and even blamed the union for the crop protection program and loss of work when the importation of East Coast mushrooms was discontinued) and other unilateral actions which altered employees working conditions without input from the certified bargaining representative (see discussion, infra), the lockout severely tainted the bargaining process.

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40. Interestingly, the company was in a no-lose situation on this vital issue. Since it interpreted the crop protection program not to be precluded by the "no-lockout" language of the contract, it was not bound by the September 6 date for implementation of the phase down.

Nowhere was this imprint more evident than during the final dispute on the duration issue which the parties were unable to resolve on November 19, 1981 — the first day of the strike. At that session, Respondent insisted upon a three-month "cushion" which would prohibit economic action (strike and/or lockout) until February 1983.[41] This cushion was vital because of the historic relationship problems encountered by the parties (i.e., the strike of 1976). While the union finally offered to forego retroactivity (and agreed to a November 1982 reopener) as a concession to the company's articulated desire not to be placed at economic disadvantage vis a vis its competition, the company refused to make any further concession on any issues, insisting on the duration it proposed. From the date of this "deadlock", Respondent showed little interest in exploring resolution of the parties' outstanding differences. There would be a minimum of formal bargaining, withdrawal of previous proposals, 24-hour ultimata, and a new package (13 January 1982) which would include articles demonstrating a regression (from the union's point of view) from previously negotiated items. (See discussion, infra.)

While the union had previously urged early extension of the contract (Soquel and Ventura) as an initial negotiation posture (see

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41. Respondent could have, and did in fact, bargain for such right by insistence on the "90-day" cushion in the negotiation session of November 19. Such a position taken at the negotiation table -- in another context -- that is, in the absence of wide-spread layoffs, transfers, and reduction in hours — would not necessarily be indicative of bad faith. As discussed supra, it is the combination of Respondent's unilateral decision to implement the crop protection program and insistence to "deadlock" upon contractual protection of such conduct which I find to be violative of its statutory duty in the instant case.

GCX 125 and GCX 141), certainly it undertook no unilateral economic action (nor could it have done so lawfully under the existing contract) when its extension proposal was rejected by the company. That Respondent proceeded with the crop protection program unilaterally in the face of the contractual language prohibiting lockout prior to 6 September and at the commencement of bargaining I find to be suggestive of bad faith and inherently prejudicial to the union's interest in pursuing successful negotiations. The action taken by the company distracted from the substantive negotiations and shifted the focus of the parties away from the table. The thought persists that "but for" the implementation of the crop protection program, the contractual difficulties of the parties may well have been resolved.[42] Lockouts which preclude bargaining before it can begin have been found violative of the NLRA. (Scott Manufacturing Co. (1961) 133 NLRB 1012 [48 LRRM 1784].) I thus conclude that in the instant context Respondent's commencement-of-bargaining crop protection program -- whether it be called a layoff for reasons related to contract expiration or a lockout of the workforce -- in conjunction with contractual language precluding lockout, certain unlawful unilateral changes and aspects of bad faith at the table, all in the absence of signficant objective indicia that a strike was imminent constitutes an unlawful evasion of bargaining in violation of section 1153(e) of the Act. This is not to suggest any *per se* rule regarding the legality of

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42. Respondent would later contend at the negotiation table that its economic package had to be reduced because of the layoffs and subsequent strike.

such economic action in other contexts, or even to engage in the process of weighing appropriate economic weapons. Rather, this conclusion merely distinguishes the lawful phase down in the Royal Packing decision from the conduct herein. That is, here, the timing of economic action seemed more peculiarly related to impacting upon bargaining rather than to real economic necessity. This conclusion is buttressed by the findings of bad faith bargaining — to wit, failure to promptly provide requested information, false declaration of impasse, and an unwillingness to resolve disputed issues following the November 19 strike, as well as certain unilateral changes in the terms and conditions of employment discussed infra.

In reaching this conclusion, I specifically reject Respondent's contention that the timing of the crop protection program was dictated solely by economic considerations. On the one hand, it is difficult to second-guess Respondent's business justification for the July 15 implementation date — some 53 days prior to the expiration of the contract. While this date far preceded the threatened implementation of the program during other negotiations both at Ventura (1978) and Soquel (1979, 1982), the testimony of expert Kneebone that the August 1978 crop protection program would have been implemented too late is uncontroverted.[43/] As the crop protection program commenced by reduction of the initial stages of the process -- e.g., the compost -- Respondent's theory

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43. Respondent's explanation that increased productivity mandated earlier implementation of the program, however, does not withstand scrutiny, as there is no particular correlation between the size of the farm and the production process. The mushrooms are grown over the same number of days regardless of the number produced.

would seem to suggest that the entire 100-day period would be necessary to bring production down to a complete halt. By starting with a phase down some 53 days prior to the expiration of the contract, Respondent could be reasonably assured of reaching less than 50 percent capacity by the date on which the union could legally take economic action. And this July 15 deadline was decided upon in early 1981 by company personnel and made known to the union before the formal negotiations commenced.

On the other hand, the timing is not really congruent with Respondent's claim that it had reasonable fear of an impending strike upon termination of the contract, as such fear is not supported by the record evidence. That is, the object indicators that the union would indeed strike that were present in the Royal Packing case are not present in the instant case. There, four days prior to the initiation of the layoffs, the union provided a memorandum of agreement for the employer(s) to sign — failure of which implicitly threatened that strike action would be taken. The ALJ therein also credited testimony that the union expressly had threatened to strike if the companies failed to sign this agreement.

In the instant case, Respondent's "objective criteria" was limited to a general feeling that the employees were unhappy with the 1978-81 contract. While all supervisors were asked to keep their eyes open for employee discussions of a strike, the meager communications through the spring of 1981 (when the July 15 date for implementation was decided) were limited to allegations that some (no more than 5) employees were predicting a strike. The alleged threat to bring the company to its knees was concededly not related

to the company until August, well after the program had been implemented.[44]

Nor can the union's failure to elect a negotiating committee and commence negotiations until early July be seen as an attempt at "brinkmanship" which would leave the company with no alternative. Rather, the July commencement of negotiations was timely in light of the historical relationship between the parties both in Ventura and Soquel. The company conceded as much during the previous 1978 Ventura sessions. (GCX 125.) I therefore cannot conclude on this record that Respondent had sufficient objective reason to believe that the union would strike upon termination of the contract, or that the legitimate fear of such action compelled the shutdown or economic layoffs of July 15.

Said conclusion does not require Respondent to bear the risks of extreme financial loss or retain employees on payroll status after the phase-out had eliminated work available to them. (See Royal Packing, page 1061.) Respondent was not required to choose between such alternatives as its price for asserting a lawful right to lockout employees (following contract expiration). Rather, I conclude that absent significant objective indicia of imminent strike, Respondent cannot lawfully commence negotiations by threat of economic action in violation of existing contract language. To rule otherwise is to effectively require the union be faced with an ultimatum -- make a concession (by modifying the existing contract)

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44. There is no record evidence of work stoppages throughout the term of the 1978-81 contract which would support Respondent's fear that a strike was imminent in 1981 (see Respondent Brief, p. 152).

or be subject to massive layoffs. Either alternative, juxtaposed with the no-strike, no-lockout provisions of the existing contract suggest Respondent's reluctance to engage in good faith negotiations and is not permissible under applicable precedent.[45] While in a sense it is true that if Respondent deferred its crop protection program until September and a strike materialized before commencement of the phase-down of operations, it might have sustained considerable economic losses, such possibilites would not by themselves justify the July 15 implementation date in the instant context. This is not to suggest that a union might avoid its obligation to bargain until the eve of contractual termination to compel Respondent to risk financial devastation. Rather, in the instant case, where there was ample time within which to negotiate, I find Respondent's commencement of bargaining posture to constitute an unlawful evasion of its duty to bargain in good faith.[46] Insofar as the purposes of the Act are to encourage collective bargaining, and to bring peace to the fields of California

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45. Unlike American Shipbuilding Company, supra, where it was held not improper for Respondent to lock cut employees in order to bring "economic pressure to bear in support of its legitimate bargaining position", no bargaining position had been established in the instant case. Respondent's economic proposal was not even prepared until 21 July 1981 (six days after the crop protection program was implemented), and as discussed infra, other aspects of its conduct both at the table and away from the table are suggestive of bad faith bargaining.

46. In light of my conclusion re the lack of justification and the timing of the crop protection program, I would also find Respondent's action "inherently destructive" of the union's interests (in reaching a collective bargaining agreement through good faith negotiations), devoid of significant economic justification and therefore violative of the Act on that basis as well.

agriculture, I am reluctant to conclude that a commencement of bargaining lockout without objective indicators of the imminency of a strike are consistent with good faith bargaining. I therefore find Respondent's conduct violative of section 1153(a) and (e) of the ALRA.[47]

2. The Bargaining

Labor Code section 1153(e) requires the Respondent "to bargain collectively and in good faith." Good faith bargaining is defined in section 1155.2 as:

> The performance of the mutual obligation of the agricultural employer and the representatives 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 ....

The Act requires a sincere effort to resolve differences, rather than the actual reaching of an agreement. O. P. Murphy (1979) 5 ALRB No. 63, review denied by Ct.App., 1st Dist., Div. 4, Nov. 10, 1980, hearing denied Dec. 10, 1980. "The parties are obligated to apply as great a degree of diligence and promptness arranging and conducting the collective bargaining negotiations as they display in other business affairs of importance." A.H. Belo Corporation (WFAA-TV) v. N.L.R.B. (1968) 170 NLRB 1558, 1565 [69 LRRM 1239]; modified (5th Cir. 1969) 411 F.2d 959.

As per Mr. Justice Frankfurter, concurring in part and dissenting in part, in N.L.R.B. v. Truitt Manufacturing Company (1956) 351 U.S. 149 [100 L.Ed 1029, 1033; 38 LRRM 2042]. "The determination of good faith normally can rest only on an inference

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47. For the reasons described infra. I find no independent violation of section 1155.3(a)(4).

based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination." Since direct evidence of bad faith is rarely found, the party's intent is normally discerned only through review of a totality of its conduct. (O. P. Murphy, supra.) The totality of conduct may include specific acts away from the bargaining table — unilateral changes, failure to provide relevant information etc. -- which constitute independent violations of the Act and are indicia of bad faith bargaining. (Masaji Eto dba Eto Farms (1980) 6 ALRB No. 20, remanded Ct.App. 5th Dist., July 23, 1981, hg. denied November 16, 1981.)

As such, "(N)o case involving an allegation of surface bargaining presents an easy issue to decide .... It is the total picture shown by the facts and evidence that either supports the charge or falls short of the quantum of affirmative proof required by law." (Borg Warner Control (1972) 198 NLRB 726, citing N.L.R.B. v. American National Insurance Company (1952) 343 U.S. 395.)

General Counsel contends that Respondent's bad faith bargaining posture was exemplified in various ways: (1) the illegal lockout as discussed supra; (2) failure to provide and delay in providing information; 3) direct communications; (4) engaging in surface bargaining by advancing patently unacceptable positions on mandatory bargaining issues; unreasonably delaying making proposals and counter-proposals; failing and refusing to advance reasons for positions taken at the bargaining table; maintaining intransigent

positions; engaging in regressive bargaining by increasing demands throughout negotiations and by offering less in economic provisions than the employees were already receiving; failing to provide an authorized, informed and prepared negotiator at each negotiation session; denigration of the union as the exclusive collective bargaining representative of Respondent's agricultural employees; (5) presentation of the January 13, 1982, proposal containing approximately 25 articles on which Respondent bargained regressively.

a. Synopsis of the At-the-Table Conduct

As discussed, supra, the bargaining commenced on a difficult note -- with notification by Respondent that the crop protection program would be implemented in the absence of an extension or written no-strike guarantees. The pace of early negotiations was painfully slow — the parties exchanged basic language proposals in early July and August and resolved minor issues, but made little real progress. Major economic issues and the duration problem -- with the union suggesting a one-year contract and the company calling for a three-year pact -- remained unresolved.

No further progress was made during the numerous September and post-expiration-of-contract sessions. It was not until UFW President Ceasar Chavez met with the company negotiating team during the period October 30 through early November that the parties made significant concessions and moved toward possible resolution. Major movement was made by both sides over language and economics, and the parties resolved all their differences except for

discipline/discharge; duration, certain wages; crew leaders; certain job descriptions; shift differential for boiler tenders and irrigators; overtime; vacations; and medical plan contribution rate.

On November 19, the strike occurred. At the Respondent's behest, another negotiation session was held and the union provided significant movement on its duration proposal by disavowing retroactivity and agreeing to a two-year proposal with a one-year reopener on economics in November 1982 to meet the company's contention that the latter was being placed at an economic disadvantage vis a vis the competition whose contracts terminated the subsequent fall. At that point, the parties therefore differed on the duration issue only insofar as the company had insisted upon a 90-day "cushion" from November 1982 to February 1983 prior to resort to economic action. The Union had modified its proposal, but was not inclined, at least at that stage of the proceeding, to give Respondent an economic advantage — that is, the luxury of waiting while the competition negotiated its 1982 contracts. For its part, Respondent indicated that it had further movement on economics, and suggested some movement on discipline (invalidating previous disciplinary action after six months), but needed further concessions from the union on duration.

No movement by either side was made the following day, and efforts by Cesar Chavez to settle the negotiations on 27 November were resisted by the company. Indeed, the company took the position that UFW President Chavez insisted upon the firing of two supervisors in exchange for the company's duration proposal, and has claimed that Mr. Chavez' demand was an improper subject of

bargaining.[48] Mr Chavez adamantly denied making such a threat and urged the company to respond to the union's latest movement (of 19 November). The company declined to do so, as its interest in negotiations had clearly waned.

The December 14 session was highlighted only by the company's insistence (and the union's denial) that the union had placed the issue of the discharge of two supervisors onto the bargaining table. There was no movement on any issue, and the union reiterated that neither the union representative proposal nor the firing of two supervisors was part of its outstanding offer. Impasse was declared on 18 December, with the company unilaterally implementing its wage increases (consistent with its latest economic offer of 9 November). On 4 January 1982 the company's existing proposal was withdrawn. (GCX 70.) On 14 January 1982, a new proposal by the company included changes which the union perceived as regressive in some 23 areas.[49]

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48. Whether or not Chavez had suggested that the firing of two supervisors and the paid union representative proposal could settle the other outstanding differences between the parties and whether or not such a suggestion is an improper subject of bargaining becomes moot as I find Chavez made it clear at the table on 27 November that he was not preconditioning settlement upon the company's acceptance of this proposal. This position was reiterated by the union at the December 13 meeting, even though the company insisted upon holding the union to its interpretation of Chavez' alleged remarks.

49. As discussed, supra, the new union security clause included language regarding religious convictions. The hiring hall provision was deleted in its entirety. The time within which to process grievances was reduced from 60 to 15 days. Rights of access were limited. The union label and the maintenance of standards articles were deleted. An optional company pension plan was included. The labor management committee which had been promoted by both sides as a solution to relationship problems was withdrawn. Crew leaders red-circled at their present wages were reduced from three years to one year.

The union counter-proposal of 15 February 1982 did not even elicit another bargaining session through the duration of the hearing which concluded on 2 April 1982.

What appeared to be "hard bargaining" during late October and early November gave way to disinterest in the bargaining process as the company claimed to have suffered from enormous losses because of the July 15 crop protection program (which it had hoped to avoid by union extension of the contract), and the 19 November strike. Following the strike, Respondent was disinclined to pursue collective bargaining. Taken in isolation, Respondent's late disinterest may not be fully conclusive of its lack of desire to bargain in good faith. But in considering the totality of Respondent's conduct — although apparently engaged in hard bargaining on certain occasions (particularly October 30 through November 8) -- I find Respondent's actions to be inconsistent with its duty under the Act. In so deciding, I have considered Respondent's initial dilatory responses to the union's information requests and its initial proposal offering less than what many employees had been earning under the existing contract to be indicative of bad faith in this context where the Respondent had insisted upon early contractual resolution as necessary to avoid the crop protection program. Similarly, Respondent's proposal of 14 January, following the take-it-or-leave-it ultimata issued by the correspondence of December 1981, suggests a disinclination to seriously pursue a solution to the parties' problems at the bargaining table. Additionally, its overeagerness to declare impasse (as early as August 1981) and the ultimate declaration of

impasse in December 1981 I find to be further indication of the absence of good faith, particularly where as here, the company had conceded that it had further movement on such issues as wages and discipline/discharge.

While I do not view the function of the Board to compel concessions or dictate particular contractual language, the company's early insistence upon the crop protection program or extension of the contract, even under existing contractual obligation not to lock out, juxtaposed with its own declaration of (false) impasse for the union's failure to negotiate a 90-day cushion which Respondent had contended that it did not need legally — are suggestive of bad faith. That is, Respondent unilaterally[50/] commenced crop protection in the absence of union concession re extension of the contract or written no-strike guarantee, despite the no-strike/no-lockout provisions of the existing contract. During the negotiations, it then insisted (to "impasse") that the company needed a 90-day cushion to avoid the relationship difficulties which it had encountered in the past. Considered in isolation, Repsondent's insistence upon the 90-day cushion may not suggest bad faith. But I find that such insistence following its previous conduct (despite the no-strike/no-lockout priviso of the existing contract) to demonstrate an unwillingness to engage in the mutual give-and-take requisite to meaningful negotiations. In a

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50. This is not to suggest that the actual implementation of the layoffs, transfers, etc. were "unilateral". The company on several occasions indicated its desire to discuss the "effects" of its decision. The union was not interested in negotiating this aspect of the company's conduct.

sense, Respondent held up the contract over a right it believed it already possessed under the law. Such adherence to "an untenable legal position during negotiations is inconsistent with the obligation to bargain in good faith." (See Dal Porto & Sons, Inc. (1983) 9 ALRB No. 4, ALJD, p. 38, citing Queen Mary Restaurant Corp. v. N.L.R.B. (9th Cir. 1977) 560 F.2d 403.) The conclusion is all the more compelling upon consideration of the company's failure to provide relevant information, certain direct communications, and various unilateral changes (per se violations), discussed infra.

In reaching this decision, I specifically reject General Counsel's allegations that the company (outside of the January 13, 1982, proposal) engaged in surface bargaining by advancing patently unacceptable positions on mandatory bargaining issues; unreasonably delayed in making proposals and counterproposals; failed and refused to advance reasons for positions taken at the bargaining table; maintained intransigent positions or failed to provide an authorized, informed and prepared negotiator at each session. On the contrary, the thirty-one (31) negotiation sessions attended by the parties between 6 July 1981 and 14 December 1981 were headed by the company's chief negotiator George Horne on all but three occasions (July 29, August 3, and October 22). On two of these three occasions, farm manager James Kahl attended in Mr. Horne's absence and engaged in meaningful discussion of outstanding issues. On the other occasion — August 3 — both Messrs. Kahl and Horne were detained by the air controllers' strike but submitted an outstanding proposal a few days later. It was clear throughout these sessions that Mr. Horne gave them his fullest attention,

provided Respondent's reasons for various positions taken and generally conducted these matters with a seriousness of purpose which a business person would give to such a process.[51] (See A. H. Belo Corporation (WFAA-TV) v. N.L.R.B. (1968) 170 NLRB 1558 [69 LRRM 1239]; modified (5th Cir. 1969) 411 F.2d 959.) Nor do I find record evidence of delays in presenting proposals or counterproposals which would indicate a failure on the company's part to approach the negotiations with the seriousness required by the statute.

Finally, I reject Respondent's contentions that the union engaged in surface bargaining by intentionally delaying negotiations (both at the commencement and during crucial points of the negotiations); repeatedly changing negotiators, failing to make counterproposals, or raising illegal subjects of bargaining.

The record simply does not support the conclusion that the union's failure to select its negotiating committee, and inability to present its first language proposal until 7 July delayed negotiations or indicated a lack of willingness to reach agreement. Indeed, by Respondent's own previous admission (GCX 125), the two-month period set aside by the parties to negotiate prior to the expiration date of the contract was ample time to reach agreement. The union, like the Respondent, prepared numerous counterproposals,

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51. At times, Respondent's explanations re counterproposals were less than lucid (particularly with respect to specific language in the arbitration and grievance, and vacation proposals.) However, I do not find that the parties' differences with respect to these issues to have seriously impacted upon the negotiations. Duration (and to a much lesser extent, wages) was the main stumbling block to successful contract resolution.

and attempted to respond to the other side's latest position in a reasonably prompt fashion. Whether or not the union indicated it ultimately desired industry-wide negotiations as Respondent suggests (See Respondent's brief, p. 254), there is no evidence that the union was intentionally delaying settlement so that it could have all mushroom company contracts expire at the same time. In actuality, it was Respondent who insisted upon a November expiration date in an effort to avoid competitive disadvantage. Until the 19 November strike, the union had insisted upon retroactivity to the September 6 contract date which had characterized the parties' earlier agreements. The longest period of inactivity — between August 13 and August 27 — during which the union prepared a full economic and language counterproposal — does not establish purposeful delay to avoid bargaining. Indeed, the union refrained from economic activity for some 10 weeks following the time it was legally permited to do so (the expiration of the contract), and, along with the company, engaged in intensive bargaining during late October-early November sessions.

Nor do I find the union's reliance on negotiators Roberto de la Cruz, Art Mendoza and Cesar Chavez to fall short of its duty to bargain in good faith. Both sides obviously considered the negotiations very important. Both sides spent many hours at the table which included the participation of chief personnel. While a quantum analysis of the number of sessions and hours spent at the table does not necessarily define a good faith effort to reach agreement by mutual give-and-take, I do not find on this record that either party was inattentive to the task at hand.

Finally, as discussed previously, the alleged injection of an "illegal" subject of bargaining -- the discharge of two supervisors -- could have had but minimal impact upon the negotiations as union negotiators Chavez and de la Cruz quickly disavowed any intention to make resolution of the parties' disagreement contingent upon any such demand.[52/] if anything, the company's insistence that the union maintained this position -- in the face of the union's on-the-table disavowal -- suggests the company's unwillingness to explore real settlement possibilities following the 19 November strike. I therefore conclude that the negotiating conduct of the union was not in bad faith, and therefore not a defense to the Respondent's surface bargaining.

b. The Failure to Provide Information

General Counsel alleges that Respondent has failed to provide and/or unduly delayed in providing information requested by the UFW during the negotiations (on 19 June, 6-7 July and 13 August 1981). Respondent contends that it has complied with all the union's demands for information.

The duty to bargain in good faith may be violated by the Respondent's refusal to furnish information relevant and reasonably necessary to the union's ability to carry out the negotiations or administration of a collective bargaining agreement. (Masaji Eto dba Eta Farms, et al., (1980) 6 ALRB No. 20; Kawano (1981) 1 ALRB No. 16; Detroit Edison Company v. N.L.R.B. (1979) 440 U.S. 301, 303

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52. Similarly, Chavez' remark in late October that the company did not deserve a contract throws little light on the union's motivation in this case, as the remarks were followed by the most intensive (and productive) negotiations of the entire period.

[99 S.Ct. 1123, 155; 59 L.Ed.2d 333; Paul W. Bertuccio (1982) 8 ALRB No. 101, ALJD p. 143.) Information must be provided with reasonable promptness to satisfy the employer's obligation. (Kawano, Inc., supra; B.F. Diamond Construction Company (1967) 163 NLRB 16.1, enf'd (5th Cir. 1968) 410 F.2d 462.)

In Kawano, failure to classify employees other than as general workers and failure to explain rate differentials was held to be a violation of section 1153(e) and (a) of the Act. Similarly, failure to furnish information on job classifications, wages, and fringe benefits, has been held to be violative of section 8(a)(5) and (1) of the NLRA. (Fry Foods, Inc. (1979) 241 NLRB No. 42 [100 LRRM 1513]; Callier's Custom Kitchens (1979) 243 NLRB No. 143 [102 LRRM 1009].)

In Paul W. Bertuccio (1982) 8 ALRB No. 101, the ALRB held that the employer violated section 1153 by refusing to provide the UFW with information requested concerning the company's production and yield. "Respondent's yield and production figures are closely related to the income of the employees. . . . Respondent did not fulfill its duty by providing only gross numbers of employees and acres, or by offering to allow the union to look through its general office records. (Paul W. Bertuccio, supra, ALJD p. 150.)

In the instant case, Respondent fell short of fulfilling its duty to provide accurate, complete, and timely information upon request of the UFW. Specifically, Respondent's did not provide the requested data regarding productivity by mushroom grade until very late in the negotiations (during the critical late October - early November sessions). Information regarding pickers' hours was made

available only for selected periods of time. No information was provided by the company as to the cost of the various fringe benefits, such as witness and jury duty pay, bereavement pay, and overtime; or of various tools and equipment. Full compliance was forthcoming only with respect to relatively minor items — e.g., acreage, and corporate structure.

I specifically reject Respondent's contention that because during the hearing an "in camera inspection" was conducted to review certain information regarding the productivity of mushrooms by grade, that such a procedure constituted an admission that Respondent had a bona fide claim of confidentiality with respect to this information. At the table, Respondent claimed it did not have the information requested in the form sought by the union. (R.T. Vol. XII, p. 127. 11. 10-23; Vol. XXIII, P. 103, 11. 14-22; Vol. XXXII, p. 76, 11. 15-20.) It was not until the hearing that the "trade secret" argument was first raised.

I further find that Respondent's failure to provide complete information re production by mushroom grade, pickers' hours, and various benefit costs in a timely fashion was significant in the instant case in light of the company's request for an early end to negotiations and its ultimatum to commence the layoffs on July 15 absent extension of the contract or written no-strike assurances. It seems highly incongruous that the Respondent would rely upon the union's inability to prepare a full economic proposal prior to the 15 July deadline as a primary justification for the implementation of the crop protection program when it was dilatory in providing the union with the information necessary to prepare

such a proposal. As in Paul W. Bertuccio (1982) 8 ALRB No. 101, the union did what it was able to do under the circumstances — it prepared economic proposals to the company with the information that it had at the time. There, as here, the union was placed at a disadvantage as it was forced to make proposals and review counter-proposals in a state of ignorance on some crucial economic items. (Paul W. Bertuccio, supra, ALJD p. 159.)

Finally, it is unclear whether General Counsel is contending that the failure to provide information regarding the number of employees in incentive crews at Soquel (G.C. Brief, p. 121) on August 13 is a separate indicator of bad faith.[53/] Respondent's contention that the union had equal means of ascertaining this information is not a sufficient defense under applicable NLRA precedent. (Bel-Air Bowl, Inc. (1980) 247 NLRB 6; The Kroger Company (1976) 226 NLRB 512; New York Times (1982) 265 NLRB No. 45 [111 LRRM 1578].) However, as farm manager James Kahl recalled providing approximations of the information requested, and union representative Lawson obtained the information from his own sources and the issue was discussed in the early September meetings, I find that any alleged failure to supply the Soquel information had no impact upon negotiations. I would conclude that this aspect of the employer's conduct provides no further indicia of bad faith.

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53. Farm manager James Kahl recalled giving rough approximations of the information requested on the evening in question. Union representative Karl Lawson denied receiving the precise information. (R.T. Vol. XXV, p. 151, ll. 9-28; R.T. Vol. XIII, p. 6, ll. 16-21.)

c. Direct Negotiations

General Counsel alleges that Respondent has bargained in bad faith through its series of direct communications to the work force disparaging of the union. It cites as precedent N.L.R.B. v. General Electric Company (2d Cir. 1969). 418 F.2d 736 [72 LRRM 2530], cert, denied (1970) 397 U.S. 965 [73 LRRM 2600] enforcing (1964) 150 NLRB 192 [57 LRRM 1491] which held an employer to have violated section 8(a)(5) of the NLRA by combining a take-it-or-leave-it bargaining posture with a public relations campaign undertaken "for the purpose of disparaging and discrediting the statutory representative in the eyes of its employee constituents, to seek to persuade the employees to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union was the true protector of the employee's interest. (Citations) Id., 150 NLRB at 195.[54]

According to the Second Circuit Court of Appeals, it was the combination of the employer's take-it-or-leave-it bargaining position and its widely publicized stance of unbending firmness which rendered it unable to alter a position once taken. Therefore, its conduct constituted a refusal to bargain in fact as well as absence of subjective good faith because it implied that the company could bargain and communicate as though the union did not exist.

Respondent herein contends that the statements made in its letters to employees are constitutionally protected free speech (First Amendment to U.S. Constitution) and are permissible speech

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54. See also Admiral Packing Co. (1981) 7 ALRB No. 43.

pursuant to section 1155 of the Act.[55/] it argues that the company has a broad right to communicate with its workers concerning the progress of collective bargaining negotiations between itself and the union. (See Proctor & Gamble Mfg. Co. (Port Ivory) (1966) 160 NLRB 334.)

In the instant case, the following communications issed by Respondent directly to its employees were of particular significance:

In the July 15 correspondence, the company revealed its crop protection program which it deemed mandatory because of the union's failure to extend the contract or agreement to written no strike assurance. Said communication not only cast doubt upon the legitimacy of the Respondent's fear of imminent strike (the letter referred to the possibility that the parties "seemed" to be heading for a serious labor dispute), it epitomized Respondent's take-it-or-leave it bargaing position: the crop protection program would be implemented before real bargaining occurred, while the union was accused of "forcing" the company into massive layoffs.[56/]

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55. Section 1155 of the Act, modeled after section 8(c) of the NLRA, provides: "The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit".

56. As discussed previously, the crop protection program, may be seen as the most serious of all the alleged "unilateral" changes implemented by the company. That is, absent union concession regarding extension of the contract or written no-strike guarantee, the company insisted upon its unilateral right to implement the crop protection program. Ironically, Respondent proceeded to declare impasse when the union failed to concede the three-month cushion it demanded before agreement to a one-year reopener clause in the next contract.

While the company contends that the letter was extremely consistent with a good faith desire to reach agreement with the union, I find the attribution of economic dislocations to the union certainly denigrative of the employees' exclusive representative. It is thus difficult to surmise how the letter is consistent with the company's intention to bargain in good faith and reach a contract with the union.

Subsequent communications reenforced the company's efforts to create a wedge between the employees and the union:

On 15 October, the company provided a form for employees to revoke their authorization for dues deductions and to resign from the union.

On 22 October, the company attirbuted the cessation of the importation of Eastern mushrooms to the union, implying that the latter was responsible for any resultant loss in work.

On 19 November, the company informed employees that they may be fined by the union if they decided to work during the strike.

On 20 November, the company appealed to workers to decide individually if the company's proposal regarding duration should be accepted.

Although considered in isolation, any one of these latter communications may seem to be innocuous,[57/] taken as a whole, in

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57. See particularly Perkins Machine Company (1963) 141 NLRB 697, where the National Board dismissed a complaint charging violation for Respondent's solicitation of employees to resign from the union and revoking authorizations to the union for deduction of dues, where the letter advised the employees of certain contract provisions, the employees were invited to make their own choice, and there were no other indicia of anti-union animus.

the context of the crop protection program implemented at the commencement of the negotiations, the premature impasse at the end of negotiations on the duration issue, the delays in providing information, and various unilateral changes, the communications support the finding that Respondent's bargaining position fell far short of its statutory mandate. I find the company's distribution (to packing shed workers) of the notice of the cessation of the importation of mushrooms to be particularly egregious, as such latter conduct constituted a unilateral change in the terms and conditions of employment violative of the (Act as discussed infra). As the notification was directed to the group most likely to be affected by the decisions in this regard, the Respondent's approach seems more geared to disparaging the employees' exclusive bargaining representative than to bargaining in good faith as contemplated by section 1153(e).

While I do not find the communications in the instant case as intrinsically harmful to the collective bargaining process as those referred to in the cases cited by General Counsel (see General Counsel Brief, citing The Red Rock Company (1949) 84 NLRB 521 and Tarlas Meat Company (1979) 239 NLRB 1400 where the employers called employees to meeting and tried to convince them to accept proposals), I find that they provide some supportive indicia of Respondent's bad faith approach to bargaining.[57a/]

57a. I would find no separate violations in these communications which I believe fall short of the direct bargaining held unlawful in Pacific Mushroom Farms (1981) 7 ALRB No. 28, rev. den. Ct.App., 1st Dist., Div. 1, May 5, 1982.

In light of the divergence of views among the circuit courts of appeal regarding the use by which statements short of threats or promises of benefits may be utilized as background for motivational information, (compare N.L.R.B. v. Colvert Dairy Products (10th Cir. 1963) 317 F.2d 44 with Darlington Mfg. Co. v. N.L.R.B. (4th Cir. 1968) 397 F.2d 760 [68 LRRM 2356], cert. denied, 393 U.S. 1023 [89 S.Ct. 632, 21 L.Ed. 567]; Indiana Metal Products V. N.L.R.B. (7th Cir. 1953) 202 F.2d 613 [31 LRRM 2490]), I would find that Respondent's conduct was violative of section 1153(e) without regard to these communications.

In summary, while the evidence is largely circumstantial and the record reflective of uneven spurts of hard bargaining enmeshed with certain indicators of bad faith, and the decision is by no means clear-cut, I would recommend that Respondent be found in violation of section 1153(e) and derivatively section 1153(a) of the Act. Our statute, like the NLRA, clearly contemplates that the parties must make a serious effort to resolve differences and reach a common ground (N.L.R.B. v. Insurance Agents International Union (1960) 361 U.S. 477, 45 LRRM 2705.) Only at times did Respondent display such an attitude in the instant case. Since the legislature has mandated the Board to effectuate its policy encouraging bargaining and not to avoid same because the mandate is difficult to apply, I will recommend the appropriate remedy therefor. I disagree with General Counsel's contention that the conduct of Respondent constitutes an additional violation of section 1155.3(c)(4). I interpret said language to be definitional — that is, to explain or define good/bad faith as opposed to independent grounds for

violation of the Act.

I also reject the argument that Respondent's conduct was violative of section 1153(c). While aspects of its behavior were denegrative of the union, I do not view Respondent's overall conduct to be aimed at ridding itself of the UFW. There was no such intention intimated by the implementation of the crop protection program and even the alleged threats were aimed at encouraging agreement to a contract (on the company's terms) rather than discouraging union activity per se. While in a sense the refusal to bargain with the employees' collective bargaining representative may be perceived as an unlawful undermining of the union's legitimate objectives, I find insufficient evidence to support a finding of violation of section 1153(c). In any event, such a finding of violation would not affect the proposed remedy in this context.

VI. ALLEGED UNILATERAL CHANGES

Unilateral changes in working conditions during bargaining are equivalent to per se violations of the duty to bargain since they constitute a refusal to negotiate or bargain in fact. N.L.R.B. v. Katz (1962) 369 U.S. 736, 743 [50 LRRM 2177]. When such conduct is present, the Board need make no finding that the totality of the employer's conduct manifests bad faith; the practice itself is conclusive of that issue, since the unilateral action places a bargaining topic outside the reach of the bargaining process. I shall discuss each alleged unilateral violation in seriatim.

A. Changes in Rates of Pay for Plant Maintenance Workers John Lopez, Francisco Sandoval, and Demetrio Vasquez Cervantes (Paragraphs 20(e)(9) and 20(e)(10)

1. John Lopez was hired as an assistant maintenance electrician in Respondent's maintenance department. When a maintenance electrician left the Respondent's employ in August 1975, Mr. Lopez was requested to perform maintenance electrician duties during off hours and weekends. He was paid a 75* per hour differential for these extra duties (over his base salary of $4.00 per hour). (R.T., Vol. XXV, p. 86.) During the first collective bargaining agreement, a special rate was negotiated for Mr. Lopez which guaranteed that he would retain his rate differential over that of his normal classification. The wage was $5.45 with the plant maintenance base at $4.65 (GCX 73, p. 58). When the plant maintenance base pay was raised to $4.98 per hour under the 1976-78 contract, Mr. Lopez' wage was raised to $5.75 per hour. The 1978 -1981 collective bargaining agreement included a maintenance of standards clause which retained Mr. Lopez' rate differential.

Former operations manager Henry Cassity testified that the company calculated the yearly increases by multiplying the rate increase in the contract (for the plant maintenance base pay) by the last wage Mr. Lopez was earning. To wit, for the September 1979 wage increase, the company multiplied the 7 percent raises in wages for plant maintenance personnel to Mr. Lopez' existing wage to arrive at the wage differential (e.g. 80¢). Mr. Lopez was notified of these changes and on one occasion (in 1980) reported an error in his pay which was subsequently recalculated by the company (R.T. Vol. XXV, PP. 55-58; RX 40).

During the summer negotiations of 1981, Mr. Lopez approached the UFW negotiating team (specifically Karl Lawson and Roberto de la Cruz) to inquire regarding the Respondent's offer with respect to his salary. Upon calculation of the percentage differential and actual money differential in Mr. Lopez' salary compared with the existing plant maintenance base (for 1981), the union concluded that there was no uniformity in the raises gives, and indeed that Mr. Lopez was earning much more than what was the bargained-for salary.[58/] Until that time, the Union had been

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58. The calculations indicated the following:

CONTRACT ANNIVERSARY YEAR	PAY RATE PLANT MAINTENANCE	JOHNNY LOPEZ	PERCENTAGE DIFFERENTIAL	DOLLAR DIFFERENTAL
1977	$4.65	$5.45	.17	$0.80
1978	4.98	5.75	.15	0.77
1979	5.25	6.55	.24	1.30
1980	5.60	7.30	.30	1.70

(GCX 74, p. 34.)

unaware of the actual salary received by Mr. Lopez.

Francisco Sandoval was initially hired by Respondent as a plant maintenance worker in 1973. After approximately 1% years, he commenced doing welder work for various hours per day. He would be paid welder wages for such work. In 1980, Mr. Sandoval spoke to operation manager Henry Cassity and supervisor Juan Martinez about receiving full time welder wages, (from $5.25 to $6.69 per hour). He was performing welding work, carpentry, plumbing, and masonry. He was thereafter (6 September 1980) compensated as a welder and classified as same (RX 47). Mr. Sandoval testified that his job duties remained identical despite the change in classification and wage rate (R.T., Vol. XV, p. 129, 11. 1-3.)

Approximately 2-3 months before the expiration of the 1981 contract, Mr. Sandoval told union negotiating committee member Teodoro Diaz about this salary adjustment.

Demetrio Cervantes was hired by Respondent in March 1979 and worked for approximately 3 months as a welder, earning welder wages. Thereafter, he worked in the plant maintenance crew, receiving plant maintenance wages and welder wages for those hours he did welding work. He would keep track of these hours and submit them to supervisor Juan Martinez (for 7-8 months). Later, he was paid approximately one-half welder wages and one-half plant maintenance wages regardless of the actual hours worked in each category, although in fact his hours in each job would fluctuate on a weekly basis. Approximately 3-4 months before the 19 November strike, the hours paid for Mr. Cervantes' welding work were reduced to 5, 7, 10 per week. When Cervantes complained to his supervisor

Juan Martinez he was told that he was being paid for welder work only for those hours when he actually performed welding. Cervantes protested that he was doing welding work and receiving maintenance pay.

For the Respondent, farm operations managery Henry Cassity testified that Mr. Cervantes performed both work as a welder and as a plant maintenance person. He was paid welder work for the welding and plant maintenance pay for his work in plant maintenance. (RX 41, R.T. Vol. XXV, p. 68, 11. 4-6.) Mr. Cassity said these payments were in accordance with the contract which guaranteed that anytime somebody worked at a higher wage classification, he would be paid at the higher rate.

2. Analysis and Conclusions

General Counsel alleges that Respondent has violated section 1153(e) of the Act by effectuating unilateral changes in the wages of members of its general plant maintenance crew from September 1978 through 19 November 1981, and has unilaterally failed to fully compensate Demetrio Cervantes for hours he worked as a welder, from January 1980 through November 1981.

It is at first blush difficult to ascertain what, if any, unilateral change occurred with respect to Mr. Lopez: A special wage rate was established for him and included in the original (1976-78) collective bargaining agreement and incorporated into the 1978-81 contract by the maintenance of standards clause. Thereafter, the company continued to pay Mr. Lopez a wage differential coterminous with the implementation of annual raises. The difficulty, of course, is that there is no clear cut explanation

as to why the total gross and percentage differentials have not varied uniformly through the years. No consistent application of a rate differential (e.g., equivalent to the contractual wage rate increases), or total amount differential (e.g. 75¢ per hour) or some combination thereof (e.g. .75¢ per hour plus percentage change) would result in the variable wages paid Mr. Lopez over the years. Respondent has been unable to provide a formula by which its calculations have been made. Admittedly, the contract language is less than precise. It assures preservation of the "rate" differential — which might suggest maintaining the percentage ratio between plant maintenance workers and Mr. Lopez, or merely raising the individual wages by the identical percentage by which the other job categories were increased. Under the circumstances it is clear that the company's (mis)calculations resulted in a variable wage rate (which on one occasion was actually negotiated directly with Mr. Lopez) without input from the collective bargaining representative. I conclude that such conduct is a "unilateral change" violative of section 1153(e) of the Act. While this board has ruled that unilateral raise in compensation to one individual might be considered de minimus, (See Cattle Valley Farms (1982) 8 ALRB No. 59, citing N.L.R.B. v. Fitzgerald Mills Corp. (2d Cir.1963) 313 F.2d 260 [52 LRRM 2174]; N.L.R.B. v. Exchange Parts Co. (1964) 375 U.S. 405 [155 LRRM 2090]; AS-H-NE Farms (1980) 6 ALRB No. 9, review denied Court of Appeals, 5th Dist., October 16, 1980, hearing denied November 12, 1980), I conclude that such doctrine is inapplicable to the instant case where a series of such unilateral

actions are alleged.[59/]

Nor am I persuaded by Respondent's suggestion that notice of the wage change to Lopez was sufficient notice to the union. The mere fact that Mr. Lopez knew what he was being paid is not sufficient to conclude that the union was afforded sufficient opportunity to bargain over the wage differential, and therefore waived such right by not timely objecting. I interpret the Medicenter Mid-South Hospital (1975) 221 NLRB 670 decision cited by Respondent to apply to situations where the union had actual notice of change with sufficient opportunity to meet and confer prior to implementation.

Mr. Sandoval received an increase in wages because his job classification was changed pursuant to his request. He testified that such an increase occurred despite the fact that his duties did not change throughout his employment. As such, I reject the company's argument that it was merely fulfilling its contractual obligation to pay the highest wage applicable to the particular task performed. Respondent's own evidence suggests that a formal change in Mr. Sandoval's classification was carried out in September 1980 and company personnel records now list him as a welder, even though the only record evidence suggests that his job duties never changed.

The union had no actual knowledge of the change in Mr. Sandoval's classification and pay rate, at least until the negotiations of August - September 1981. Nor is the Respondent's

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59. I draw no inference re respondents good/bad faith bargaining posture by virtue of this finding of a violation of the Act with respect to this unilateral change in Mr. Lopez' wages.

attempt to categorize the change as de minimus persuasive. The precedent relied upon — a change in policy of posting job notices rather than requiring sign ups, or a requirement that time clocks be punched rather than employees merely sign out — is clearly distinguishable from the change in wage rate and/or job classification in the instant case. (See" Rust Craft Broadcasters of New York (1976) 225 NLRB 327; Clements Wire & Manufacturing Co. (1981) 257 NLRB NO. 143; American Ambulance (1981) 255 NLRB 417; Oak Cliff-Golman Baking Company (1973) 207 NLRB No. 138.) Moreover, as discussed above in the case of Mr. Lopez, the company committed various other unilateral changes during the relevant time period. I thus conclude that Respondent has violated the Act in this regard as well.

I reach a different conclusion with respect to Mr. Cervantes' situation. At best, the latter testified to the company's failure to pay him welder's pay for certain hours worked as a welder. Testimony of company personnel suggests that Mr. Cervantes was paid a welder rate when he performed welder duties, as such payment was mandated by the contract. Said testimony is corroborated by company personnel records (RX 41) which indicate that Mr. Cervantes was indeed paid variable hours at the welder rate throughout 1979-81. Nor do these records support Mr. Cervantes' contention that the method by which he submitted his hours changed during the relevant period. I thus conclude that no "change" has occurred with respect to Mr. Cervantes' wage rate, and would recommend that this allegation of the complaint be dismissed.

B. Case Crew Wage Increase (Paragraph 20(e)(4)

1. Facts

In May 1979, the company raised the wages of the case crew (in an amount equal to one hour's general labor per day per member). The reason for this increase was the Respondent's decision to minimize disease risk by closing off one of the two access doors to the mushroom houses. Since the workers would then only be able to enter from one end of the room, it would take them longer to complete their task. This change was discussed between the shop steward Demetrio Vasquez, ranch president Victor Becerra, the entire crew, Anthony Ashe, and then agricultural manager Hank Knaust. The company reduced the agreed upon change to writing on 16 May 1979 (RX 38).[60/]

The UFW contract administrator at the time -- Kurt Ullman -- admitted knowledge of this change in the access to the rooms by letter of September 1979 (RX 27), but denied any knowledge until the date of the hearing that wages had been altered. Ullman protested the Respondent's unilateral action "without notification to the appropriate union personnel."

Union representatives Robert de la Cruz and Karl Lawson testified that they did not receive notice of the case crew wage increase until discussion with the workers during the summer 1981 negotiations.

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60. Mr. Becerra denied discussing this issue. (R.T. Vol. XXXI, p. 164.) As the ranch committee is listed on the relevant memorandum, I conclude that it is more likely than not that Mr. Becerra participated in discussions on this issue at least through 16 May 1979.

2. Analysis and Conclusions

General Counsel contends that Respondent has unilaterally increased the wages of its ease crew since May of 1979. It is clear that the case crew members were paid the per room incentive rate reflected in the 1978-81 contract with the addition of one hour's pay at the general labor hourly rate per room to compensate for the additional work required with the shutting off of one access door. Mr. Oilman's letter of 21 September 1979 refers to the fact that the company negotiated directly with the crew when it decided to close one entrance to the room, indicating he (Mr. Oilman) had knowledge of the change in working conditions as early as 21 September 1979. However, the union contract administrator denied, and there is no evidence to the contrary, knowledge of the wage change. Even if Oilman had in fact received the intra-company memorandum of 16 May 1979 (Respondent Exhibit 38 indicates Oilman received a carbon copy) there is no indication in that correspondence that any new wage rate would in fact be implemented. Indeed, the company indicated in that memo that the appropriate rate of compensation was being reviewed, and that thereafter concerned personnel would be informed of the company's (unilateral) decision. I conclude that this wage change was not made with the consent and/or knowledge of the union, but rather was implemented without providing the union an opportunity to negotiate in violation of section 1153(e) of the Act.

I also reject Respondent's suggestion that notice to Victor Becerra of the Ranch Committee (Respondent's Brief, p. 326, citing Merillat Industries, Inc. (1980) 252 NLRB 784) is sufficient to constitute notice to the union. In the instant case, a change in

the terms of the contract was undertaken and accomplished without prior consent by the union representatives. Here, unlike Merillat, a collective bargaining agreement was in effect. In Merillat, union stewards had met with company personnel to discuss an absentee problem which necessitated the formulation of new company rules. The stewards stated that absenteeism was a company problem. Here, there is no record evidence that stewards (or Ranch Committee members) had any express or implicit authority to alter or modify contractual agreements negotiated by the parties. I thus conclude that the union did not waive its right to bargain over this issue, nor is the charge time-barred by Labor Code section 1160.2 (six-months statute of limitations).[61/]

C. Reduction in Wages for the Chemical Applicators Paragraph 20(e)(7)

1. Facts

On 29 August 1981, the company reduced the earnings of chemical applicator and spray truck driver employees at the ranch pursuant to authorization of farm manager James Kahl. Agricultural manager Knaust met with union steward (for the "B" equipment operator crew) Carlos Sandoval and chemical applicator Martimiano Villanueva to discuss the changes on 1 September 1981. Knaust asked Sandoval to translate for Villanueva that the latter's salary was going to be reduced as he would be working fewer hours (from 11.2 to

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61. Article 36 (Modification) of the 1978-81 Collective Bargaining Agreement provided that "(n)o provision or term of this agreement may be amended, modified, changed, altered or waived except by written consent executed by the parties hereto. (GCX 74, p. 21.) Article 18 (New or Changed Operations) required notification to the union prior to the implementation of new wage rates. (GCX 74, p. 14.)

6.72 hours for the Vapona, and from 10.1 to 6.0 hour for the dust), although the hourly rate would remain the same. Knaust explained that the reason for the reduction in hours was due to the closing down of one of the lines -- "less rooms implied less work" (R.T. Vol. XVIII, p. 158, 11. 24-28.)

Union representative Karl Lawson testified that he learned of the reduced wages in September 1981 when worker Melacio Cardona -- a chemical applicator -- showed him Kahl's confirming memorandum. (GCX 31.)[62/]

2. Analysis and Conclusions

General Counsel alleges that Respondent has unilaterally reduced and/or changed the wages of its chemical applicators and the spray truck drivers since 1979 to the present. In fact, "changes" in the weekly earnings (although not the wage rate) apparently occurred on two occasions during this period. Sometime between April 15, 1980 and 29 August 1981, the hours for the Vapona applicator were reduced from 14 to 11.2; the hours for the dust applicator were reduced from 12.6 to 10.1. There is no evidence that the union ever received notice of this latter reduction, at least until union steward Carlos Sandoval was notified in September

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62. It was Lawson's understanding the the resolution of an earlier grievance guaranteed the company applicators 14 hours per day (Vapona) and 12.6 hours per day (dust). Thus, General Counsel contends that two unilateral changes in this regard were made during the 1978-81 contract. However, there is insufficient record evidence to establish that an earlier rate had been "unilaterally" changed prior to this conversation with Cardona. (See GCX 167.) Additionally, General Counsel's contentions in this regard were not made clear until its post-hearing brief. I would thus decline to find an independent violation of the Act for this earlier conduct which I do not believe to have been fully litigated. (See Harry Carian Sales (1980) 6 ALRB No. 55.)

1981 that the "new rate would drop from 11.2 to 6.72 and 10.1 to 6.0 respectively." Union representative Karl Lawson also referred to September 1981 as the date on which he learned of the reduced wages following a conversation with chemical applicator Melacio Cardona. Thus, General Counsel contends that these unilateral changes in the number of hours of work and hence weekly pay received by employees are violative of sections 1153(a) and (e) of the Act. (N.L.R.B. v. Katz (1962) 369 U.S. 736; Joe Maggio, Inc. (1982) 3 ALRB No. 72.)

With respect to the second reduction (29 August 1981) it is clear that the "change" was part of the implementation of the crop protection program -- the total number of hours were reduced for this category of employees, as others were laid off, or assumed different tasks. There is no contractual provision which specifies the total hourly work required of these workers. As discussed supra, the union's position with respect to the impact of the layoffs was to "follow the contract". It thus declined to negotiate over the effects of the crop protection program. Thus, the legality of the decision to reduce the hourly work of these employees rests upon the legality of the crop protection program itself.[63] I would recommend dismissing this allegation as an independent violation of the Act.

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63. I reject Respondent's contention that notice to Carlos Sandoval — a steward — who served as interpreter for chemical applicator Villanueva when the company explained its previously reached decision — would constitute notice to the union which would provide it with an opportunity to bargain. As the NLRB has held in Spriggs Distributing Company (1975) 219 NLRB 1046, a union steward is not a union's agent for purposes of contract negotiations in the absence of any past history or experience which would create the impression that the steward had authority to negotiate contracts, and where the union had not delegated this authority either expressly or by implication.

D. Hours Worked by Sweepers (Clean-Up Crew) (Paragraph 20(e)(3))

1. Facts

Jose Montes Castillo worked as a sweeper for Respondent from 31 August 1979 to September 1981. Approximately six months after he started, Mr. Castillo spoke with supervisor Julio Perez and asked to be paid piece rate. The supervisor agreed to pay the sweepers[64/] for 9 hours of work regardless of how quickly they finished. On those days when the workers left early, the supervisor would punch their time cards for 9 hours of work. Thus, although Mr. Castillo would work some six-to-seven (up to ten) hours per day, he would receive compensation for only nine. As the strike approached, the sweepers' work declined and apparently they received pay on an hourly basis only for the work actually done.

Union representative Lawson did not learn of this "change" until a meeting with the negotiating meeting in late July-early August 1931 — when he was informed by negotiating committee member Teodoro Diaz that workers had been switched from hourly to incentive. (R.T. Vol. XIII, p. 55/ 11. 4-6.) The matter was brought to the company's attention by Roberto de la Cruz at the September 2 negotiation session.

2. Analysis and Conclusions

General Counsel alleges that from January 1980 to November 1981 Respondent has unilaterally reduced and/or changed the wages and fringe benefits of its clean-up crew, and has also violated the wages and fringe benefit provisions of the West Foods-UFW Collective

64. Mr. Castillo and Constantino Contreras were the only two sweepers in Respondent's employ.

Bargaining Agreement 1978-81. Contrary to General Counsel's assertion that the sweepers (Messrs. Castillo and Contreras) were changed from hourly to piece rate or incentive status, the evidence suggests only that the supervisors permitted the workers to be paid for nine hours work regardless of the actual time it took to do their job. There is no evidence that the sweepers worked more than the nine hours per day (as an average or on any given occasion) called for in the contract (Article 19), and hence no evidence that the effect of this "agreement" was to deny the sweepers the full fringes due them. Under NLRB precedent, however, the "change" occurring in the instant case is of the type which necessitates notice to the employees' bargaining representative. See Carbonex Coal Company (1982) 262 NLRB No. 159 (change of shift schedule from 8-12 hours without notification to the union constituted violation).

While the employees still received the hourly rate mandated by the contract, they were credited with nine hours work even if they finished early. The arrangement was made directly between employees and the supervisors and the new working conditions allowed them to leave early if they finished their work. While there is no evidence of any change in rate of pay, nor are there pay records which would indicate that the employees were denied wages and fringes mandated by the contract, I find that the change in working conditions required notice to the bargaining representative.[65/]

65. See Mike O'Connor Chevrolet (1974) 209 NLRB 701, which categorized changes which cover subjects over which Respondent had an obligation to bargain: (1) a change in the number of automobiles salesmen would have to sell; (2) a new rule requiring salesmen to

(Footnote 65 continued----)

Nor do I agree with Respondent's suggestion that the Medicenter decision (see discussion, supra) holds that notice to employees Castillo and Contreras is equivalent to notice to the union. I therefore conclude that Respondent has violated section 1153(e) of the Act by its conduct in this regard and will recommend the appropriate remedy therefor.[66/]

E. "A" Operator Crew Leader Position (Paragraph 20(e)(14))

1. Facts

Filiberto Santoyo was hired by Respondent in 1970 and worked from 1975 until the November 1981 strike as a Class "A" equipment operator. In June 1980, supervisor Dennis Wheeler asked Mr. Santoyo if he would help out as a crew leader until the company could get another supervisor because a supervisor had quit without prior warning. There was no posting for this "new position" and Mr. Santoyo worked as crew leader for 4-6 weeks (GCX 142). The duties involved checking to see that the job was done properly by the other workers. (GCX 74, p. 29.) Mr. Santoyo did not speak to anyone

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(Footnote 65 continued——)

work more Saturdays; (3) an additional $100 personal liability for salesmen; (4) withdrawal of the privilege of leaving premises during working hours for refreshments. Changes over which Respondent has no obligation to bargain: (1) a change in the type of car provided an employee (with fewer extras) which did not affect the terms and conditions of employment since it only affected one employee and it was not contended that Respondent changed its policy with respect to assignment of demonstrator cars to its employees in general; and (2) a rule which required salesmen to maintain time records where there was no evidence that the rule went beyond the requirements of law.

66. I would find no independent violation for the company's apparent return to the former policy of payment only for actual work done. This later "change" in reality reflects the reduction in hours discussed with respect to Respondent's crop protection program.

connected with the union regarding his temporary assignment -- steward, ranch committee member, or representative -- until the hearing.

For the Respondent, then-agricultural manager Hank Knaust testified that the company needed an individual knowledgeable about compost present on Sundays, and additionally, someone to unload trucks at night (during the rainy season for approximately six weeks). Mr. Santoyo was placed in this position on a temporary basis.

2. Analysis and Conclusions

General Counsel alleges that from August 1980, Respondent unilaterally created a new bargaining unit position of crew leader for the "A" operators, failed to post the vacancy prior to filling said position, and thereafter eliminated said position.

Article 10 (Management Rights) of the 1978-31 contract (GCX 74, p. 13) provides that the company retain all rights to assign and transfer employees. Crew leaders are identified generally under Job Descriptions in the 1978-81 Agreement (GCX 74, p. 29). Thus, any "change" which occurred had already been contemplated by and negotiated by the parties. I thus find no violation by the temporary placement of Mr. Santoyo into the crew leader position and recommend dismissal of this allegation of the complaint.

F. Packing of Mushrooms not Grown at West Foods (Paragraph 20(c))

1. Facts

In November 1980, the company brought in approximately one truckload (one week's worth) of harvested mushrooms to its Ventura plant for packing and shipping.

During the last week of September 1981, farm manager James Kahl was informed through the company's marketing organization that there were excess mushrooms on the East Coast that could be brought to the Ventura plant for packing and shipping. The company decided to bring in a load of these mushrooms, pack them at Ventura, and ship them to West Coast markets. Kahl described the first shipment of mushrooms as "experimental" to see if the mushrooms could survive the transport and be packed successfully (R.T. Vol. III; p. 148). Shipping orders revealed four separate shipments ordered on the 5th, 9th, 11th and 12th of October 1981 (GCX 79). Notification to the Union was not given until the negotiation session of October 9. George Horne asked Roberto de la Cruz whether the union had any problems with this action, and de la Cruz said that he would give the. Union's position forthwith. At the negotiation session of 10 October, de la Cruz informed Horne that he had turned the matter over to the UFW’s legal department. If the legal department disagreed with this "subcontracting", the company would be so notified. On 16 October 1981, de la Cruz wired the union's opposition to the company's unilateral change in operations and requested that the Respondent cease importing a product to be packed by West Foods Ventura employees. By letter of 26 October, the company complied with the union's request "as a good faith step to bring us closer to a new contract". A letter was also sent to all employees referring to the packing of these mushrooms (GCX 50 A & B; see discussion supra).

2. Analysis and Conclusions

General Counsel alleges that in November 1980 and October

1981, Respondent unilaterally subcontracted out and/or diverted the bargaining unit work of growing and harvesting mushrooms — and using the UFW label in packing these mushrooms without first giving notice to or bargaining with the UFW. The essence of the charge is that mushrooms grown from the East Coast were brought into the Ventura Farm for packing and shipping without the union's prior consent. General Counsel has likened the conduct here to the subcontracting of bargaining unit work in Fibreboard Paper Corporation v. N.L.R.B. (1964) 379 U.S. 203, which was held to be a "term and condition of employment". The United States Supreme Court reasoned that it was therefore obligatory upon the employer to notify the union of any proposed subcontracting, and to bargain over the decision and effects of such a change.

That the union had no knowledge of these events until after the fact is uncontroverted. Respondent's claim that its notification was timely and that the union waived its right to bargain over these programs which it did not learn about until the negotiation session of 10 October 1981 — after the mushrooms had already been imported and packed — are unconvincing. Whether de la Cruz' ambiguous remark that the company would not be liable until the union evaluated its position on this matter could be deemed a waiver of any objections for conduct occurring from the time of notification of the union's response (compare General Counsel Exhibits 46 and 47), there is no record evidence to suggest that the union waived its objections to the importation of the mushrooms that had already occurred in 1980 and 1981. De la Cruz' version in this regard was supported by union witness Richard Chavez. (R.T. Vol.

IV, P. 103.)

Respondent further contends that the packing and shipping of East Coast mushrooms was consistent with its crop protection program and provided greater hours of work for the packing shed workers. While the impact of subcontracting[67] may be just the opposite of that caused by the bringing in of outside mushrooms — e.g., an increase in bargaining unit work as opposed to a decrease — each event would constitute a change in the terms and conditions of employment, and is therefore a mandatory subject of bargaining. (See Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85.)

Nor can this experimental plan be seen as a necessary aspect of the economic phase down — similar to the layoffs, dislocations and loss of hours incurred throughout the plant. Rather, the company was at once phasing down its work force to protect against potential strike, and at the same time preserving its markets by importing East Coast mushrooms. If the packing workers were to benefit by these combined programs (or at least have their status quo preserved), certainly the pickers would not. When the union decided that it was not in its best interest to agree to such a program, the employees were informed by the company that it was the union which sought to deprive the work force (which had been

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67. In a sense, the company's conduct here was a type of subcontracting — insofar as the arrangement can be viewed as a "subcontracting" out of the growing and harvesting operations (by virtue of the crop protection program which effectively deprived the bargaining unit employees of work). The importation of mushrooms in conjunction with the crop protection program effectively shifted bargaining unit harvesting and growing operations to non-bargaining unit personnel (on the East Coast) yet provided work for the packing shed employees and maintained Respondent's markets.

previously "victimized" by the crop protection program of July 15, also attributable to the union) of much needed additional work.[68] As conceded by Respondent, the importation of mushrooms was a "very low risk project" for the company which it voluntarily (and unilaterally) chose to undertake (Respondent Brief, p. 334). If there was a strike, trucks could be rerouted and mushrooms packed at another local packing operation.

I find Respondent's unilateral conduct in this regard to be a per se violation of section 1153(e). Further, I find the company's denigration of the union's position communicated directly to the employees to be evidence of bad faith bargaining (see discussion supra).

G. Supervisors Performing "A" and "B" Operator Work (Paragraph 20(e)(2))

1. Facts

In late December-early January 1981, ranch committee vice president Teodoro Diaz observed supervisors Jose Arambula and Enrique Hernandez operating machinery which was used by the "A" and "B" operators who were bargaining unit members. Diaz brought this to the attention of supervisor Gregory Tuttle and the issue of supervisors doing bargaining unit work was discussed at a grievance meeting on 23 December 1980. Tuttle informed Diaz and Karl Lawson that he would attempt to resolve this problem, thereafter spoke with supervisor Arambula, and Diaz did not observe either Arambula or

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68. Interestingly, the "invitation" to resign from the union was mailed to the employees on 15 October 1981 (GCX 45 A & B). One week later, the company informed the employees that the union opposed the effort to provide additional work for employees (GCX 50 A & 3).

Hernandez performing this type of bargaining unit work following the meeting. James Kahl reiterated these instructions to supervisory personnel when he first assumed the farm manager position in early 1981 — stating that he was paying his people to be supervisors and not to do bargaining unit work. (R.T. Vol. XXIV, p. 61, 11. 13-28.) A similar problem was brought to Mr. Diaz' attention in February or March 1981 by employees Juan Medina and Roberto Santoyo — but no action was taken by the Union.

Juan Medina observed supervisors Jose Arambula,[69/] Juan Martinez and Mike Binsely performing "A" and "B" operator work on various occasions in 1981. Arambula would use the "B" operator machines for 5-6 hours per day and occasionally all day. He would use the "A" operator machines three-to-four hours per day, three-to-four days per week. (R.T. Vol. XIX, pp. 57-58.) Maintenance supervisor Juan Martinez was observed by Medina using the "A" and "B" operator machinery to perform operator work for 2-3 hours per day 1 or 2 days per week from 1979-80 up until the November 1981 strike. Compost supervisor Mike Binsely was seen using the machinery to do operator tasks 2-3 hours per day on a daily basis through June 1981.

For the Respondent, Juan Martinez denied using the "A" and "B" operator machinery for any period of time greater than one-half hour per day. He did concede operating machinery on an emergency basis — e.g., when people were at lunch and a truck arrived, he would unload the material (which did not take more than 5 minutes)

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69. The functional/incentive supervisor.

rather than interfere with the employees' lunch.[70/]

Martinez also used "B" machinery to bring sand over to where work was being done on a cement slab during a two-week period in the summer of 1981. He stated that there were no "A" or "B" operators present and he would make two trips to the sand pile per day to provide materials for the workers who would otherwise be without work. (R.T. Vol. XXVII, p. 59.)

Jose Arambula denied using the machinery in 1981 except for emergencies — when it was raining or supplements had to be pushed inside the houses and no operators were around — and for training. (R.T. Vol. XXVII, p. 4, ll. 11-26.)[71/] He stated that he operated the "A" and "B" machines approximately one time every two months, specifically denying ever having operated the "A" machine 3-4 hours per day or 2-3 days per week or the "B" machinery for 6-8 hours per day, 2-3 days per week. (R.T. Vol. XXVII, p. 5, ll. 1-9.)

2. Analysis and Conclusions

General Counsel alleges the Respondent has unilaterally authorized its supervisors to perform bargaining unit work by operating machinery from January through November 1981. Article 13 of the 1978-81 collective bargaining agreement prohibits supervisors from performing bargaining unit work "except for instruction, training, and emergencies." (GCX 74, p. 16.) Part 5, section a, of the supplementary agreement also permits compost foremen to operate

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70. This policy would also avoid the obligation of paying overtime.

71. But see Mr. Arambula's admission that there were no people to train in 1981. (R.T. Vol. XXVII, p. 37, ll. 26-27.)

cranes and graders from time to time (GCX 74, p. 32). After review of the record in this regard, I find insufficient evidence that Jose Arambula operated the machinery so as to deprive employees of bargaining unit work as alleged by General Counsel. Juan Medina's memory was particularly poor on details, and although I find him to be a sincere witness, I conclude that it is more likely than not that Mr. Arambula utilized the machinery as he (Arambula) described — in emergency situations when there were no other operators available and not for longer than one-half hour per day. Indeed, on those occasions when the supervisors admitted to violating these guidelines, the union and company met to discuss the problems at first step grievance. I reach a similar conclusion with respect to the allegations pertaining to Juan Martinez and Mike Binsely — the latter of whom as compost foreman was permitted time-to-time usage of the machinery under the collective bargaining agreement. To wit, there is insufficient evidence to conclude that the supervisors performed work on this machinery which was prohibited by the existing collective bargaining agreement.

In any event, proof of an alleged violation of this provision of the contract would not necessarily entail a unilateral "change" in company policy which would constitute a violation of the Act. While it is true that the company has a duty to bargain over workload and over the performance by supervisors of work which is usually done by employees in the bargaining unit (see Beacon Piece Dyeing & Finishing Company (1958) 121 NLRB 953; Crown Coach Corporation (1965) 155 NLRB 625), as matters covered by the existing contract, the union would have the right to grieve any perceived

violations. Although the supervisor's alleged reasons for his use of the machinery may not be of the type contemplated by the parties when they negotiated the "emergency" language of the article, it cannot be concluded as a matter of law that the company had implemented a change in policy by the mere fact that supervisors were observed operating such machinery for varying periods of time. Furthermore, as the union steward was the person imbued with the authority to institute these first-step grievances, knowledge of any such violations by the steward would constitute knowledge to the union, (Merillat Industries, Inc. (1980) 252 NLRB 784) and all known violations occurring more than six months prior to the filing of charges would be barred by the Statute of Limitations (Labor Code Section 1160.2.) I therefore recommend that these allegations of the complaint be dismissed.

H. Supervisors Performing Product Pickup Work
(Paragraph 20(e)(6)) [72/]

1. Facts

Severiano Martinez had been employed in Respondent's product pickup crew from 1975 through November 1981. He observed supervisor Luis Partida picking up mushrooms for 1½ - 2 hours per day for three days per week commencing in January/February 1981 and lasting about two months.

During the same period, Martinez also observed supervisors Julio Perez picking up mushrooms 1-2 hours per day, three days per week, and Samuel Monroy picking up mushrooms 2-3 hours per day for

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72. Picking up baskets of mushrooms from the edge of the boards in the mushroom houses.

three days per week.

The pick-up workers and pick-up steward Juan Gonzalez met with supervisors Gregory Tuttle and Julio Perez to discuss the problem during February 1981. Approximately 15-20 days following the meeting, the problem recurred and another meeting was called between the workers, union steward Gonzales or Jacinto Ortiz, and supervisors partida, Tuttle and Perez. The supervisors promised to avoid doing product pick-up work. The problem recurred about 1 - 1½ months prior to the expiration of the contract when all three supervisors were observed picking up mushrooms for more than one-half hour per day by Mr. Martinez. Martinez also testified that he observed partida, Perez and Monroy picking up mushrooms 2-3 hours per day approximately 3 days per week until the 19 November 1981 strike.

For Respondent, farm manager James Kahl testified that early in 1931 there was discussion between Teodoro Diaz[73/] and himself regarding the pickup work done by supervisors Julio Perez and Samuel Monroy. Kahl promised to make sure that supervisors were doing what the contract stated. (R.T. Vol. VI, p. 12, 11. 20-26.) Diaz testified that he never observed Monroy doing such work after he discussed this matter directly with the supervisor in February or March, 1981. (R.T. Vol. XVII, p. 7, 11. 17-18.) Indeed, Diaz denied noticing or learning of any problems with supervisors helping in the mushroom pick-up during all of 1981. (R.T. Vol. XIV, p. 11,

73. Mr. Diaz was the union steward for a pick-up crew for some period of time between December 1979 and November 1981, as well as vice-president of the ranch committee from May-June 1980. He was also a member of the negotiating committee from June 1981.

11. 26-28; p. 12, 11. 1-3.)

Supervisor Partida denied any excess pick-up work, and claimed that he only performed pick-up work to teach the pickers the proper way to do the job or to train new people. (R.T. Vol. XXVII, P. 73, 11. 22-27.) On cross-examination, Mr. Partida could not recall specifically which people he trained but insisted that such instruction could be done in about 10 minutes. (R.T. Vol. XXVIII, pp. 12-13.)

Supervisor Julio Perez admitted to working in excess of one-half hour assisting with the pick-up in December 1980. Within a week, union steward Jacinto Ortiz protested and the matter was discussed among Tuttle, Perez and Ortiz. Perez promised that he would not do more pick-up than the contract provided (30 minutes), and claimed to have fulfilled this commitment. No further complaints or grievances were raised in this regard. (R.T. Vol. XXVIII, p. 67, 11. 18-23.)

2. Analysis and Conclusions

General Counsel alleges that from January 1981 through November 1981 Respondent has unilaterally authorized supervisors to perform bargaining unit work cleaning mushrooms from growing houses. Article 13 of the 1978-81 collective bargaining agreement permitted supervisors to perform bargaining unit work only for purposes of instruction, training and emergencies. (GCX 74, p. 12.) Picking supervisors were also allowed to assist in cleaning mushrooms from rooms for the last one-half hour of the working day. (GCX 74, p. 32.)

The evidence on this issue, however, establishes only that

the company may have violated the contract early in 1981, which resulted in grievance meetings between company personnel, workers, and stewards. To credit Mr. Martinez' non-specific recollection of violations which occurred thereafter would not establish a unilateral change in company policy violative of the Act, but isolated violations of a particular paragraph of the contract. To wit-, there is insufficient evidence that any change in company policy occurred. I therefore recommend that this paragraph of the complaint be dismissed.

I. Working Conditions of Irrigators (Paragraph 20(e)(15))

1. Facts

Irrigator (and crew steward) Cruz Rodriguez testified that in July 1981[74/] the irrigator crew commenced laying pipes, putting down salt, unloading the spawn trucks, and putting the filters on the coolers -- work not previously performed by that crew. (R.T. Vo. XVII, p. 90, 11. 24-28; p. 91, 1. I.)[75/] The crew continued this work through November 1981 although all received the irrigator wage. When Rodriguez spoke to supervisor Neil Adler in August regarding this shift in job duties he was told that the workers had to do what they were told, not what they wanted to do. Rodriguez reported the job change to ranch committee president victor Becerra

74. After the crop protection layoffs had commenced.

75. Plant maintenance workers normally put up filters and were paid $5.60 per hour. (R.T. Vol. XXXI, p. 138, 11. 13-15, RX 17.) Chemical workers (sprayers) normally laid salt and were paid $4.28 an hour. (R.T. Vol. XVII, p. 92, 11. 11-13.) Room attendants and area maintenance workers were paid $4.21 an hour and normally unloaded trucks and laid down pipes. (GCX 74; R.T. vol. XXVI, p. 117.) Irrigators were paid $4.28 per hour. (GCX 74.)

who said that nothing could be done. Neither union representative Roberto de la Cruz nor Karl Lawson stated that they learned of the "new" duties performed by the irrigator crew until the date of the hearing. (R.T. Vol. XX, pp. 10-11; pp. 35-36.)

For the Respondent, Hank Knaust testified that irrigators were called upon to do work that fell outside the classification of irrigation work in early 1981 (May-August) and right through the strike. Knaust explained that the reason for the changed duties was to give the irrigators sufficient work. Because of the crop protection program, there were not enough rooms to irrigate. The action was taken to carry into effect the company's policy to absorb as many people as possible into other positions and minimize the impact of the crop protection program. (R.T. Vol. XXVI, p. 17, 11. 6-11.) According to Knaust, the work involved laying down steam pipes, unloading spawn, changing filters, and laying down salt. Room attendants normally laid pipes and put the filters in the coolers; general yard clean-up people (area maintenance) normally unloaded spawn; floor sweepers (picking department), room attendants, and, in one instance, the chemical sprayer would normally put down the salt. Knaust stated that the work was general labor work — normally paid at a lower rate than the irrigators ($4.21 per hour rather than $4.28 per hour), but that the irrigators retained the irrigation wages for this lower classification work.[76/]

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76. Hank Knaust also related another occasion in early 1981 when chemical applicator Martimiano Villanueva was utilized to spray flies for two hours so that a general laborer assumed his duties laying salt. This job shift was accomplished in consultation with ranch committee president victor Becerra. (See R.T. vol. XXVI, p. 123.)

2. Analysis and Conclusions

General Counsel alleges that Respondent unilaterally changed the duties and working conditions of the irrigator crew and failed to compensate the crew at appropriate wage rates for their "new" job duties from July through November 1981. It is conceded by all parties that irrigators were given duties not covered by the contractual job description, as one aspect of the crop protection program. That is, since the number of rooms to irrigate declined with the economic layoffs in other areas, the irrigators were requested to lay down steam pipes, unload spawn, change filters, and lay down salt. These tasks were generally performed by room attendants, yard clean-up people, and the floor sweepers (all done by general labor people) — in lower classifications than irrigators who were paid at the higher irrigator rate. While there was some dispute as to whether the plant maintenance personnel (earning a higher salary) changed filters (see the testimony of Edmundo Garcia, R.T. Vol. XXXI, p. 138), I credit the recollection of Hank Knaust in this regard as the witness who would have greater expertise re the various job classifications and duties in his capacity as agricultural manager and later farm manager at West Foods.

As an integral part of the layoffs, transfers, and reductions in hours which characterized the crop protection program, the legality of Respondent's conduct with respect to the irrigator crew, hinges upon the earlier discussion regarding implementation of the crop protection program. Insofar as the union refused to discuss specific implementation of this program (apart from the dictate that the "company followed the contract"), it cannot now

conscionably accuse the company of failing to bargain over specific applications of that program. I therefore recommend that this allegation be dismissed.[77]

J. Supervisors Breaking/Removing Cement and Putting up a Roof (Paragraphs 20(e)(12) and 20(e)(13))

1. Facts

Erasto Alcantar was a maintenance worker (and crew steward) with Respondent from August 1976 until the 19 November 1981 strike. Approximately two or three months before the expiration of the 1981 contract, he observed supervisor Jose Arambula breaking cement (with the slab breaking machine) for some two to four hours per day, two to three days per week for two to three weeks. On occasion, supervisor Juan Martinez picked up the pieces of cement and assisted in the breaking up of the cement approximately three hours per day, four to five days per week for over one month. Wayne Rhodes[78] also helped Mr. Alcantar put up a roof in mid-1981 (four months before the expiration of the contract) from six hours per day for some six weeks. Alcantar believed that ranch committee vice president Teodoro Diaz, ranch committee president victor Becerra, and Edmundo Garcia all observed that cement work was being performed by the

77. This of course, does not determine the issue of whether or not the company's implementation was in violation of the contract, which might more properly be decided by an arbitrator. I conclude only that no "unilateral change in working conditions" occurred which would constitute a violation of section 1153(e). (Compare Paragraph 18, letter of understanding attached to GCX 74 which requires the company to "make a good faith effort to provide as much work opportunity as possible for all workers" with Article 16 (p. 13) which preserves management's right to transfer employees, See also the job descriptions for irrigators (pp. 27-28, GCX 74).)

78. Alcantar testified that Wayne Rhodes gave orders to supervisor Juan Martinez. (R.T. Vol. XV, p. 149, 11. 9-16.)

supervisors. (R.T. Vol. XV, pp. 168-170.) Mr. Diaz denied discussing the matter until after the contract had terminated. (R.T. Vol. XVII, p. 4, 11. 17-18.) No grievances were filed. (R.T. Vol. XVII, p. 5, 11. 22-25.)

For the Respondent, supervisor Jose Arambula testified that during the summer of 1981 he helped break cement with a jackhammer approximately three times for some 15 to 18 minutes on each occasion in the presence of Erasto Alcantar. (R.T. Vol. XXVII, p. 7, 11. 16-23.) Approximately two days later, Mr. Alcantar and Mr. Arambula engaged in light conversation wherein Alcantar told the supervisor to "get going" with the hammer but the supervisor declined because his shoulder was sore. No grievances or complaints were ever addressed to Arambula over this issue.

Supervisor Juan Martinez recalled working approximately two weeks during the summer of 1981 supervising cement slab work. He admitted using machinery to bring materials and to break down the cement when operators were not present. He denied ever working as much as one-half hour on any given day in such work. Martinez stated that the work was done in the presence of Alcantar and that no complaint or grievance was ever made regarding the supervisor's conduct. (R.T. Vol. XXVII, p. 54.)

2. Analysis and Conclusions

General Counsel alleges that since July 1981 Respondent has unilaterally authorized its supervisors to perform bargaining unit work breaking and removing cement and putting up a roof. The evidence, however, at best support a finding of isolated instances of supervisorial assistance to a crew breaking and removing cement

for a three-to-four week period which may or may not be in violation of Article 13 of the 1978-81 collective bargaining agreement. (OCX 74, p. 12.) Additionally, the cement slab work and roofing work apparently performed by Wayne Rhodes was done in the presence of union steward Alcantar who filed no grievances (because he did not have the special forms necessary). Under the circumstances, General Counsel has failed to prove that a change in company policy occurred which would have required notice to/or bargaining with the union. I recommend that this allegation be dismissed.

K. Discontinuance of Four-Hour Minimum Pay (Paragraph 20(e)(5))

1. Facts

Farm manager James Kahl and agricultural manager Hank Knaust conceded that there were occasions when workers were paid for less than four hours work on a given day commencing in August 1981.[79/] Messrs. Kahl and Knaust attributed this "change" to the low production from crop protection and opined that the new policy was "beyond the company's control" and therefore appropriate pursuant to Article 20A of the collective bargaining agreement. (GXC 74, p. 16; R.T. Vol. XXVI, P. 108, 11. 3-6.)

In a meeting of packing workers held 24 September, packing supervisor Gerald H. Suprenant through the translation of foreman Rafael Guillen told the workers that the four-hour guarantee would no longer be in effect and the workers would only be paid for their actual hours worked. Suprenant stated that he gave no reason for

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79. A summary of the company's payroll records (GCX 121) reveals that pickers did not receive the four-hour minimum pay on 8 August, 4 September, and 5 September 1981.

the discontinuance of the policy, but that he had been informed by upper management to convey this change to the workers (R.T. Vol. XXXI, p. 9, 11. 2-9). Guillen essentially corroborated the supervisor's statement but added that Suprenant told him to tell the workers that the company was not going to be able to guarantee the four-hour minimum because "there wasn't something agreed upon in the contract". (R.T. Vol. XXX, p. 96, 11. 17-20.)

Packing workers Carmen Padilia and Leticia Sanchez affirmed Mr. Guillen's version of the meeting — attributing the discontinuance of the four-hour minimum to the expiration of the contract (R.T. Vol. XIV, p. 123, 11. 5-20; Vol. XVI, p. 132, 11. 11-14.) Union representative Karl Lawson did not learn of the discontinuance of the four hour minimum until September 1981 (after expiration of the contract) when several workers from the packing shed informed him of Suprenant's speech. (R. T. vol. XIII, P. 53, 11. 11-17.)

2. Analysis and Conclusions

General Counsel alleges that Respondent unilaterally discontinued its (contractually mandated) practice of paying a minimum of four hours pay to hourly and piece rate employees when such employees were called to work and were furnished less than four hours work. Respondent's suggestion that this change was necessitated as a result of the implementation of the crop protection program does not withstand scrutiny. In the first place, it is difficult to equate reductions in hours, job transfers, and layoffs with the company's failure to abide by contractual provisions (GXC 74, Article 20, p. 16) which require the payment of

a minimum of four hours of pay regardless of the number of hours of work performed. While the crop protection program might have dictated reductions in hours, and work force, it does not necessarily follow that the company was "compelled" to unilaterally discontinue payment of a previously bargained for guarantee.

Nor is Respondent's contention that it merely followed the contract by the discontinuation of the guarantee supported by the record. The relevant contractual language provides that the four-hour reporting and standby time need not be paid "when work covered by this agreement is delayed or cannot be carried out because of rain, frost, government condemnation of crop, or other causes beyond the control of the company." (GCX 74, p. 16.) Said paragraph cannot readily be interpreted to include the company's (unilateral) implementation of the crop protection program. Even if it were true in some sense that the union had alternatives to the crop protection program — that is, it could agree to an extension of the contract, or 60-day written strike notification — no credible contention can be made that the company did not absolutely control the timing of its implementation. (See discussion supra.)

Apart from these contractual considerations, the record evidence does not factually support a causal nexus between the discontinuance of the four-hour guaratee and the crop protection program. On the contrary, the announcement of the discontinuance of the policy was not made until 24 September 1981. I credit the testimony of packing workers Carmen Padilla, Leticia Sanchez, and Rafael Guillen that this policy change was linked to the expiration of the contract by supervisor Suprenant. Indeed, the company was

relaxing the crop protection program (in effect phasing down its phase down) shortly after the date of Suprenant's announcement since the union had made good on its verbal assurances that it did not intend to strike. Yet the four-hour guarantee was never reinstated. Under applicable ALRB and NLRB precedent "the collective bargaining agreement survives its expiration date for the purposes of making the status quo as to wages and working conditions. The employer is required to maintain that status quo following the expiration of the collective bargaining agreement until the parties negotiate a new agreement or bargain in good faith to impasse. (N.L.R.B. v. Carilli (9th Cir. 1981) 648 F.2d 1206 [107 LRRM 2961]; Clear Pine Mouldings, Inc. v. N.L.R.B. (9th Cir. 1980) 632 F.2d 721; see also Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 35; Tex-Cal Land Management Company (1982) 8 ALRB No. 85.)

Although the Respondent's contractual obligations cease with the expiration of the contract, those terms and conditions established by the contract governing the employer/employee relationship survive the contract. The company is thus presented with a continuing obligation to apply those terms and conditions, unless the Respondent gives timely notice of its intention to modify a condition of employment, and the union fails to timely request bargaining, or impasse is reached during bargaining over the proposed change. (Bay Area Sealers (1980) 251 NLRB 89 [105 LRRM 1545].)

Since the four-hour minimum is manifestly a term and condition of employment (specifically provided for in the 1978-81 collective bargaining agreement) and no prior notification was given

to the union regarding its discontinuance, I conclude that Respondent has committed a per se violation of section 1153(e) of the Act by this unilateral change.[80/]

L. Discontinuance of Pay for Standby Time when Machinery Breaks Down (Paragraph 20(e)(8)

1. Facts

Fill crew employee Rafael Gallardo testified that in mid-October he noticed that he was no longer being paid for standby time when machinery broke down (on two occasions). He spoke with supervisor Jose Arambula in this regard in October and was informed that "since the contract expired, we are going to do what they said or what the company said or something like that". (R.T. Vol. XIV, P. 92, 11. 22-25.) Prior to the expiration of the contract, Gallardo was paid for his standby time for periods when the machinery broke down (through chain breaks and electrical burns) which occurred approximately one to two times per month. Mr. Gallardo did not know whether the policy with respect to standby time differed if workers were responsible for the breakdown. (R.T. Vol. XIV, pp. 112-114.)

For the Respondent, farm manager James Kahl testified that the company paid standby time at the general labor hourly rate to incentive crews, (e.g. the fill, spawn, case, and dump) when equipment broke down for causes attributable to the company. If the

80. I do not find independent violations of section 1155.2(c) and 1155.3(c) which I interpret to define good faith bargaining and to set forth requirements for timely modifying existing contracts, rather than separate bases for violations of section 1153(a) and (e). See discussion of surface bargaiing allegations, supra.

breakdown was attributable to the crew, then the fixed rate would stay in effect. He recalled one occasion when he received a report of an incentive crew member not paid standby when machinery broke down. He did not recollect which crew this involved, the date, or the cause of the machinery breakdown.

Former agricultural manager Henry Knaust confirmed this oral company policy and denied that standby pay was ever refused when machinery broke down due to circumstances not the fault of the worker. (R.T. Vol. VI, p. 131, 11. 18-28; p. 132, 11. 1-3.) He recalled only one instance in 1979 when standby time was not paid due to the worker's negligence, stating that the policy remained in effect following the expiration of the contract. (R.T. Vol. XXVI, p. 105, 11. 23-27.)

2. Analysis and Conclusions

General Counsel alleges that since September 1981 Respondent has unilaterally discontinued its practice of paying the general labor hourly rate to fill crew members for work performed on standby time when they were unable to perform their normal fill crew tasks due to non-functioning machinery.

At best, the record supports Mr. Gallardo's claim that he did not receive standby pay on an isolated occasion. There is insufficient evidence that the company changed its policy in this regard, as I do not credit Mr. Gallardo's statement that supervisor Jose Arambula attributed the discontinuance to the expiration of the contract. While Mr. Arambula was not asked about this issue, Mr. Gallardo's recollection was particularly poor in this regard, and his recitation of the alleged statement imprecise. At most, the

supervisor expressed an opinion that the company was going to do what it wanted. Without further proof that the company changed its policy (which was consistently described by Messrs. Knaust and Kahl) I cannot conclude that Respondent has violated section 1153(e) of the Act.

I specifically reject General Counsel's assertion that Respondent's concession of the alleged change regarding the four-hour reporting minimum — which is the same article of the contract — necessarily suggests that the company also discontinued its practice with respect to machinery. With respect to the four-hour minimum guarantee, there was uncontroverted testimony that the policy was changed. In this instance, General Counsel has offered testimony from only one employee who thought that he had been denied pay and an ambiguous remark from the supervisor. In the former situation, a crew supervisor announced the change in policy to an entire packing crew. In this case, no such announcement was made. While I have rejected Respondent's rationale that the crop protection program mandated the four-hour minimum guarantee, I am not compelled to find additional changes in policy merely by the aforesaid position. I therefore recommend that this allegation of the complaint be dismissed.

M. Teamster Union Members Performing UFW Bargaining Unit Work During the Strike (Paragraph 20(d))

1. Facts

In the days following the strike, the parties entered into an agreement (GCX 61) regarding certain clean-up work to be done by the striking employees on an emergency basis. Prior to the reaching of that agreement, James Kahl and Roberto de la Cruz discussed the

possibility of the union providing a gob driver to assist the crew workers. The next morning — following execution of the agreement — Kahl called de la Cruz to request that the union provide a bargaining unit equipment operator with a Class 2 license (for truck driving) to haul the mushrooms to the dump. De la Cruz demurred on the basis that the agreement had already been reached. Kahl explained that the company would have to hire a non-bargaining unit person to drive the truck to get rid of the mushrooms and subsequently utilized the only person available to them — the person that normally drove the over-the-road trucks — who was a member of the Teamsters' Union. The latter worked side-by-side with the union members who performed the two-day operation.

2. Analysis and Conclusions

General Counsel has withdrawn its allegation with respect to this issue, and I believe such action is appropriate. The evidence suggests that the company made known its needs for a licensed operator to drive the gob truck and afforded the union opportunity to negotiate over same. This was done prior to utilization of the non-bargaining unit member. The union decided not to provide any additional replacement help (from the strikers) other than that which had been agreed upon. Respondent has a right to conduct its business during the strike period, and as the union was given proper notice prior to its decision, I recommend that this allegation of the complaint be dismissed.

N. Provision of Room, Board, Insurance and Transportation to Replacement Workers (Paragraph 20(e)(11))

1. Facts

Since December 1981, Respondent entered into an agreement

with a labor contractor to meet its work force requirement. The company paid the contractor a twelve percent (12%) commission, and provided safe transportation for the replacements from their place of lodging to the company and back. (R.T. Vol. VI, pp. 42-44.) Respondent similarly provided transportation to employees during the 1976 strike (R.T. Vol. VI, p. 61). The labor contractor agreed to provide the workers with meals, lodging, insurance, and equipment. The workers would be charged the actual costs of the meals and
lodging which were approximately six dollars per day collected weekly on payday. (GCX 82.)[81/] Kahl explained that the payment of transportation and security was due to Respondent's inability to hire replacement workers on any other basis. (R.T. vol. XXIV, p. 15, 11. 23-27.) They had attempted unsuccessfully to secure workers from two other labor contractors over a two week period.

Union representative Roberto de la Cruz learned of the provision of food to the replacements in November and December through union members (Teodoro Diaz, Juan Medina, and Jorge Chavez) who were taking post-strike access.

2. Analysis and Conclusions

General Counsel alleges that Respondent has unilaterally

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81. GXC 82 was posted at the farm in the break room. Kahl noticed the leaflet in mid-December 1981. It indicated that replacements would be provided transportation, insurance and any special tools or equipment as required; that the work schedule would be nine-hours per day, six days per week at $4.21 per hour. Employees would be provided with suitable housing and regular meals for which they would be charged the actual cost of approximately $6.00 per day. In consideration of the above, a commission of approximately 12 percent of the wage rate would be paid to the labor contractor.

changed wages and working conditions since November 19, 1981, by providing benefits to its agricultural employees (replacement workers) which it had not previously provided — specifically room and board, transportation and insurance. It is undisputed that Respondent provided transportation for the replacement workers which they had done previously during the strike of 1976. It is also undisputed (GCX 82) that Respondent agreed to pay a labor contractor a commission of approximately 12 percent of the wage rate in return for the contractor's provision of room, board and insurance to the workers.

Under the ALRA, an employer utilizing a labor contractor is deemed the employer for all purposes of the Act. (Vista Verde Farms (1977) 3 ALRB No. 91); Security Farms (1978) 4 ALRB No. 67.) In Pacific Mushrooms Farms (1981) 7 ALRB No. 28, this Board held that the provision of free room and board to non-strikers, as well as changes in vacation policy, were economic inducements to abandon the strike in violation of section 1153(c) of the Act. Moreover, since these changes were implemented without notice to or negotiation with the union, they also violated section 1153(a) and (e). (See O'Land, Inc. (1975) 206 NLRB 210 [84 LRRM 1378].)

In the instant case, Respondent provided only free transportation. The replacement workers were charged six dollars per day for room and board. While such a change in policy was unilateral (no notice was given to the union) and in violation of 1153(a) and (e) of the Act, I do not find sufficient evidence that the new policy was intended to or had the effect of discouraging union activity in violation of section 1153(c). Unlike the situation

in Pacific Mushroom Farms, supra, there is no indication as to what extent, if any, the provision of room and board at a cost of $6.00 per day constituted an economic inducement to abandon the strike.

Respondent seeks to justify its action by business necessity, citing Pilot Freight Carriers, Inc. (1976) 223 NLRB 286, where replacements were permitted to use company equipment without charge. There, Respondent made a showing that the replacement workers were actually afraid to utilize their own vehicles and to drive alone at a time when the strike was still in effect. Respondent has made no such showing on this record. All allegations of strike-related violence substantially post-date the decision to provide free transportation. Here, Respondent's conduct appears to have been economically motivated. The provision of free transportation allowed it to continue operations. But the NLRB has held that economic considerations alone would not justify a unilateral change. (Airport Limousine Service, Inc. (1977) 231 NLRB 932 [96 LRRM 1177].) Neither exigent circumstances nor a business necessity would relieve the employer of its duty to notify and to bargain with the union. Such defense requires bargaining to the extent the situation permits. (See Local 777, Democratic Union Organizing Committee v. N.L.R.B. (1978) 603 F.2d 862, 890 [99 LRRM 2903].) This Board has approved the NLRB rule that economic necessity alone is insufficient to justify unilateral change without prior notice to and bargaining with the union. (See Joe Maggio, Inc. (1982) 8 ALRB No. 72.) The ALRB has indicated that particular exigencies or circumstances which might be faced to justify an employer's unilateral changes in working conditions would be decided

on a case-by-case basis.

In the instant context, Respondent has not offered any explanation as to why it did not notify or bargain with the union. No exigent circumstances have been suggested which would excuse or justify implementation of these benefits on an emergency basis. On the contrary, the union and company were negotiating after commencement of the strike regarding provisions of replacement workers (strikers) to perform certain emergency clean-up tasks. No threat of damage or harm was created by the strike itself at the time the policy was implemented which might have relieved the Respondent of its duty to notify and bargain with the union. I therefore conclude that Respondent's unilateral provision of free transportation as well as room and board at $6.00 per day to replacement workers constituted a violation of section 1153(e) of the Act.[51/]

O. Implementation of New Wage Rates on December 18, 1981 (Paragraph 20(e)(9))

1. Facts

As previously discussed, by letter of 18 December 1981, farm manager James Kahl informed the union of the implementation of the wage rates contained in the company's latest offer made on the evening of November 8-9 (GCX 62, 68). The new rates involved increases for hourly, incentive and piece rate employees, and

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82. As there is no evidence that the "insurance" provided by the labor contractor was any different from the workers' compensation insurance Respondent was compelled under State law to provide (see section 17½ of Article 20 of the California Constitution; section 324 of the California Labor Code), I conclude that there was no change in this regard and recommend dismissal of the allegation as it relates to the provision of insurance.

elimination of crew leader positions (thus resulting in somewhat lower wage rates for the latter categories). Employees simultaneously received notification of the new rates. (GCX 69 A and B.) Kahl and negotiator Horne testified that they viewed the negotiations as deadlocked at this time and that the company did not have any room for movement whatsoever on any of the outstanding issues. (R.T. Vol. VI, p. 25, 11. 3-7; Vol. XXXIII, p. 65, 11. 9-12.)

2. Analysis and Conclusions

General Counsel contends that Respondent unilaterally increased the wages of hourly, incentive, and piece rate employees, and unilaterally reduced the wages of its incentive crew leaders. There is no dispute about the implementation of these changes. The only question is whether or not the negotiations had reached a legitimate impasse.

As I find that no bona fide impasse existed on 18 December (both the company and the union had room for movement on various issues), I conclude that Respondent violated section 1153(e) of the Act by its unilateral conduct. Since the raises presented significant increases to non-strikers during the strike, and were implemented without further justification, I further find that the increases constituted an indirect invitation to the strikers to abandon the strike as well as an inducement to replacement workers not to join the strike and are therefore violative of section 1153(c) of the Act. (See pacific Mushroom Farms (1981) 7 ALRB No. 28, review denied Ct.App., 1st Dist., Div. 1, May 5, 1982.)

Under the NLRB, whether or not a bargaining impasse exists

is a matter of judgment: Factors relevant to a finding of a legitimate bargaining impasse include the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement and the contemporaneous understanding of the parties. (Taft Broadcasting Company (1967) 163 NLRB 475, affirmed (D.C. Cir. 1968) 395 F.2d 622.)

In the instant case, the bargaining history of the parties presents a mixed picture. While there have been two prior contracts at Ventura and a relatively smooth relationship at Soquel, there had also been a strike in 1976 and all parties conceded that there had been serious relationship problems involving management, the workers, supervisory personnel, and the union.

Respondent's implementation of the crop protection program at the commencement of negotiations and questionable good faith at the table as discussed supra also belies the bona fides of the impasse.

While a long and unsuccessful bargaining history is relevant to a finding of impasse and the parties herein certainly engaged in lengthy and unsuccessful negotiations, simple mathematical calculation of the number of meetings is not determinative of this factor. Respondent itself conceded that major movement was made during the sessions of October 30 through November 8. On November 19, when the union moved further on the critical duration issue, the chief company spokesman asserted that the parties seemed very close but so far apart. Respondent's contentions to the contrary (see Respondent Brief, p. 346), the

parties were in fact getting very close on wages, and indeed the company had indicated that it would make economic concessions if there was further movement from the union on duration. The company's indication of further movement, coupled with the union's actual movement, support the finding that an impasse had not yet been reached. That Respondent lost interest in the negotiations from the date of the November 19 strike hardly justifies its unilateral implementation of wages.

The record also indicates that while wages were an important economic issue, the key to the negotiations was duration. Although there were critical differences between the parties as of 9 November, I see no continuous deadlock which would logically point to an impasse. The union made a significant concession on duration and was willing to explore other alternatives to contract resolution. The company, on the other hand, issued ultimata (see telegrams of December 3 and December 10 — GCX 64, GCX 66).

Finally, there was certainly lack of agreement between the parties regarding the impasse situation. The union had steadfastly refused to admit as much, and made what it perceived to be a significant concession as late as 19 November. The company, on the other hand, seemed intent as early as August 1981 on insisting that impasse was near. While such "posturing" of the parties is perhaps not unexpected in this setting of historical relationship difficulties, I find insufficient evidence that the impasse declared on 18 December was legitimate and therefore conclude that the wage changes — implemented as they were without consent with and/or negotiation of the union were violative of section 1153(a), (c) and

(e) of the Act.[83/]

P. Enforcement of Rules Regarding Wearing of Tennis Shoes (Paragraph 20(e)(10))

1. Facts

Prior to the strike Respondent maintained a rule that workers were required to wear safe shoes while at the ranch. Tennis shoes were not considered safe.[84/] Workers were told about this rule when they entered the farm for initial training. (GCX 120). A progressive disciplinary procedure was utilized for violators of the policy — verbal warning, written warning, suspension, etc. Leeway was given workers who were unable to immediately pay for new shoes, and they would be allowed to wait for their next paycheck (and perhaps be provided with boots in the interim). (R.T. vol. VI, pp. 26-28.)

Farm manager James Kahl recalled one suspension occurring ' because of violation of this rule, and testified that through the date of the hearing, the rule had remained in effect and had "been enforced basically like before the strike". (R.T. vol. VI, p. 29, 11. 13-15, 26-28; p. 30, 11. 1-3.) While Kahl conceded that some new people (post-strike) came into the farm wearing tennis shoes,

83. I reject Respondent's factual assertion that neither side made any movement from November 8. The union's proposal of 19 November clearly constituted a concession from its previous position regarding duration, and provided the company with the protection from economic disadvantage which it had sought. There was some evidence that the company had indicated movement on its disciplinary proposal as well (see discussion of meeting of November 27), and Horne clearly indicated that there was movement on some economic issues if the union "came around" on duration.

84. Apparently, tennis shoes would not adequately grip the ground, and the cloth material was insufficient to protect the worker's feet if hit by a falling object.

they have been informed that it was against company policy. He denied that the replacement workers have generally been wearing tennis shoes on a daily basis since the November 19 strike. This policy and its enforcement (pre-and post-strike) was confirmed by Kahl's successor Hank Knaust. (R.T. Vol. VI, p. 133.)

Jorge Chavez was among the union members who took access to the ranch during the post-strike period (four to five days per week). In late December, he noticed that about 50 percent of the approximately 30 replacement workers he observed wore tennis shoes to work. In January, a majority of some 80 workers were wearing tennis shoes.

Jose B. Gonzales took access at the end of January three to four days a week for a period of two-and-one-half weeks. He would observe 10-15 people wearing tennis shoes when the workers gathered at the lunchroom. Some wore tennis shoes day after day.

Replacement worker Magdalena Ortiz went to work at the Ventura farm around the end of November 1981. On her first (and only) day on the job she overheard someone[85] from the company tell workers that it was okay to wear boots or tennis shoes. On cross-examination, Ms. Ortiz explained that she was instructed that she did not have to change out of her tennis shoes the first day, but could wear boots the next day. (R.T. vol. XVII, P. 145, 11. 1-9.)

Company office personnel Cindy Halstead, Crystal Stroup,

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85. Ms. Ortiz identified the individual (Maria) as a "tall white person, not very young but not very old either." (R.T. Vol. XVII, p. 144, 11. 14-16.)

Maria Godinez, Lisa McClester, Glenda McGill and Roxanne Ostrem all denied informing replacement workers that it was permissible to wear tennis shoes.

Picking supervisor Luis Partida confirmed that workers who wore tennis shoes would be given boots on the second day for a day or two and thereafter were expected to wear proper footwear. (R.T. Vol. XXVII, p. 76.) The policy remained the same as prior to the strike. Hank Knaust added that one person was terminated for failure to wear proper footwear (albeit not tennis shoes) following the strike (R.T. Vol. XXVI, pp. 75-77.) In the two instances where he observed individuals wearing tennis shoes (post-strike), Mr. Knaust instructed the workers to report back with proper footwear. (R.T. Vol. XXVI, p. 91.)

2. Analysis and Conclusions

General Counsel alleges that Respondent has unilaterally discontinued a safety rule concerning the wearing of protective footwear since the date of the strike. Specifically, Respondent is charged with permitting replacement workers hired following the 19 November strike to wear tennis shoes in violation of a previously promulgated company rule which prohibited such footwear.

There is some evidence that union access takers Jorge Chavez and Jose B. Gonzales observed numerous replacement workers wearing tennis shoes on more than one occasion. On her only day at work, replacement worker Magdalena Ortiz overheard a supervisor tell a worker that wearing boots or tennis shoes was permitted. However, Respondent personnel (farm manager James Kahl, agricultural manager Hank Knaust, picking supervisor Luis Partida, and a panoply of

office workers) vigorously denied any change in company policy. Since enforcement of the rule was by no means uniform even prior to the strike — as employees were routinely given grace periods, or permitted extra time to buy shoes — I find the record evidence insufficient to support General Counsel's theory that company policy was changed. As many more "new" employees were hired during the period immediately following the strike, I do not find it particularly unusual that the recently arrived workers would take a day or two to buy appropriate gear. Respondent's policy — pre- and post-strike — was to allow a certain leeway for the new workers. At least one person was disciplined (fired) for violation of the footwear rule post-strike and General Counsel can point to only one instance of similar discipline (suspension) pre-strike. (R.T. vol. VI, p. 29.) I therefore recommend that this allegation of the complaint be dismissed.

VII. STRIKE-RELATED ISSUES

A. Solicitation of Replacement Workers (Paragraph 20(i))

1. Facts

Replacement worker Magdalena Ortiz testified that she worked for one day around the end of November at Respondent's Ventura farm. She was not informed of the strike until after she arrived at the plant.

Union steward Edmundo Garcia recalled boarding a bus of replacement workers in Santa Paula approximately five days after the strike commenced. As the bus neared Respondent's farm, Garcia stood up and introduced himself as a striker, and requested that the

replacements not break the strike. A man on the bus reacted quickly stating that "he didn't know what was going on", and indicated that he would cooperate. (R.T. Vol. XVIII, p. 28, 11. 12-24.)

Respondent personnel clerk Maria Godinez testified that she began handling applications for replacement workers in mid- or late-December. She greeted the workers, asked them if they were aware of the strike in progress, and "left the decision to cross the picket line to the individual worker". (R.T. Vol. XXX, p. 51, 11. 17-25.)

Hank Knaust detailed the efforts to hire replacement workers (other than through labor contractors) as follows: Newspaper and radio advertisements were run in the local media starting in January 1982. In each advertisement, the company inserted a paragraph notifying the applicants that a labor dispute was in progress (RX 45). Knaust instructed personnel clerk Godinez that all new replacement workers were also to be informed of the labor dispute when they came into the office prior to being hired. (R.T. Vol. XXVI, p. 74.)

2. Analysis and Conclusions

General Counsel alleges that Respondent has solicited for employment and employed workers without first informing them that the UFW was on strike. General Counsel's theory is essentially that recruitment without informing the potential replacement worker of an existing strike creates a circumstance such that the replacement worker loses any real choice as to whether or not to work for the recruiting company (during a strike). Thus, such practice is unlawful restraint, coercion, and interference in violation of

section 1153(a) of the Act.

This Board has previously noted that General Counsel's theory is not so. unreasonable that evidence based upon it should be excluded, noting the statutory mandates of 7 USC section 1045(b)(3) and California Labor Code section 970(d), 973, and 1696(3).[86/] (Sun Harvest, Inc. (1980) 6 ALRB No. 4.) The importance of protecting the workers' right to impart and receive information concerning a strike has already been articulated in the ALRB's authorization of post-strike access to the work site in the absence of alternative means of communciation. (Bruce Church (1981) 7 ALRB No. 20; Growers Exchange, Inc. (1982) 8 ALRB No. 7.)

In the instant case, however, the uncontroverted evidence reflects that Respondent's newspaper and radio advertisements (RX 45) contained references to the strike. Office clerk Maria Godinez also testified that she informed all potential replacement employees of the existence of the strike upon their entry to the plant. The only replacement worker to testify in this regard — Magdalena Ortiz — confirmed that she was informed of the strike when she had arrived.

Nor are the references by Edmundo Garcia to a potential replacement worker's remarks particularly supportive of General Counsel's case. It is equally possible that this unidentified recruit did not know about the strike, or did not know why Mr.

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86. California Labor Code section 1696(3) requires farm labor contractors or their licensees, who transport replacement workers to any plant where a strike is in progress, to inform the workers that such conditions exist. Violation of this Act is a misdemeanor.

Garcia was standing and speaking to the group of workers on the bus. Apparently no others on the bus made any similar statement. I therefore cannot conclude from this record that the Respondent has violated the Act by breaching a statutory duty to inform potential replacement workers of the on-going strike. These isolated incidents, weighed against Respondent's evidence of strike references in all advertisements and verbal notification to all potential replacement workers upon their arrival at the plant, lead me to recommend dismissal of this allegation of the complaint.

B. Post-Strike Access (Paragraph 20(h)(1), (2), (3))

1. Facts

In December 1981,[87/] Roberto de la Cruz and James Kahl met to discuss post-strike access.[88/] The union claimed that it had the legal right to take such access. The company contended that the law in the matter was as yet unsettled, but would permit "controlled and regulated access" to allow the union to speak with replacements. De la Cruz recollected that the parties originally agreed that the

87. Roberto de la Cruz placed the date in November but as no replacements had been hired at least through Thanksgiving and the time sequence was confirmed by Hank Knaust (R.T. vol. XXVI, pp. 9-17), I credit James Kahl's recollection in this regard. (R.T. Vol. XXIII, P. 133.)

88. Roberto de la Cruz explained the reasons for requesting access as follows: To inform replacement workers of the status of on-going negotiations; to inform them that the union was the employees' exclusive bargaining representative, and to explain the history of the strike in an attempt to convince them to join. According to de la Cruz, it was impossible to communciate with the replacement workers at the picket line or through use of a sound system given the plant set-up (one road leading into the plant, blocked by a gate which was opened by guards with the road leading another 200-300 yards into the plant where workers departed from vehicles) and the inability of the union to communicate with replacements at their residences. (R.T. Vol. IX, p. 111-112.)

union would have the right to take access an hour before work, during lunch, and an hour after work. The union would give advance notice to ascertain the number of replacement workers on a given day (one union organizer was allowed per every 15 workers). Access takers would be led through the gate by a company representative, and then escorted to the area where the replacements were eating or entering/leaving work. (R.T. Vol. IX, p. 107, 11. 3-21.)

James Kahl, on the other hand, recalled that access was agreed to only for the lunchtime period, and that access could only be taken in the lunchroom area. Kahl notified the supervisors of the agreement, advised them to stay clear of the lunchroom area whenever access was taken, but that they could do any work that they had to do in the area without interruption (e.g. paperwork and time card duties).

Approximately one week later, de la Cruz telephoned Kahl to meet concerning the access agreement that had been previously reached. The union was concerned that supervisors were observing the access taken, that the access-takers were being restricted exclusively to the eating area, or being stalled at the entrance gate. The company was concerned that the access-takers followed workers into work areas or approached the time card area where they might observe names of the replacement workers or interfere with the supervisors' work, and also expressed concern about the conduct of union representatives who allegedly made derogatory remarks to supervisors when taking access. Following the second discussion, Kahl explained to the supervisors that the access takers could go outside the lunchroom area to speak with workers who were eating

their lunch, and that the access-takers agreed not to look at time cards. Thus, supervisors could stay in the area to do their normal work, but could not listen to or observe the access takers.

While no other access-related problems were communicated between the parties in the ensuing days, witnesses detailed various problems they experienced: Teodoro Diaz described an event in late December when security guard Bob Wilson approached access takers who were speaking to one of the replacement workers in the lunchroom and observed the conversation at a distance of 12-15 feet for about 20 minutes. Approximately two weeks later, Diaz attempted to speak with a replacement worker in the lunchroom when he noticed that supervisor Julio Perez was seated at the window next to the time clock looking in Diaz' direction. (R.T. Vol. XIV, pp. 43-44.)

Juan Medina described an occasion between December 1931 and January 1982 when supervisor Enrique Hernandez called Medina over to tell the latter that he had to remain in the lunchroom area. Hernandez had been standing for approximately one-half hour by the restroom approximately 30 feet away from the area where access takers were speaking to workers. Supervisor Julio Perez was seen by the time clock for one-half hour observing Juan Medina speak to workers at a distance of approximately 10 feet. Two-to-three days later, Medina noted Hernandez observing an access-taker/worker conversation about 30-40 feet away (in the same area near the restroom). Julio Perez was also at the time card area during this period. On other occasions after access had been initiated, Medina noted supervisor Samuel Monroy and a "checker" by the name of Gregory (Tuttle) at a distance of some 15 feet standing outside the

time clock area for 10-25 minutes and observing the access takers speak to the workers. He also observed security guard Bob Wilson staring from the dining room toward Medina and a replacement worker.

For the company, supervisor Julio Perez testified that he was in charge of escorting the access takers on a daily basis at lunch time. He would -help sign-in the access takers, lead them to the lunchroom, and allow them to proceed to the lunch area. Perez would then go into his office (downstairs from the lunchroom and right behind the time clock) and eat lunch. He denied ever calling over Mr. Medina or interrupting the latter's efforts to speak with workers. On one occasion, he observed Jorge Chavez looking at time cards. After informing Hank Knaust of this problem, Perez was told to post himself next to the time clock and make sure that the union people were not looking at them. But he was to position himself so that he could not observe the workers and access takers in the lunchroom area. He denied seeing or hearing any conversation or interfering with any conversation between the access takers and the worekrs thereafter.

Supervisor Enrique Hernandez testified that on one occasion he told Juan Medina that access-taker Jose Gonzalez was speaking with a replacement worker by the cooler -- some 30 feet outside the lunchroom area, contrary to Hernandez' understanding of the agreed upon area for access. He denied standing by the restroom on other occasions.

On 28 January 1982, picketers yelled epithets and pounded on the cars of entering replacement workers. On the next day, picketers threw gravel and rocks. On 31 January 1982, grower

Salvador Soils suffered similar indignities, as did replacement worker Ramon Ibarra whose car was rocked from side to side. Pedro Fernandez was also threatened and had his car window pulled out of alignment.

On 1 February 1982, the picketers yelled threats and obscenities at Hector Cerda and pelted stones at his car. A side window was broken and Cerda injured his hand from the shattered glass.

Based on the picket line violence, farm manager Hank Knaust decided on that day to discontinue access and notified the union by telegram of this decision (GCX 83).[89/] The company thereafter requested its attorneys to modify an existing temporary restraining order (RX 43), which was finally signed on 3 March 1982. Between 1 February and 4 March 1982, Knaust received one report of a broken bus window (approximately 15 February) and two incidents of female replacement workers who were allegedly followed home (approximately February 8 and 9). On 12 March, the company decided to repermit access as the situation had "cooled down" (RX 44). Access recommenced the following week and was taking place through the end of the hearing in April 1982.

2. Analysis and Conclusions

General Counsel alleges that Respondent has denied and/or frustrated attempts by the UFW representatives to take access to the

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89. The telegram explained that: "(B)ecause of violence at the premises of West Foods, Inc. by striking employees and other persons who may have been permitted access to West Foods, effective immediately no further access by UFW representatives and/or striking employees would be permitted . . . ."

work site by (1) unreasonably limiting the areas in the plant in which the union representatives were allowed to communicate with the workers; (2) engaging in surveillance and other obstruction of the communications between the union representatives and employees at the plant; and (3) absolutely denying access.

In Bruce Church (1981) 7 ALRB No. 20, the ALRB held that "an employer's denial of strike access is an unfair labor practice when the union has no effective alternative means of communication with the non-strikers." The Board subsequently noted that no effective alternative means of communication was apparent in the open field situation, but that in the nursery setting alternative means of communication may be possible because of the limited access to the nursery. (Growers Exchange, Inc. (1982) 8 ALRB No. 7, citing Sunnyside Nurseries (1980) 6 ALRB No. 52.) And the Board has denied post-strike access to a grower's packing she which was found to be more akin to the industrial plant to which the NLRB has historically denied access. (Bertuccio Farms (1982) 8 ALRB No. 70.)

Respondent herein has conceded that no alternative means of communication existed pursuant to this Board's ruling in Bruce Church, supra. (See R.T. Vol. XX, p. 77, 11. 24-28; p. 78, 11. 1-14.)[90] The issues for decision, then, are whether the company unreasonably limited access, whether supervisory personnel engaged in unlawful surveillance and interference, and whether or not access

90. Respondent apparently has changed its position on this issue (Respondent's Brief, pp. 352-353). I conclude, however, that Mr. de la Cruz' testimony is sufficient to support a finding that the union had no effective alternative means of communication in the instant context.

was denied in violation of the Act following picket line violence in late January-early February 1982.

a. Limitation of Access to Areas Where Union Representatives were Allowed to Communicate With Workers

While both parties concede that there was original agreement to limited post-strike access, there is disagreement as to the specific terms of this voluntary accord. The union understood that representatives would be able to speak with workers wherever they were eating. The company recalled that the agreement limited the site of access to the immediate lunchroom area. Regardless of the accuracy of either parties' recollection, it is clear that the parties met on a second occasion in December. Both sides discussed the problems they were having (the company accused union representatives of looking at time cards; the union complained of tardiness in permitting entry into the premises, and supervisorial surveillance) and as a result of the second meeting, all parties understood that access would include all areas where workers were eating. Supervisors were instructed not to interfere with the access takers, but to go about their business in the vicinity if they had such business. No further complaints by either side arose until the incidents of January 28-February 1. On this record, I cannot conclude that any unreasonable limitations were placed on the access taken during the early period of the strike. The parties voluntarily agreed upon a modus operandi, and discussed differences of interpretation. There is no evidence to suggest that the parties did other than misinterpret the original accord. I cannot conclude that a violation has been proven by the mere fact that the company

subsequently agreed to an expansion of the access area and thus recommend dismissal of this allegation of the complaint.

b. Surveillance and Interference

General Counsel's evidence of surveillance and interference was also less than compelling. Although Messrs. Diaz and Medina testified in sincere, straightforward manners,[91/] the responsible supervisory personnel denied the allegations in equally precise terms.[92/] The company policy not to interfere with the union representatives was explicit, although supervisors were told to complete whatever work they had in the area. This Board has previously held that the mere presence of the supervisor in the fields as part of his normal duties was insufficient evidence to establish unlawful surveillance under 1153(a) of the Act. (See Harry Carian Sales (1980) 6 ALRB No. 55.) I thus conclude that insufficient evidence of surveillance or interference has been proffered in the instant case as well.

c. Denial of Access

I reach a different conclusion with respect to Respondent's decision to deny access from 1 February to 12 March 1982. It is clear that there were serious incidents of violence at the picket line from 28 January through February 1 which I do not condone. A

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91. As discussed, with respect to Mr. Medina's testimony concerning the allegation of supervisors performing "A" operator equipment work, I found Mr. Medina's recollection of details to be somewhat imprecise.

92. Although security guard Bob Wilson did not testify, I do not find the allegations relating to his conduct sufficient to constitute a violation of the Act. There is no evidence that he was away from his normal duty post or not performing his normal job during the period in question.

denial of access may be permissible in an atmosphere of coercion which has resulted from repeated and aggravated violent acts. But this Board has called for the "most scrupulous judgment" in deciding that a "form of communication has become so identified with the noxious conduct as to have lost its protection as an appeal to reason." (Growers Exchange, Inc. (1982) 8 ALRB No. 7, p. 7.) There, the Board rejected Respondent's justification of denying access because of isolated acts of violence. There, as here, there is no evidence of any violence associated with the access takers themselves. Acts of violence apparently committed by union adherents, but not related to the taking of access itself are normally insufficient to deprive the striking workers of the right to communication. (Growers Exchange, Inc., supra.) Respondent's reference to acts taken by the access takers were not proven at the hearing. The evidence that Jose Conchas allegedly brandished a hammer while removing clothing and materials from his locker certainly cannot be supportive of the company's position in this regard as Respondent permitted access directly thereafter.[93/] it was not until the picket line violence that Respondent reconsidered its position.

Nor does Respondent's reliance upon the revised temporary restraining order dispel the conclusion that its unilateral conduct was inappropriate under the circumstances. While certain additional "safeguards" were obtained in the second temporary restraining order

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93. Because of the imprecision of supervisor Julio Perez' testimony in this regard, and the specific denial of the incident by Conchas, I do not find that this violent conduct occurred as alleged by Respondent.

which were not present in the first,[94] the fact remains that the company unilaterally took this action in response to incidents unrelated to the taking of access. The violence and intimidation which occurred on 28 January through 1 February 1982 were independently enjoinable, or enjoinable as unfair labor practices. (Growers Exchange, Inc. (1982) 8 ALRB No. 1, citing C.C.P. section 527(3); Kaplan's Fruit and Produce (1979) 26 Cal.3d 60; California Labor Code section 1160.4.) The more appropriate response, as suggested both by the Board and by the courts, would be to deal with the unlawful conduct directly, rather than indirectly by denial of access. I thus conclude that Respondent was without sufficient justification to deny access rights for six weeks in a context where the parties had agreed that limited access was a necessary means of communication between the union and the replacement workers, where there were no incidents of violence related to the access taking itself, but were limited to the picket line conduct of union adherents over a three-day period. I therefore conclude that Respondent has interfered with employee rights guaranteed under Labor Code section 1152 in violation of section 1153(a) of the Act, and shall recommend the appropriate remedy therefore.

VIII. SUMMARY

I find that Respondent violated sections 1153(a) and (e) of the Act by its implementation of a crop protection program which resulted in demotions, job transfers, layoffs, and reductions in

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94. [Compare Rx 48 with RX 43.]

work hours of bargaining unit employees from on or about July 15, 1981 through and including November 19, 1981. Respondent has further violated sections 1153(a) and (e) of the Act by its failure to bargain in good faith with the UFW; by its failure to provide and refusal to provide in a timely manner relevant information requested by the UFW during the negotiations; and by the following unilateral changes in wages, hours and working conditions: variations in wages of plant maintenance worker John Lopez from September 1978; variations in wages and classification of plant maintenance worker Francisco Sandoval from September 1980; increase in case crew wages in May 1979; change in the hourly work schedule of sweepers from August 1980; discontinuance of the four-hour minimum pay upon contract expiration in September 1981; importation of mushrooms not grown at Ventura for packing and shipping at West Foods Ventura in November 1980 and October 1981; provision of free transportation and room and board at $6.00 per day to replacement workers following the strike of November 19, 1981; and wage adjustments of 18 December 1981 in the absence of bona fide impasse (which I also find to be violative of section 1153(c)). Finally, I find that Respondent violated section 1153(a) of the Act by its denial of a post-strike access to union representatives from February 6 through March 12, 1982. I recommend dismissal of all other fully litigated allegations raised during the hearing. While I am rejecting many of the allegations raised in General Counsel's Sixth Amended Complaint, I find that the proven violations have had a profound impact upon the bargaining unit employees at West Foods Ventura. Because of the importance of preserving stability in California agriculture, and

the need for assuring that problems between the parties are resolved at the bargaining table and not in the fields (farms), I find the violations to be very serious, and recommend the following:

IX. REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of section 1153(a), (c) and (e) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent violated Labor Code section 1153(a) and (e) by failing and refusing to bargain in good faith and by its conduct was responsible for the parties' failure to reach an agreement, I shall recommend that Respondent be ordered to meet and bargain collectively with regard to wages, hours and other terms and conditions of employment in good faith, to provide relevant information requested by the union for the purpose of conducting the negotiations, and to make its employees whole for loss of wages and other economic losses they incurred as a result of Respondent's refusal to bargain, plus interest in accordance with the make whole formula set forth in Adam Dairy dba Ranch de Rios (1978) 4 ALRB No. 24, review denied by Court of Appeals, Second District, Division Three, March 17, 1980.[95/] Although I find that Respondent's bad

95. In light of Adam Dairy, supra, I specifically reject General Counsel's suggestion that a determination be made at this phase of the hearing with respect to awarding fringe benefits directly to the union.

faith conduct was manifest as early as July 15, 1981 (date of implementation of the crop protection program), I recommend that the make whole remedy be applied from September 6, 1981 -- the date of expiration of the collective bargaining agreement[96/] and should continue until such time as Respondent commences to bargain in good faith with the UFW, and thereafter reaches an agreement or bargains to bona fide impasse.

Having found that Respondent violated section 1153(a) and (e) by the implementation of its crop protection program, I shall recommend that it be ordered to make whole all of the employees affected by this conduct for any losses they may have suffered as a result of Respondent's unlawful action by payment to them of a sum of money equal to the wages and other benefits they would have earned from 15 July 1981 through 19 November 1981 had such program not been implemented, with interest at the rate formulated by applicable Board precedent and computed in accordance with applicable Board precedent. I shall further recommend that the Respondent shall be ordered to preserve and upon request make available to the Board and its agents for examination and copying all relevant information necessary for the calculation of the back pay and/or make whole due them.

Because I have found that Respondent has violated section 1153(a) and (e) of the Act by its unilateral changes in wages, working conditions, and terms of employment, I shall recommend that

96. An earlier commencement date of (contractual) make whole liability would be punitive in light of the parties' then-existing collective bargaining agreement.

upon request of the UFW, it rescind the unilateral changes heretofore made in its employees' wages, terms and conditions of employment. I shall also recommend that it be ordered to make whole all the employees affected by the discontinuance of the four-hour minimum guarantee for any losses they may have suffered as a result of Respondent's unlawful action by payment to them of a sum of money equal to the wages and other benefits they would have earned from August 1981 had such unilateral change not been implemented, with interest at the rate formulated by applicable Board precedent and computed in accordance with applicable Board precedent.

Having found that Respondent unlawfully denied post-strike access, I shall recommend that it permit access to its premises by UFW representatives or other union agents for the purposes of communicating with non-striking employees during any period when there is a strike in progress at Respondent's premises. Said access takers may visit the Respondent's property for a period not to exceed one hour during the working day for the purpose of meeting and talking with the employees during their lunch period, at such location or locations as employees eat their lunch (or for longer periods of time and over an expanded area if the parties voluntarily agree). If there is no established lunch break, the access period shall encompass the time when employees are actually taking a lunch break, whenever that occurs during a day. Access shall be limited to one UFW representative or union agent for every 15 workers on the property. Said access shall continue until a voluntary agreement on strike access is reached by the parties or until the union ceases to be the collective bargaining representative of the Respondent's

employees, whichever occurs first.

In order to further effectuate the purposes of the Act and to insure the employees the enjoyment of the rights guaranteed them in section 1152 of the Act, I shall also recommend that Respondent publish and make known to its employees that it has violated the Act, and has been ordered not to engage in future violations of the Act. (M. Caratan, Inc. (1978) 4 ARLB no. 83; 6 ALRB No. 14 (1980) review denied by Court of Appeal, Fifth District, May 27, 1980.)

Upon the basis of the entire record, the findings of fact and conclusions of law, pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, West Foods, Inc., its officers, agents, representatives, successors, and assigns, shall: 1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith as defined in Labor Code section 1155.2(a) with the UFW, as the certified exclusive collective bargaining representative of Respondent's agricultural employees; and in particular by unilaterally changing employees wages or terms or conditions of work, implementing a crop protection program (or lockout); and/or failing or refusing to provide relevant information requested by the union for the purpose of conducting negotiations.

(b) Denying reasonable access to Respondent's premises, to any UFW representative or other union agent for the purpose of communicating with non-striking employees while there is

a strike in progress at Respondent's premises.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self organization, to form, join, or refrain from forming or joining a labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to refrain from any and all such activities.

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

(a) Upon request, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to such employees' rates of pay, wages, hours, and other terms of employment, provide such relevant information as requested by the UFW to conduct the negotiations, and if an agreement is reached, embody such agreement in a signed contract.

(b) Upon request of the UFW, rescind the unilateral changes heretofore made in its employees' wage rates and terms and conditions of employment.

(c) Make whole its agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW. "Make whole" shall extend from September 6, 1981 until the date in which Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(d) Make whole all employees affected by Respondent's

crop protection program, either through layoffs, reductions in number of hours, or transfers to more onerous duties, as well as by Respondent's discontinuance of the four-hour minimum guarantee, for all losses of pay and other economic losses they have suffered as a result of such conduct, such amounts as to be computed in accordance with established Board precedent, plus interest thereon, computed in accordance with the Board's decision and order in Lu-Ette Farms, Inc. (August 18, 1982) 8 ALRB No. 55.

(e) During any period when there is a strike in progress at Respondent's premises, permit access to its premises by UFW representatives or other union agents for the purpose of communicating with non-striking employees. Said access takers may enter the Respondent's property for a period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the access period shall encompass such lunch break. If there is no established lunch break, the access period shall encompass the time when employees are actually taking their lunch break, whenever that occurs during the day. Access shall be limited to one UFW representative or union agent for every 15 workers on the property. Said access shall continue until a voluntary agreement on strike access is reached by the parties or until the union ceases to be the collective bargaining representative of Respondent's employees, whichever occurs first.

(f) Preserve and, upon request, make available to this Board or its agents, for examination, photocopying and otherwise

copying all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to the determination, by the Regional Director, of the amounts of make whole and interest due under the terms of this order.

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

(h) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this order, to all agricultural employees employed by Respondent any time during the period from May 1979 to the present.

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

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

(k) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors

and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

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

DATED: June 17, 1983

STUART A. WEIN
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Oxnard Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we, West Foods, Inc., had violated the law. After a hearing at which all sides had an opportunity to present evidence, the Board found that we did violate the law by bargaining in bad faith with the UFW regarding a collective bargaining agreement; by failing to provide relevant information requested by the union for the purpose of conducting negotiations; by changing wage rates and terms and conditions of employment without first negotiating with the UFW; by implementing a crop protection program; and by denying reasonable access to our premises to union representatives for the purpose of communicating with non-striking employees while there was a strike in progress. The Board has told us to post and publish this Notice. We will do what the Board has ordered as to do.

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

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

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

WE WILL NOT make any changes in your wages, hours or conditions of employment without negotiating with the UFW.

WE WILL NOT refuse to allow agents of your certified bargaining representative to enter our property at reasonable times during a strike at our property so that they can talk to the employees who are working;

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

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

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW and of the implementation of a crop protection

program, and of the discontinuance of the four-hour minimimum guranteee.

DATED: WEST FOODS, INC.

By: ______________________________
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 528 South A Street, Oxnard California 93030. The telephone number is (805) 486-4475.

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

DO NOT REMOVE OR MUTILATE