Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LU-ETTE FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 83-CE-54-EC 11 ALRB No. 20

DECISION AND ORDER

On December 20, 1984., Administrative Law Judge (ALJ) James Wolpman issued the attached Decision in this matter. Thereafter Respondent and the United Farm Workers of America, AFL-CIO (UFW) timely filed exceptions to the ALJ's Decision, and briefs in support thereof.

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

The Board has considered the record and the ALJ ' s Decision in light of the exceptions[2/] and briefs of the parties

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

2/We decline to adopt the UFW's suggestion that we order Respondent to make health insurance contributions in the amount necessary to provide the same level of benefits as previously provided through the expired Collective Bargaining Agreement. Like the National Labor Relations Board, in cases where a respondent ceases making contributions to benefit funds as are required under the parties' contract, we will order it to make

(Fn. 2 cont. on p. 2.)

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

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB) hereby orders that Respondent Lu-Ette Farms, Inc., its owners, officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing to provide health insurance contributions for its agricultural employees, failing to pay the differential rate for the packing of 30 lettuce heads per carton, and failing to pay for standby time after one hour of waiting where frost conditions exist.

(b) Failing to provide bus transportation to lettuce harvest employees and failing to provide a new knife each season to cutter/packers and gloves each week to cutter/packers and closer and loaders.

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

2. Take the following affirmative actions which are

(Fn. 2 cont.)

such payments and to make its employees whole for all economic losses they suffered as a result of its failure to make the payments. (See i.e., Wayne's Olive Knoll Farm d/b/a Wayne's Dairy (1976) 223 NLRB 260 [92 LRRM 1229] .)

[3/]The parties' Collective Bargaining Agreement was extended to January 15, 1979 instead of to January 15, 1980, as stated in the ALJ's Decision. (See Lu-Ette Farms, Inc. (1982) 8 ALRB No. 91.)

deemed necessary to effectuate the policies of the Agricultural Labor Relations Act (ALRA or Act):

(a) Make health insurance contributions for its agricultural employees in the amount and on the terms and conditions specified in the expired Collective Bargaining Agreement with the UFW, and continue such payments until Respondent negotiates in good faith with the UFW to a new agreement or to impasse.

(b) Pay the differential specified in the expired Collective Bargaining Agreement for packing 2-5- dozen (30) heads of lettuce per carton and pay lettuce harvest employees for the time they wait to begin work when frost conditions exist as provided for in the Agreement.

(c) Provide bus transportation (one bus per crew, with a pick up point in Calexico) for lettuce harvest employees and provide a new knife each season to cutter/packers and new gloves each week to cutter/packers and loader and closers.

(d) Make no change in any of the above terms and conditions of employment without notifying the UFW and offering it the opportunity to bargain over such changes, and thereafter bargain to agreement or impasse.

(e) Make whole its agricultural employees for all economic losses they have suffered as a result of Respondent's failure to provide health insurance coverage and its failure to provide bus transportation, as described above.

(f) Make whole all members of its lettuce harvest crews for the earnings they lost as a result of the failure to

pay the required differential for packing 2½ dozen heads of lettuce per carton and as a result of the failure to pay standby time during frost conditions, as provided in the expired Collective Bargaining Agreement, from December 1, 1982 to the date hereof, and thereafter until there has been notice, and if requested by the UFW, bargaining to agreement or impasse, plus interest thereon computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(g) Make whole its cutter/packers for the economic losses to them of having to provide their own knives to cut Respondent's lettuce and make whole its cutter/packers and its closers and loaders for the economic loss to them resulting from the failure to provide gloves; makewhole to run from December 1, 1982 to the date of this Order, and thereafter until such equipment is provided as required or until there has been notice and, if requested by the UFW, bargaining to agreement or impasse.

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

(i) 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.

(j) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time subsequent to August 24, 1983, and thereafter until Respondent commences paying its contributions to the employees' health insurance plan, commences paying the required rate differential to the lettuce harvesters, reinstates bus transportation, commences supplying its cutter/packers with knives, commences supplying its cutter/packers and its loaders and closers with gloves, and agrees to follow the standby time provisions of the parties' collective bargaining agreement, or until 30 days from the date of issuance of this Order, whichever occurs first.

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

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

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

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

Dated: September 10, 1985

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE OF AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Lu-Ette Farms, Inc., had violated the law. After a hearing in which each side had a chance to present evidence, the Board .has found that we violated the Agricultural Labor Relations Act (Act) by failing to provide health insurance to our employees, by failing to provide bus transportation to lettuce harvest employees, by failing to pay the required differential for certain lettuce harvest work, by failing to provide certain equipment and protective gear, and by failing to pay standby time when frost conditions existed, all without first notifying the United Farm Workers of America, AFL-CIO (UFW) as your representative. The Board has told us to post and publish this Notice and to mail it to those employees who worked for us between August 24, 1983 until we reinstate the practices we unilaterally abolished. We will do what the Board has ordered us to do.

We also want to tell you that the 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 do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL REIMBURSE those workers who suffered economic losses as a result of the change we made in the terms and conditions of their employment, and as a result of the failure to pay for health insurance, standby time and packout differentials.

WE WILL NOT make any change(s) in required payments or in the terms or conditions of employment for any of our agricultural workers without notifying the UFW and giving it an opportunity to bargain about such change(s).

Dated: LU-ETTE FARMS, 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 319 Waterman

Avenue, El Centro, California 92243. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Lu-Ette Farms, Inc.
UFW

Case No. 83-CE-54-EC
11 ALRB No. 20

ALJ DECISION

The ALJ concluded that Respondent violated section 1153(e) and (a) of the Act by each of the following acts; failing to provide a new knife each season for each cutter/packer; failing to provide new gloves for each cutter/packer and for each loader and closer on a weekly basis; unilaterally discontinuing its policy of paying standby time; failing to make contributions to the employees' medical plan; failing to provide bus transportation in accordance with the parties' Supplemental Agreement; and failing to pay the differential rate to the lettuce crews when they packed 2½ dozen heads per carton. The ALJ recommended that Respondent be ordered to reinstate the practices it discontinued and to make its employees whole for the economic losses they suffered as a result of its actions.

BOARD DECISION

The Board adopted the ALJ's findings and conclusions and his recommended order.

* * *

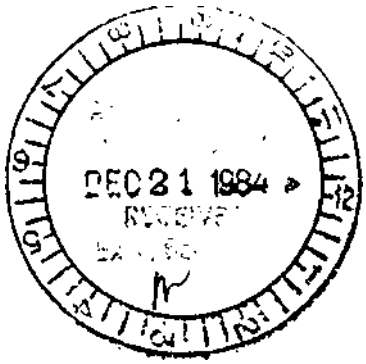
* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Case No. 83-CE-54-EC

In the Matter of)
)
LU-ETTE FARMS, INC.,)
)
Respondent,)
)
and)
)
UNITED FARM WORKERS OF AMERICA, AFL-CIO,)
)
Charging Party.)



Appearances :

Helene Cauchon
El Centro, California
for General Counsel

Ronald E. Hull
El Centro, California
for Respondent

Before: James Wolpman
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPAN Administrative Law Judge: This case was heard by me on July 24, 1984, in El Centro, California. It arose out of a charge filed by the United Farm Workers of America, AFL-CIO ("UFW") alleging that Respondent Lu-Ette Farms, Inc. violated Labor Code section 1153(e) and (a) by instituting a number of unilateral changes in working conditions without notifying or bargaining with the UFW as the certified collective bargaining representative of its employees. (G.C. Ex. 1-A.) A complaint embodying those charges issued on February 29, 1984 (G.C. Ex. 1-B), and on March 8, 1984, Respondent answered denying any violation of the Agricultural Labor Relations Act. (G.C. Ex. 1-C.)

At the outset of the hearing, the parties informed me that the allegations contained in Paragraghs 7a, 7b and 7c of the complaint had been settled and that the settlement would be reduced to writing. (Tr. 4.) Upon their later assurances that this had been accomplished, I granted General Counsel's motion to sever those paragraphs from the complaint. (Tr. 42.)

All parties were given a full opportunity to participate in the proceedings. General Counsel and Respondent were represented throughout, and both filed briefs after the close of the hearing. The UFW filed a notice of intervention but did not choose to participate in the hearing or to file a brief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Jurisdiction

Respondent is an Agricultural Employer within the meaning of Labor Code section 1140.4(c) and the UFW is a Labor Organization within the meaning of section 1140.4(f). (G.C. Ex. 1-C.)

II. Background

Lu-Ette Farms has been engaged in agricultural operations in the Imperial Valley for .a number of years. (See 8 ALRB No. 91.) William Danielo (a/k/a Daniell), its president and manager, makes all management decisions including those concerning the scheduling of lettuce harvest workers and the equipment to be provided them. (8 ALRB No. 91; Tr. 43.) He has done so since at least 1974. (Tr. 43-44.)

The UFW was certified as the collective bargaining representative for Lu-Ette's agricultural employees on September 29, 1976 (see 8 ALRB No. 55), and entered into a Collective Bargaining Agreement with Respondent on December 2, 1977; the Agreement included an Appendix dealing with wages and a Supplemental Agreement covering certain other conditions. (G.C. Ex. 3.) It had an expiration date of January 1, 1979, but was extended until January 15, 1980. Shortly after it expired, the UFW struck; and the strike continued for some time. Eventually, in late January or early February 1982 -- midway through the lettuce harvest season which runs from December to March (Tr. 9.) -- a number of harvest employees were reinstated pursuant to Board and Court proceedings-(Tr. 8, 23, 37, 39.)[1/]

III. The Alleged Unfair Labor Practices

After severence of the three allegations which were settled, there remained five allegations of unlawful unilateral

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1. A description of the strike and consequent legal proceedings is to be be found in the following Board and ALJ Decisions involving Lu-Ette Farms: 8 ALRB No. 55, 8 ALRB No. 91, and 10 ALRB No. 20.

changes in working conditions. (G.C. Ex. 1-B, Paragraphs 7c, 7d, If, 7g & 7h.) At the beginning of the hearing the parties presented a written stipulation (G.C. Ex. 2; Tr. 4) sufficient to establish a prima facie case with respect to three of the five. (Paragraphs 7c, 7d & 7h.) All three involved departures from practices which had been either incorporated or negotiated into the 1977-79 Collective Bargaining Agreement: (1) Failing to make contributions to the medical plan (G.C. Ex. 3, Art. 30, p. 29); (2) failing to provide bus transportation on the terms provided for in Supplemental Agreement (G.C. Ex. 3, p. 30); and (3) failing to pay the differential rate provided for in the Appendix to the Agreement to lettuce ground crews when they packed 2½ dozen heads per carton. (G.C. Ex 3, p. 28.) The Respondent indicated that, aside from legal argument, it had no evidence to submit on any of the three. (Tr. 4.) As a result, the evidentiary hearing was confined to the two remaining allegations: Paragraph 7f--the failure to provide equipment[2/] and protective gear to lettuce harvest workers, and Paragraph 7g—the failure to pay them for standby time.

IV. The Alleged Failure to Provide Equipment and Protective Gear

A. Findings of Fact.

The General Counsel alleges that, contrary to established practice and, in some cases, contrary to specific provisions in the expired collective bargaining agreement, the Respondent failed —

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2. The complaint speaks only of "protective gear"; yet the parties litigated not only the failure to provide boots and gloves, but also the related failure to provide knives. Although knives can hardly be characterized as "protective gear", the failure to provide them may nevertheless be adjudicated in this proceeding. (George A. Lucas & Sons (1981) 7 ALRB No. 47.)

beginning with the 1982-83 harvest season and continuing through the 1982-84 season -- to provide the following equipment for its lettuce harvest workers:

1. A new knife each season for each cutter/packer;

2. New gloves for each cutter/packer and for each closer and loader on a weekly basis;

3. Rubber boots for all lettuce harvest employees to wear in wet, muddy fields.

The Respondent claims that it provided knives to cutter/packers and gloves to closers and loaders, but denies that it ever provided, or had any obligation to provide, gloves to its cutter/packers or boots to any of its lettuce harvest workers.

The expired Collective Bargaining Agreement and its Supplement contain a number of relevant—or arguably relevant—provisions:

> ARTICLE 14: HEALTH AND SAFETY
>
> F. Tools and equipment and protective garments necessary to perform the work and/or to safeguard the health of or to prevent injury to a worker's person shall be provided, maintained and paid for by the Company. Workers shall be responsible for returning all such equipment that was checked out to them but shall not be responsible for breakage or normal wear and tear. Workers shall be charged actual cost for equipment that is not returned. Receipts for returned equipment shall be given to the worker by the Company. (G.C. Ex. 2, pp. 14-15.)
>
> * * *
>
> F. EQUIPMENT
>
> In accordance with the provisions of ARTICLE 14: HEALTH AND SAFETY, Section F, of this AGREEMENT, the Company shall provide the following equipment:
>
> LETTUCE GROUND CREWS
>
> | | |
> |---|---|
> | CUTTERS: | One knife per man per season. |
> | CLOSERS & LOADERS: | Gloves, one pair per may per week. (G.C. Ex. 3, Supplemental Agreement, p. 30.) |

* * *

ARTICLE 12: MAINTENANCE OF STANDARDS

Company agrees that all conditions of employment for workers relating to wages, hours of work and general working conditions shall be maintained at no less than the highest standards in effect as of this date of this Agreement. Conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. (G.C. Ex. 3, p. 13.)

* * *

ARTICLE 16: MANAGEMENT RIGHTS

The Company retains all rights of management including the following, unless they are limited by some other provision of this Agreement: to decide the nature of equipment, machinery, methods or processess used; to introduce new equipment, machinery, methods or processes, and to change or discontinue existing equipment, machinery or processes; to determine the products to be produced, or the conduct of its business; to direct and supervise all of the employees including the right to assign and transfer employees; to determine when overtime shall be worked and whether to require overtime. (G.C. Ex 3, p. 15.)

Knives. Two cutter/packers who returned to work after the strike testified that they were no longer given new knives at the beginning of each season but had to provide their own. (Tr. 8-10, 23-25.) Their testimony was straightforward, clear and believeable in its detail. It was corroborated and up-dated by the stipulated testimony of five other cutter/packers. (Tr. 39-40.) I accept it over the contrary testimony of Bill Danielo. His denial -- and the manner of that denial -- was cursory and dismissive, and cannot be credited. I therefore find that there was an established practice, embodied in the expired agreement, of providing new knives each season for cutter/packers and that the pracctice was abandoned at the beginning of the 1982-83 season and has not been reinstituted to date.

Gloves. The two cutter/packers also testified that prior to strike, and as far back as 1977, rubber/plastic gloves had been provided by the company for its cutter/packers even through the practice was not written into the collective bargaining agreement. (Tr. 8, 10, 23, 25.) A pair would last about a week, and, when it wore out, a new pair was issued. (Tr. 10.) Again, their testimony was straightforward, clear, believable, and corroborated by the five cutter/packers whose testimony was stipulated to. (Tr. 39-40.)

Danielo's denial that cutter/packers were ever provided with gloves is subject to the same criticism as his denial that they received new knives each season, and it is likewise discredited. I find, therefore, that prior to the strike cutter/packers received new gloves each week as their old ones wore out.

Danielo also denied that, after reinstatement, he discontinued the practice embodied in the expired collective bargaining agreement of providing gloves to closers and loaders. (Tr. 44.) Gustavo Villareal, who worked for a time as a closer after his reinstatement in 1982, testified specifically about asking for gloves at the time, cutting his hand, asking again and being told by Tom Daniell (Bill's father) that, "It is better that you pee on your hands so that you can go ahead [working]." (Tr. 37-38.) The failure to provide gloves after reinstatement was corroborated by the stipulated testimony of Francisco Moran, another cutter/packer who worked for a time as a closer. (Tr. 39-40.) I accept Villareal's specific, graphic and corroborated testimony over Danielo's cursory denial and find that, after reinstatement, gloves were no longer provided to closers and loaders.

Rubber Boots. General Counsel's witnesses testified that prior to the strike Lu-Ette supplied them with knee-high rubber/plastic overshoes to keep their feet and legs dry while they worked in wet, muddy fields, but stopped doing so after their reinstatement. (Tr. 11-12, 27-28, 39-40.) They explained that boots were necessary to prevent them from catching colds or developing arthritis. Danielo denied that boots had ever been provided at company expense and went on to say that the issue had been raised and rejected when the company and the UFW negotiated the Equipment provision of the 1977-79 Supplemental Agreement. (Tr. 45.)

The testimony of General Counsel's witnesses -- both those who testified and those whose testimony was stipulated to -- was unclear on whether boots were provided on only one occasion, or at the beginning of each season, or at some other interval-Furthermore, the witnesses' who actually testified did not attempt to establish the practice as existing before 1978 (Tr. 11, 27-28), while those whose testimony was stipulated to appear to reach further back in time. (Tr. 39-40.)

Although I have already expressed some doubts about Danielo's credibility, his testimony on this issue has more content and substance than elsewhere. He explained that, on occasion, boots may have been provided; but, if so, arrangements were made to deduct their cost from the worker's pay. (Tr. 44.) More significantly, there was no attempt to rebut his testimony that the matter had been the subject of "a big argument" during negotiations for the 1977-79 agreement and, "It was never put in the contract. We never agreed

to it." (Tr. 45.)

B. Analysis and Conclusions of Law.

The law to be applied in determining whether or not a particular change in policy or practice constitutes a violation of section 1153(e) is clear and well established. According to Tex-Cal Land Management (1982) 8 ALRB No. 85:

> Where a term or condition of employment is established by past practice and/or contractual provision, a unilateral change constitutes "a renunciation of the most basic of collective bargaining principles, the acceptance and implementation of the bargain reached during negotiations." (Citation omitted.) Even after expiration of the contract, an employer's unilateral change of any existing working condition without notifying and bargaining with the certified bargaining representative constitutes a per se violation of section 1153(e) and (a) of the Act. (Citations omitted.) Where the unilateral change relates to a mandatory subject of bargaining ... a prima facie violation of section 1153(e) and (a) is established. (Citations omitted.) (Id. at pp. 5-6.)

There is no doubt that providing knives, gloves and boots is -- in the context of the work performed in the fields by lettuce harvest crews -- a mandatory subject of bargaining. (See: Southeastern Michigan Gas Company (1972) 198 NLRB 1221, 1222, aff'd. 485 F.2d 1239 (6th Cir. 1973) [Boots for meter readers]; Bartlett-Collins Company (1977) 230 NLRB 144, 167-168 & fn. 4 [Gloves for workers handling hot material].)

Having found the existence of a contractual requirement--knives for cutter/packers and gloves for loaders and closers--and a past practice--gloves for cutter/packers,[3/] and the

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3. The Maintenance of Standards clause in the Agreement (G.C. Ex. 3, Art. 12, p. 13) has the effect of elevating this practice to a contractual provision.

parties having stipulated to the absence of notice and bargaining with the UFW (G.C. Ex. 2; Tr. 20-21), I conclude that the General Counsel has established a prima facie case. Furthermore, Respondent has not invoked the impasse or necessity defenses, and its claim of waiver based upon the failure to mention gloves for cutter/packers in the equipment clause of the Agreement is negated by the language of Maintenance of Standards clause and the legal requirement that a waiver be clear and unequivocal. (Mario Saikhon, Inc. (1982) 8 ALRB No. 88, p. 10.)

Not so, however, with boots. The General Counsel had the burden of demonstrating the existence of a clear and well established practice or policy. The failure to delineate its precise terms and the failure to establish a clear date for its inception, are enough to preclude any finding that there existed a clear and established practice of providing rubber boots to members of the lettuce harvest crew. Furthermore, Respondent has come forward with uncontradicted evidence that a proposal that they be provided was specifically discussed and rejected during negotiations.[4/] This is enough to constitute a waiver of any entitlement and to bring into play the the language of the Management Rights clause. (G.C. Ex. 3, Art. 16.) So, too, with General Counsel's reliance on the general language of the Health and Safety clause. (G.C. Ex. 3, Art. 12.) The commitment there to

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4. Even if I were to accept the testimony that boots were provided in 1978, that would not be enough to trigger the Maintenance of Standards clause. That clause is concerned with practices in effect on the date of the agreement—December 2, 1977, and the only evidence of the existence of such a practice prior to 1978 is in the stipulated testimony. Such testimony, while useful for corroboration, is insufficient, where contradicted by "live" testimony, to prove the existence of a pre-1978 practice.

provide "protective garments necessary ... to safeguard health" must be read in the light of Respondent's outright rejection during negotiations of the proposal to supply boots to the harvest crew members.

I therefore conclude that Respondent violated section 1153(e), and derivatively section 1153(a), by failing to provide new knives each season, beginning in December 1982, to its cutter/packers and by failing to provide new gloves on a weekly basis, beginning in December 1982, both to its cutter/packers and to closers and loaders. In all other respects, I recommend that Paragraph 7f of the complaint be dismissed.

V. THE ALLEGED FAILURE TO PAY FOR STANDBY TIME

A. Findings of Fact.

The Collective Bargaining Agreement contains a general clause exempting time spent waiting for work to begin because of frost (and some other conditions) from the 4 hour pay guarantee. (G.C. Ex 3, Art. 20A, p. 18.) The Supplemental Agreement contains a provision designed to avoid the problem and, where that is not possible, provides for wages to be paid after the first hour of waiting:

> G. REPORTING AND STANDBY TIME
>
> 1. FROST SEASON WAITING TIME. During the frost season, the company shall advise workers at the end of the day of an approximate reporting time for the following morning based on available frost reports, in a good faith effort to prevent excess waiting for the workers.
>
> Once the Company has transported workers to the field or worksite, the Company shall pay all waiting time after the first hour when working in the Imperial Valley and after the first two (2) hours when working outside the Imperial Valley. All waiting time shall be paid at the worker's hourly rate. (G.C. Ex. 3, Supplemental Agreement, p. 32.)

The General Counsel presented two witnesses who testified that, subsequent to their reinstatment in January 1982, there were a number of occasions When, because of frost conditions, workers had to wait in the fields anywhere from 2 to 4 hours before they could start work. (Tr. 14, 30, 40.) Their testimony was corroborated by the stipulated testimony of the five other workers. (Tr. 39-40.)[5/] The frequency of such occasions was variously described as twice a week in January and February, five or more times in January, and five to ten times each season. (Tr. 13, 29, 40.)

Danielo testified that he would contact the U.S. Weather Service daily to obtain the prediction for the following day and, on that basis, would schedule crews to avoid waiting time. (Tr. 45-46.) He went on to say that, on those occasions when employees were kept waiting more than an hour because of frost, they were paid in accordance with the Supplemental Agreement. (Tr. 47.) However, in responding to a subpoena from the General Counsel, Respondent indicated that it had no records indicating that such payments had been made. (Tr. 5-6.)

Once again there is a conflict in the evidence. I am troubled by the inability of the Respondent to produce records to corroborate Danielo's testimony that workers had been paid for their waiting time. This, taken together with his cursory denial and the straightforward, clear and corroborated testimony of the two witnesses, leads me to find that the practice of paying standby time

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5. While none of the workers worked all of the season, taken together, there is testiomony covering every season from January 1982 on.

after one hour during frosts was in fact discontinued after the strike.[6/]

B. Analysis and Conclusions of Law

The legal test is the same as that applied to the alleged failure to supply knives, boots and gloves: Was there a change in an established practice involving a mandatory subject of bargaining without notifying or bargaining with the certified bargaining agent? (Tex-Cal Land Management, supra.)

Here the practice was defined by the collective bargaining agreement and is of the kind which survives its expiration. (N.L.R.B. v. Southwest Security Equipment Corp. (9th Cir. 1984) 736 F.2d 1332, 1337.) Premiums paid to employees for unusual hours or working conditions are an element of wages and thus constitute a mandatory subject of bargaining. (Irvington Motors, Inc. (1964) 147 NLRB 565, aff'd 343 F.2d 759.)

Respondent conceded its failure to notify or bargain with the UFW (G.C. Ex. 2; Tr. 20-21) and raised no affirmative defenses, but instead confined itself to asserting that it had paid frost

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6. Respondent introduced weather summaries prepared by the Imperial Irrigation District containing daily air temperatures for the Imperial Valley for January and February 1983 and January and February 1984. Those exhibits show that temperatures were 37 degrees or less for only 3 days in January and February 1983 (35°, 35°, & 35°), and for only 5 days in January and February 1984 (33°, 35° 37°, 36°, & 37°). However, air temperatures run 2 to 4 degrees higher than ground temperatures (which determine frost) and there are temperature variations in different parts of the Valley which are not disclosed in the reports. (Tr. 50, 52.) The exhibits are therefore inconclusive. In any event, Danielo never denied there were occasions when work was delayed; he only denied that he failed to pay waiting time on such occasions. The two exhibits will be of help during compliance proceedings in establishing the actual pay lost by the workers.

waiting time. Having rejected that assertion, I conclude that Respondent violated section 1153(e), and derivatively section 1153(a), by failing to pay standby time after the first hour of waiting when frost conditions existing in January and February 1983 and 1984. (Complaint, paragraph 7g.)

VI. THE THREE STIPULATED CHANGES IN WAGES AND WORKING CONDITIONS

The parties stipulated to Respondent's failure to continue in effect a number of practices which had originated in the expired collective bargaining agreement:

1. The failure to make contributions to the medical plan. (G.C. Ex. 3, Art. 30, p. 29.)

2. The failure to provide bus transportation in accordance with the Supplemental Agreement. (G.C. Ex. 3, p. 30.)

3. The failure to pay the differential rate to lettuce crews when they packed 2^ dozen heads per carton. (G.C. Ex. 3, p. 28.)

It was also stipulated that the changes were made without notice or bargaining with the UFW. (G.C. Ex. 2.)

Since all of the changes involved mandatory subjects of bargaining (see: Wayne's Olive Knoll Farms, Inc. d/b/a Wayne's Dairy (1976) 223 NLRB 260 [Discontinuance of pension and medical plan contributions after expiration of collective bargaining agreement]; Martori Brothers (1982) 8 ALRB No. 23, ALJD, p. 19 [Discontinuance of bus pickup point in Calexico]; Irvington Motors, Inc., supra, [Shift premium as "wages"]), General Counsel has established a prima facie case with respect to each.[7/]

7. The issue of whether and to what extent there is ERISA pre-emption of ALRB's finding of violations or remedies dealing with employee benefit plans is presently before the 9th Circuit in Martori Distributors, et al. v. A.L.R.B., 9th Cir., Nos. 84-6137, 84-6275; and Fresh International Corp., et al. v. A.L.R.B., 9th Cir., No. 84-6351.

Respondent's defense to these changes is somewhat confusing (see Resp. Brief, pp. 5-7); its argument seems to be that there were no violations because there was no anti-union motivation and, further, that the union waived its opposition to the changes by failing to bring them up in negotiations. Respondent also seems to say that the failure of the union to bring the changes to its attention proves that they were de minimus. (See Cattle Valley Farms (1982) 8 ALRB No. 59.)

The failure to pay medical premiums or wage rate premiums can hardly be described as de minimus. Bus transportation to the work site is, in the context of agriculture, too significant a benefit to be characterized as de minimus in the absence of evidence establishing that it had little or no value in the particular circumstances of Respondent's operation. A waiver of the right to object to a material change in wages or working conditions must be clear and unequivocal (Mario Saikhon, Inc., supra), and that was not the case here. Finally, anti-union motivation is not a necessary element in cases involving the failure to negotiate over unilateral changes in mandatory subjects of bargaining. (N.L.R.B. v. Katz (1962) 369 U.S. 736.)

I therefore conclude that Respondent violated section 1153(e), and derivatively section 1153(a), beginning in December 1982 and continuing through the close of the 1983-84 season, by making each of the three changes described above. (Complaint, paragraphs 7c, 7d & 7h.)

REMEDY

Having found that Respondent violated section 1153(a) and (e) of the Act, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act as delineated in the following order. In fashioning such affirmative relief, I have taken into account the nature of the instant violations and prior litigation before the ALRB in which respondent has been adjudged guilty of violating the Act, as described in the above findings of fact and conclusions of law.

RECOMMENDED ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Lu-Ette Farms, Inc., its owners, officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing to provide health insurance contributions for its agricultural employees, failing to pay differencial rate for the packing of 30 lettuce heads per carton, and failing to pay for standby time after one hour of waiting where frost conditions exist.

(b) Failing to provide bus transportation to lettuce harvest employees and failing to provide a new knife each season to cutter/packers and gloves each week to cutter/packers and closer and loaders.

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

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

(a) Make health insurance contributions for its agricultural employees in the amount and on the terms and conditions specified in the expired Collective Bargaining Agreement with the UFW.

(b) Pay the differential specified in the expired Collective Bargaining Agreement for packing 2h dozen (30 heads) of lettuce per carton and pay lettuce harvest employees for the time they wait to begin work when frost conditions exist as provided for in the Agreement.

(c) Provide bus transportation (one bus per crew, with a pick up point Calexico) for lettuce harvest employees and provide a new knife each season to cutter/packers and new gloves each week to cutter/packers and loader and closers.

(d) Make no change in any of the above terms and conditions of employment without notifying the UFW and offering it the opportunity to bargain over such changes, and thereafter bargain to agreement or impasse.

(e) Make whole its agricultural employees for all economic losses they have suffered as a result of respondents failure to provide health insurance coverage and its failure to provide bus transportation, as described above.

(f) Make whole all members of its lettuce harvest crews for the earnings they lost as a result of the failure to pay the required differential for packing 2½ dozen heads of lettuce per carton and and as a result of the failure to pay by standby time during frost conditions, as provided in the expired Collective Bargaining Agreement, from December 1, 1982 to the date hereof, and

thereafter until there has been notice and, if requested by the UFW, bargaining to agreement or impasse, plus interest thereon computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(g) Make whole its cutter/packers for the economic losses to them of having to provide their own knives to cut Respondent's lettuce and make whole its cutter/packers and its closers and loaders for the economic loss to them resulting from the failure to provide gloves; make whole to run from December 1, 1982 to the date hereof, and thereafter until such equipment is provided as required or until there has been notice and, if requested by the UFW, bargaining to agreement or impasse.

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

(i) 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.

(j) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from December 1, 1982 to the date of mailing.

(k) Provide a copy of the attached notice, in the appropriate language, to each employee hired by respondent during the 12-month period following a remedial order.

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

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

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

DATED: December 20, 1984

JAMES WOLPMAN
Chief Administrative Law Judge

NOTICE OF AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing in which each side had a chance to present evidence, the Board has found that we violated the Agricultural Labor Relations Act (Act) by failing to provide health insurance to our employees, by failing to provide bus transportation to lettuce harvest employees, by failing to pay the required differential for certain lettuce harvest work, by failing to provide certain equipment and protective gear, and by failing to pay standby time when frost conditions existed, all without first notifying the United Farm Workers of America, AFL-CIO (UFW) as your representative. The Board has told us to post and publish this Notice and to mail it to certain of those who worked for us between June 1, 1983 and the present. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Realations 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 do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL REIMBURSE those workers who suffered economic losses as a result of the changes we made in the the terms and conditions of their employment, and as a result of the the failure to pay for health insurance, standby time and packout differentials.

WE WILL NOT make any change(s) in required payments or in the terms or conditions of employment for any of our agricultural workers without notifying the UFW and giving it an opportunity to bargain about such change(s).

Dated: LU-ETTE FARMS, INC.

By: _____
(Representative) (Title)

If you have any question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue El Centro, California 92243. The telephone number is (619) 353-2130. This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE