Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TEX-CAL LAND MANAGEMENT, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 80-CE-119-D 11 ALRB No. 28 (7 ALRB No. 11)

SUPPLEMENTAL DECISION AND ORDER

Pursuant to the remand order of the Court of Appeal of the State of California, Fifth Appellate District, in Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1982) 135 Cal.App.3d 906, we herein reconsider our Decision in Tex-Cal Land Management, Inc. (1981) 7 ALRB No. 11.[1/]

In 7 ALRB No. 11, the Agricultural Labor Relations Board (Board) found that Respondent had committed a per se violation of Labor Code section 1153(e) and (a) by refusing to sign the final typed copy of a collective bargaining agreement it had previously agreed to and initialled. The Court of Appeal held that Respondent's mere refusal to sign the contract did not, without further inquiry and findings concerning Respondent's

[1/] Pursuant to our Executive Secretary's August 17, 1984. Order in Tex-Cal Land Management, Inc., Case Nos. 80-CE-119-D, 81-CE-64-D and 83-CE-7-D, the Board has reconsidered General Counsel's motion to consolidate Case No. 80-CE-119-D with the other two cases. The motion is hereby denied, as such consolidation, is not necessary to effectuate the purposes of the Agricultural Labor Relations Act or to avoid unnecessary costs or delay (8 Cal. Admin. Code section 20335).

good or bad faith, constitute an unfair labor practice in light of evidence showing that a true "meeting of the minds" had not been reached as to a material aspect of the contract, the subcontracting article. The court therefore remanded the case to the Board for further proceedings to determine whether Respondent's position in refusing to sign the contract was taken in good faith, and whether Respondent's unyielding posture after the refusal to sign was in good faith.

On September 2, 1983, the Board remanded this matter to an Administrative Law Judge (ALJ) for further evidentiary hearing on the question of whether the refusal of Respondent's representative Dudley R. (Randy) Steele to sign the contract constituted bad faith bargaining. The ALJ was directed to examine the totality of circumstances surrounding Steele's refusal to sign, including conduct subsequent to the refusal, to resolve the issue of bad faith.[2/]

Pursuant to the provisions of Labor Code section 114-6, the Board has delegated its authority in this matter to a

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[2/] Respondent argued herein that the instant proceeding is barred by the statute of limitations (Labor Code section 1160.2), laches and collateral estoppel, because once General Counsel elected to try the case as a per se refusal to bargain, it could not later be retried as a bad faith bargaining case. We reject this argument, since the underlying issue has always been whether Respondent's refusal to sign the contract constituted bad faith bargaining. Since the Court of Appeal ruled that the Board could not presume bad faith from the mere refusal to sign, a remand was ordered for the purpose of obtaining further evidence on the question.

three-member panel.[3]

Evidence in the original administrative hearing in this matter showed that the parties began negotiations for a new contract on March 24, 1980, and met approximately 19 times thereafter through June 11.[4] At the bargaining sessions, Emilio Huerta and five members of an employee bargaining committee represented the United Farm Workers of America, AFL-CIO (UFW). Huerta had complete authority to bind the UFW to any agreements reached. Tex-Cal's attorney Sidney Chapin and president Randy Steele represented Respondent. Although Chapin was the employer's principal negotiator, Steele had complete authority to speak for Tex-Cal and bind it to agreements reached in Chapin's absence. During negotiations, the terms of the previous contract (which expired May 10) were extended on a day-to-day basis.

At the commencement of negotiations, the parties agreed to initial each article as they reached agreement on it. They agreed that initialling an article would demonstrate complete agreement on the article's terms, and would manifest an intent to be bound by the article's particular provisions.

On May 9, Huerta and Steele discussed the issue of subcontracting, with Steele initially proposing retention of

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[3] The signatures of Board members in all Board Decisions appear with the signature of the chairperson first (if participating), followed by the signatures of the participating Board members in order of their seniority.

[4] All dates refer to 1980 unless otherwise noted.

the subcontracting article from the previous contract.[5/] At the May 10 session, Huerta presented Steele with a written proposal on subcontracting: Tex-Cal could subcontract when the employees lacked the necessary skills or Tex-Cal lacked the necessary equipment, and could subcontract operations which it had historically subcontracted in the past, provided that such subcontracting would be limited to the amount of acreage and man-hours which had been subcontracted in the past. Huerta explained that the proposed language would limit Respondent's ability to expand the amount of acreage of "exempt" crops (i.e., crops that had been subcontracted previously).

Later in the session, Steele questioned whether the man-hour limitation meant that Respondent could subcontract only the exact number of man-hours subcontracted in the prior year. Huerta responded that the language was intended only as a guideline. Steele then asked whether the purpose of the acreage limitation was to preserve existing bargaining work, for example, the acreage devoted to table grapes. Huerta answered that if, for example, Tex-Cal harvested 3,000 acres of table grapes in the past, it would have to continue to harvest no more nor less than 3,000 acres of table grapes. However, the language was intended as a guideline, so that if severe rain made some of

[5/] That agreement allowed Tex-Cal to subcontract operations when it did not possess the necessary equipment, or the employees did not possess the necessary skills, to perform the work, or when Tex-Cal had subcontracted the operation in the past. The agreement listed some of the operations which had been subcontracted in the past, including the harvesting of raisin and wine grapes, kiwis, and almonds.

the grapes unusable as table grapes, Tex-Cal could harvest them for wine.

Steele then posed a hypothetical: if Tex-Cal removed vines from an old vineyard of wine grapes (an "exempt" crop), would it be forced to plant table grapes on the land, or could it plant another exempt crop such as almonds? Huerta responded that Tex-Cal could plant whatever it wanted on that land. Huerta asked if the subcontracting language was acceptable, and Steele indicated that it was, but he would like to have attorney/negotiator Chapin review it. Although Huerta's response appears unclear, the Court of Appeal found that Huerta agreed to Chapin's review.

At the next bargaining session on May 14, Steele initialled the subcontracting article (Article 17) without question. Respondent raised no questions regarding the subcontracting article between May 14 and June 11, when the parties met to resolve conflicts over certain other terms of the contract. Subcontracting was not discussed at the June 11 meeting, and after the pending conflicts were resolved, the parties (including both Steele and Chapin) acknowledged that they had reached agreement on the entire contract. The UFW agreed to type up the final contract and send it to Tex-Cal for approval.

The contract was typed from all the initialled articles and mailed to Tex-Cal July 9 with a cover letter from Huerta to Chapin asking him to review the contract and notify Huerta of any necessary changes or corrections. On July 31, Chapin called Huerta and left a message that the contract could be signed

at Tex-Cal's office the following morning. At the meeting the next day, August 1, Steele raised questions about the subcontracting article and then refused to sign the contract.

At the re-opened hearing in this matter, Huerta testified that when Steele stated on August 1 that he would not sign any contract containing the Article 17 language, he did not give any reason or propose a solution to Respondent's apparent problem with the language. Huerta asked Chapin what the problem was. Chapin said he did not know. After August 1, Huerta telephoned Chapin and again asked him what Respondent's problems were. However, between August 1 and September 8[6/] Respondent did not identify the problems or offer alternative language.

Randy Steele testified that during the 1980 negotiations he understood that as the president, "owner" and sole stockholder of Tex-Cal, he was running the company and could speak on its behalf and negotiate for it. Steele was sure that he showed the subcontracting article to Chapin between May 10 and the May 14 initialling, and that during their conversations they tried to determine where the UFW was headed. According to Steele, Chapin said that the language would open the door toward limiting whatever Respondent wanted to do with non-bargaining-unit workers for the upcoming year.

Steele testified that he decided probably a week before August 1 that he was not going to sign the contract because of

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[6/] Prior to the opening of the first hearing, at the urging of the ALJ, the parties held two settlement/bargaining sessions on September 8 and 9. These sessions proved unsuccessful.

problems with the subcontracting language. When asked why he waited until August 1 to express his concerns to the UFW, he answered that the subcontracting article was a point of contention between the Union and Respondent and was historically held out until the last of the signing of the contract. He admitted that, after refusing to sign the agreement, he shoved the contract back in Huerta's face, told him to go get his lawyers, and walked out of the room.

Steele acknowledged that in agreeing to the Article 17 proposal, Respondent was making a concession on subcontracting language in comparison with the previous contract's language. He agreed that, next to wages, subcontracting was probably the most important item on the table during negotiations.

Sidney Chapin testified he reviewed Article 17 on August 1 "perhaps for the second time" and called the objectionable language to Steele's attention. Steele's initial reaction (which subsequently changed) was that he had not agreed to that language.

Chapin stated that after August 1, he and Huerta had two or three telephone conversations. Huerta, in his testimony, described his approach during these conversations as focusing on one question: How do we resolve the problem and get this contract signed? Chapin claimed that Huerta never offered to change Article 17 because he was convinced that Respondent had a duty to sign the existing contract. However, on cross-examination Chapin admitted that Tex-Cal did not, at any time between August 1 and September 8, offer to sit down with the

UFW and resolve the disputed language.[7/]

At the September 8 settlement/negotiation session, Huerta asked Respondent to make a proposal because he did not know what the problems with the subcontracting language were. Chapin's initial suggestion was that Respondent agree not to subcontract to the detriment of the bargaining unit, but Huerta replied that he was not sure such language would fully protect the Union. Huerta suggested guaranteeing the amount of acreage which could be subcontracted, but Steele objected that this would infringe on management rights. Huerta asked how the conflict could be resolved. Steele responded by proposing that Tex-Cal be permitted to subcontract those operations which it had subcontracted in the past, with no limitations on acreage or man-hours. Huerta asked, "What's in it for us?" and Steele answered, "You got yourself a contract."

The next day, September 9, Huerta proposed removing all references to past practices from the subcontracting article, retaining the list of exempt crops and operations from the old contract, adding language guaranteeing that table grape acreage would not be converted to raisins, and resolving the outstanding grievances related to subcontracting for an estimated total of $70,000.[8/] Steele asked whether the UFW was more concerned with maintaining acreage or work hours in the grapes. When Huerta

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[7/] Chapin also testified that in the fall of 1981 Tex-Cal and the UFW entered into a new collective bargaining agreement.

[8/] Huerta emphasized that even if the parties were unable to resolve the grievances, that would not in any way prohibit the reaching of an agreement.

said work hours, Chapin suggested that such a guarantee would not adequately protect Tex-Cal against factors such as weather and inspection problems which might affect the number of work hours available. Chapin also thought the figure of $70,000 for resolving the grievances was very high.

Chapin again suggested allowing Respondent to subcontract those operations it had historically subcontracted. Huerta responded that past practice language, which had previously caused problems of interpretation, would be unnecessary if a specific list were included stating which operations Respondent could subcontract. After Chapin and Steele conferred off the record, Chapin told Huerta that Respondent did not want to compromise on the past practice language. The meeting adjourned, and the hearing in 7 ALRB No. 11 began the following day.

After hearing the evidence presented at the re-opened hearing, the ALJ herein concluded that General Counsel had not proven that Respondent refused to bargain in good faith, and recommended dismissal of the complaint. For the reasons stated below, we overrule the ALJ's recommendation and find that the totality of the circumstances shows that Respondent's refusal to sign the contract on August 1 constituted bad faith bargaining.

Almost three months passed from the time Steele tentatively agreed to the subcontracting language until the time he refused to sign the contract on August 1. Steele testified that he was sure he discussed the language with Chapin between May 10 and the May 14 initialling, and that Chapin said the language would limit whatever Respondent wanted to do with

non-bargaining-unit workers for the upcoming year.[9/] Steele admitted knowing that, next to wages, subcontracting was the most important issue on the bargaining table. Steele and Chapin also knew the issue to be a sensitive one, in view of the numerous grievances and unfair labor practice charges that the Union had filed over subcontracting.

Thus, at the least, Respondent would have been extremely negligent in not promptly bringing its problems with the subcontracting language to the UFW's attention and attempting to resolve the matter. However, we find that in failing to notify the Union promptly of the problem, Respondent knowingly misled the UFW negotiators (who had every reason to believe they had a fully agreed-upon contract) about Respondent's intention to be bound by the agreement, and we hold that this conduct constituted bargaining in bad faith.

We find further evidence of bad faith in Respondent's conduct subsequent to August 1. After the August 1 refusal to sign, Respondent showed no willingness to explain or discuss its problems with the subcontracting article. Since Respondent was the party that had problems with the negotiated language, it was incumbent upon it to explain its difficulties with the proposal or to make a counterproposal. Contrary to the ALJ's

[9/] Steele's testimony on this point was uncontradicted, as Chapin did not deny reviewing the article with Steele before it was initialled. The ALJ's conclusion that there was insufficient evidence to conclude that Steele was advised by Chapin as to the "plain meaning" of Article 17's language (ALJ Decision, p. 24) does not belie the fact that Steele and Chapin both knew they had significant problems with the language before Steele initialled the article.

conclusion, we find that the UFW did not insist upon the contract as written and thereby preclude bargaining. On August 1, Huerta asked Chapin, "Does the Company have a proposal for us?" and on August 4, Huerta inquired as to whether Respondent was proposing "any type of resolution to resolve this matter." Thus, although the Union believed Respondent had a duty to sign the contract as written, it nevertheless extended to Respondent the opportunity to present a counterproposal. Respondent, on the other hand, showed its unwillingness to bargain when Chapin advised Huerta on August 5 that Steele had no proposal to offer and was not willing to sign anything. As the First Circuit Court of Appeal stated in a National Labor Relations Board case,

> While the Board cannot force an employer to make a "concession" on any specific issue or to adopt any particular position, the employer is obligated to make some reasonable effort in some direction to compose his differences with the union, if § 8(a)(5) [10/] is to be read as imposing any substantial obligation at all.
> (NLRB v. Reed & Prince Mfg. Co. (1st Cir. 1953) 205 F.2d 131, 134-135 132 LRRM 2225].)

We also find that although the unilateral changes found in Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85 are not necessary in order to support our finding of bad faith in the instant case, they do provide further evidence of Respondent's overall bad faith herein. (Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36.)[11/]

10/ Section 8(a)(5) of the National Labor Relations Act is the equivalent of Labor Code section 1153(e).

11/ Chairperson James-Massengale would not rely on the unilateral changes in 8 ALRB No. 85 as evidence of Respondent's overall bad faith herein.

We conclude that the totality of circumstances, both before and after August 1, 1980, shows that Respondent's refusal to execute the contract on August I was in bad faith. We will order a makewhole remedy from the date of the refusal until September 8, 1980, the date of the negotiation/settlement meeting when Respondent for the first time explained its problem with the subcontracting proposal.[12/]

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Tex-Cal Land Management, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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

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

[12/] Since the period of bad faith bargaining we have found in this case is so short, we believe it would not be appropriate to impose extended mailing or reading provisions in our remedial order. Accordingly, we will order only a standard 60-day posting of the Notice to Agricultural Employees and mailing of the Order only to those employees employed by Respondent during the period from August 1, 1980 until September 8, 1980. (See M.B. Zaninovich, Inc. (1980) 6 ALRB No. 23.)

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

(a) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, the period of said obligation to extend from August 1, 1980 until September 8, 1980.

(b) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terms of this Order.

(c) 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.

(d) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 50 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.

(e) 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 August 1, 1980, until September 8, 1980.

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

Dated: November 19, 1985

JYRL JAMES-MASSENGALE, Chairperson

JORGE CARRILLO, Member

MEMBER WALDIE, Concurring and Dissenting:

I concur in the findings in the majority opinion holding that Respondent knowingly misled the UFW about the problems Respondent had (or would discover) with the subcontracting article. Respondent thereby intentionally thwarted good faith bargaining, for it harbored no desire to be bound by a contract with the UFW. I further agree with the majority that conduct following the August 1, 1980, refusal to sign the agreement previously agreed upon was indicative of Respondent's bad faith. By refusing to present counterproposals or to explain objections to pending proposals Respondent violated its duty to bargain with a certified union. (NLRB v. George P. Pilling & Son Co. (3d Cir. 1941) 119 F.2d 32 [8 LRRM 557]; NLRB v. Reed & Prince Mfg. Co. (1st Cir. 1941) 118 F.2d 874 [8 LRRM 729]; NLRB v. Alterman Transport Lines Inc. (5th Cir. 1979) 587 F.2d 212 [100 LRRM 2260]; Arakelian Farms (1983) 9 ALRB No. 25.)

Where I part company with the majority is in the adoption

of a remedy for this unlawful conduct. I would find that Respondent's unlawful bargaining conduct began with the initialing of the subcontracting article on May 14, 1980. At that time, Respondent agreed to one of the most troubling and sensitive articles separating the parties, and a contract rapidly concluded. However, Respondent had no intent of agreeing to the contract initialed. Respondent has presented no excuse for its subsequent refusal to abide by its tentative agreement, except extreme negligence. We have discounted that negligence, and it would not amount to good cause to withdraw from such agreements in any event. (O'Malley Lumber Co. (1978) 234 NLRB 1171 [98 LRRM 1168]; NLRB v. Randle-Eastern Ambulance Service (5th Cir. 1978) 584 F.2d 720 [99 LRRM 3377].) Respondent's rejection of the bargaining process by its unilateral withdrawal without explanation from its prior tentative agreement constituted bad faith bargaining on Respondent's part. (San Antonio Machine Corp. v. NLRB (5 Cir. 1966) 363 F.2d 633 [62 LRRM 2674]; Birmingham Plastics, Inc. (1975) 221 NLRB 141 [90 LRRM 1482].)

I am also unconvinced that good faith negotiations recommenced in September 1980, and would leave to compliance the fixing of the termination of the makewhole remedy ordered here. The record demonstrates that the parties finally reached agreement in the fall of 1981, retroactive to June of 1981. The determination of the termination of makewhole relief, the discovery of when good faith negotiations began, is properly a function of subsequent compliance proceedings and the majority offers no rationale for the radical departure from our standard remedial practice in this

matter. I fear that this new practice of terminating makewhole based on an inadequate record in liability proceedings is but the next step in a seemingly new Board willingness to deny makewhole in part or in its entirety. (See my concurring and dissenting opinion in O. E. Mayou (1985) 11 ALRB No. 25.) Such a result is particularly unfair here, for the General Counsel and the UFW were never given the opportunity to litigate the scope of the remedial provisions awarded, nor were they afforded notice that such would be required. It has been our standard practice, following the NLRB, to defer to compliance such remedial issues, and I see no basis for deviating from that practice here.

Dated: November 19, 1985

JEROME R. WALDIE, Board Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano 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 at which each side had a chance to present its facts, the Board has found that we failed and refused to bargain in good faith with the United Farm Workers of America, AFL-CIO, (UFW) in violation of the law. The Board has told us to post and mail this Notice.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act (Act) is a law which gives you and all 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 try to get a contract or to help or protect one another; and
6. To decide not to do any of the above things.

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

WE WILL NOT in the future refuse to bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible. In addition, we will reimburse all workers who were employed at any time during the period from August 1, 1980, to September 8, 1980 for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW.

Dated: TEX-CAL LAND MANAGEMENT, INC.

By: ______________________________
(Representative) (Title)

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

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

TEX-CAL LAND MANAGEMENT, INC.

11 ALRB No. 28
(7 ALRB No. 11)
Case No. 80-CE-119-D

ALJ Decision

The ALJ found that the evidence at the re-opened hearing in this matter did not establish that Respondent's refusal on August 1, 1980 to sign a collective bargaining agreement with the UFW constituted bargaining in bad faith. Consequently, the ALJ recommended dismissal of the complaint.

Board Decision

The Board overruled the ALJ's recommended decision and found that the totality of circumstances showed that Respondent's refusal to sign the collective bargaining agreement was in bad faith. The Board found that for a period of nearly three months Respondents' negotiators were aware of problems with the contract's subcontracting language, but failed to bring its problems to the UFW's attention or attempt to resolve the matter. Thus, Respondent knowingly misled the UFW about its intention to be bound by the agreement. Respondent also exhibited bad faith in its conduct subsequent to August 1, 1980 when it showed no willingness to explain or discuss its problems with the subcontracting language. The Board ordered a makewhole remedy from the date of the refusal to sign the contract until September 8, 19890, the date of a negotiation/settlement meeting when Respondent for the first time explained its problems with the subcontracting article and thereby engaged in good faith bargaining.

Dissenting Opinion

Member Waldie filed a dissenting opinion, agreeing with the finding of bad faith bargaining by Respondent. However, Member Waldie dated the onset of the bad faith bargaining from the date Respondent initialed (tentatively agreed with) articles in the proposed contract treating subcontracting rights and obligations. He also dissented from the conclusion in the majority opinion that good faith negotiations ever commenced. He would leave to compliance the dating of the period of makewhole relief noting that the record before the Board did not address the issue of the onset of good faith negotiations following a finding of bad faith and the parties should be given the opportunity to argue the merits of the issue.

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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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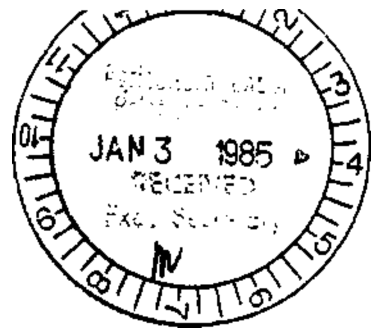

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: TEX-CAL LAND MANAGEMENT, INC, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 80-CE-119-D (7 ALRB No. 11)

Appearances:

Gerald M. Leverett
Werdel, Chapin & Leverett
5544 California Avenue, Suite 140
Bakersfield, California 93309
For Respondent

Marcos Caraacho
United Farm Workers
P. O. Box 30
Keene, California 93531
For Charging Party

Mark D. Ginsberg
Agricultural Labor Relations Board
112 Boronda Road
Salinas, California 93907
For General Counsel

Before: Thomas M. Sobel
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

PRELIMINARY STATEMENT

On May 15, 1981, the Agricultural Labor Relations Board issued its Decision and Order finding that Respondent Tex-Cal Land Management committed a per se violation of Labor Code section 1153(e) by refusing to sign a fully agreed-upon contract. On September 6, 1982, the Court of Appeal rejected the premise upon which the Board concluded that Respondent violated the Act when the court concluded, contrary to the Board, that an ambiguity in the subcontracting article prevented agreement from being reached. (Tex-Cal Land Management v. Agricultural Labor Relations Board (1982) 135 Cal.App.3d 906.) The court was nevertheless concerned about the implications of Randy Steele's conduct before and after his refusal to sign the agreement and remanded the case to the Board to determine: (1) whether Steele's questioning the meaning of Article 17 was in good faith, and (2) whether his unyielding posture after his refusal to sign was in bad faith. On September 19, 1984, a hearing was held for these purposes.

BACKGROUND

A collective bargaining agreement between Tex-Cal Land Management and the UFW was in effect from June 1, 1979 until May 10, 1980. On March 24, 1980 the parties began negotiations for a new contract. Union negotiator, Emilio Huerta, and a bargaining committee composed of five Tex-Cal employees represented the union; the attorney for Tex-Cal, Sid Chapin, and the owner of Tex-Cal, Randy Steele, represented the company. Chapin was the company's principal negotiator. (See Stipulation of the Parties incorporated in ALJD, 7 ALRB No. 11.) Then negotiations began, the parties

agreed to initial each article as agreement was reached on it.

On May 9, 1980, Huerta and Steele took up the issue of subcontracting, an issue which had produced a number of problems under the old contract leading to the filing of both grievances[1/] and unfair labor practice charges. The charges went to complaint and, after hearing, the Board found Respondent had unlawfully subcontracted bargaining unit work. (I:24; Tex-Cal Land Management (1982) 8 ALRB No. 85.) Despite the union's complaints about what it considered diversion of unit work, the parties' discussions about subcontracting were restrained.

When negotiations began, Huerta asked the company for movement on the subcontracting issue. Steele replied that the ability to subcontract was very important to the company and that he wanted to retain the list of exempt crops from the old article;[2/]

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1. Except to note that the filing of grievances reveals the existence of problems in contract interpretation between the parties, I do not rely on the existence of grievances as evidence of bad faith.

2. Steele explained:

> Many of the jobs are highly specialized jobs that utilize highly specialized equipment. They are jobs that are only done every 20, 30 or 40 years. For instance, No. 8 is the removal of almond trees supporting devices. You plant an almond orchard for 30, 40 years. You do the same with a vineyard. Removal of vineyard trellis systems, where this utilizes special equipment, that only happens . . . maybe you would feel more at ease by going into these different lists, or these different items on this list and . . . extracting the jobs encompassed by them.

* * *

(Footnote continued----)

however, he stated he would be willing to include language which insured retention of bargaining unit jobs which he understood to be the union's primary concern. Huerta explained that the union's goals were broader than Steele took them to be: he was interested "in try[ing] to provide as much work as possible to the employees . . . we represent." (Resp. B, p. 11.) In other words, he wanted to obtain more work, not merely to insure the work previously under contract. He proposed that if a subcontractor provided only labor, those operations which he performed, and which were considered exempt in the previous contract, should become unit work in the new one. Pressing his theme of guaranteeing the amount of unit work, Steele stressed that the company's main operation was in table grapes and that the union could be assured that the amount of unit work would remain stable.[3/]

(Footnote 2 continued----)

> [The] company feels that it does not have to sacrifice what has historically been, but yet we feel that there can be language . . . incorporated in the Article, that would insure the bargaining unit jobs that have been questioned now.
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> * * *
>
> Items such as repair of vineyard, as an example. There can be language put into the Article that can insure that, and the Company is more than willing to put that kind of language in.

(Resp. B, p. 10.)

3. (UFW): That's what I'm saying, getting away from what's happened in the past . . . okay, our goal is to try to provide as much work as possible to the people which we represent. And going off the list of the existing agreement, the harvesting of raisins, or wine, or cannery,

(Footnote continued----)

When Huerta admitted to Steele that part of his concern was to prevent the company from increasing its production of exempt crops, Steele repeated his assurances that historically Tex-Cal has kept the amount of unit work stable. When Huerta pressed for additional pruning work, Steele said the work was only occasional and not worth including in the contract. Huerta then said "let us consider your ideas and somehow incorporate [them] into some kind of language that will insure the work which is covered now, and then . . . " at which point Steele interrupted him and the following conversation took place:

(Footnote 3 continued----)

> those operations in which the only thing in which the Sub-contractor provides is the labor . . . and strictly labor.
>
> (Steele): But here again, you see, I don't think you can really [objectively] sit back and say, no, they're trying to whittle down their table grape size, or trying to circumvent the Union. All of the other crops we grow are far less than what we produce in table grapes, and it was under those parameters that we negotiated this contract last year. Yes, we are diversified to a small extent. We do have other crops, but they're not that great, and they're crops that we feel require rather specialized skills. In no way have we gone out and tried to limit our acreage of table grapes. The vines that have been pulled up have been wine varietals, they weren't table grapes. They require . . . less . . . labor than table grapes. So, I can't see where you're sitting back saying, no, they are, on purpose, trying to circumvent this contract. We're not. The crops that we do have under sub-contracting clause, are crops that are not [introduced] to this area . . . [until] four or five years ago. Only . . . recently have you seen such a large influx. Proportionately we haven't increased our acreage that great, as compared to the rest of the area as far as expanding into these crops. The bulk of our crops are table grapes. That is what these people that work with Tex-Cal are best at, the harvesting and cultural practices of table grapes. They're good at it.
>
> (RX B, p. 11-13.)

Randy: Which is covered under the present agreement . . . ?

UFW: Right, and which is also . . . .

Randy: In other words, what you're saying, all work that is not specified here.

UFW: Will be unit work . . . right?

Randy: Because that's the intent of this Article.

UFW: Something to insure that, and then let us give you our demands.

Randy: Okay.

(Emphasis added, RX R, p. 15.)

After discussion of a number of other items, the parties agreed to meet the next day, May 10, 1980.

At the next meeting Steele again proposed retaining the subcontracting term from the previous contract. Without much discussion, Huerta presented him with a draft article which repeated the language of the previous contract with the insertion of the language underlined below, which was new:

> The Company shall have the right to subcontract under the following conditions: [IT] When the Company employees do not have the skills to perform the work to be subcontracted and when the operation to be subcontracted requires specialized equipment not owned by the Company. The Company shall also have the right to subcontract those operations which it has historically subcontracted in the past, provided, however, that the operation to be subcontracted shall be limited to the amount of acreage and man hours of which (sic) has been subcontracted in the past. The Company agrees that it shall not subcontract any operation which bargaining unit employees have performed in the past and it shall not subcontract to the detriment of the bargaining unit or the Union.

Huerta specifically explained that the new language put a limit on the company's ability to expand the amount of exempt acres it previously worked. After Huerta's explanatory remarks, the

conversation turned to a variety of other subjects before Steele resumed discussion of subcontracting by questioning whether the specific "man-hour" limitation in the proposed article meant that the company could only subcontract the exact number of man-hours subcontracted in the prior year. Huerta responded that the language was only a guideline. Steele then asked whether the language was intended to preserve the acreage devoted to table grapes.[4/] Instead of answering him directly, Huerta told Steele to look at it the other way: if Tex-Cal harvested 3000 acres of table grapes, under the article, it would have to continue to harvest no more nor less than 3000 acres of table grapes. He emphasized that the language was meant as a guideline "so that if unusually severe rain rendered some grapes [unsaleable as] table grapes, Tex-Cal could harvest [them] for wine." [Ibid.] Steele then posed a hypothetical of his own: if Tex-Cal removed some acreage of exempt crops, could it plant other exempt crops on that acreage? Despite his earlier statements about the meaning of the limitation, Huerta essentially responded that Tex-Cal could plant whatever it wanted.[5/]

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4. Referring to the underlined clause, Randy asked:

> Okay. Now "limited to the amount of acreage" as I understand it, by the nature of the contract, we can't violate it. So that means, by not being able to violate the contract .... I take it, you put this in here to protect table grapes? (GCX 12, p. 10.)

5. Randy: But what I'm saying, are you by saying this, are you saying you've got this amount of (acres of) almonds, and this 40 acres of 65 year-old Muscats that you're going to pull out, you can't put that in almonds, you've gotta put it in grapes?

(Footnote continued----)

After the discussion, Steele indicated his assent to the article. He asked Huerta if he could show the article to Chapin who was not at the session and was not then available. Huerta appeared to demur although the transcript of his answer is garbled.[6/]

(Footnote 5 continued----)

UFW: No.

Randy: Okay.

UFW: I think that the stuff like that is covered in Management rights . . . what you want to plant. (GCX 12, p. 11.)

6. The transcript of 5/10/80 has this exchange:

UFW: Then [the new language of Article 17] is acceptable?

Randy: So far as I'm concerned it is. Is it proper to ask for review of counsel? before it's finally signed, or do you want to sign it now or...... So far as I'm concerned, in concept, this thing is agreeable with me.

UFW: Well, Sid may be thinking of something else, and say, well, personally I'd like this, and be in agreement with him, or if there was, say Juan was a negotiator, or say I'm the negotiator and I present it to Juan or say I go back to Ben, and who knows what their thinking is. What can be changed because it's us and the committe or you and the committee who are going to be here after.

(G.C. 12, p. 11.)

From Huerta's response, it is not clear to me that Huerta agreed to Chapin's review. Indeed, Huerta testified at the original hearing that he tried to discourage Steele from talking to Chapin:

Mr. Steele then indicated to me, well, then, that he could agree to the language. And that he would like the review of counsel. Okay.

So, I asked him why he wanted the review of counsel, He asked me if it was proper, and I asked him why. And he

(Footnote continued----)

Finally, Randy indicated his agreement to the proposed article "with the understanding of what we talked about before". (OCX 12, p. 13.) The Court of Appeals has summarized what happened next.

> On May 14, at the next bargaining session, Steele initialed the subcontract article without question. By so doing, Steele realized he was binding Tex-Cal to the term. Between May 14 and June 11, Tex-Cal raised no questions or issues regarding the subcontracting term.
>
> On June 11, the parties met to resolve conflicts over certain terms in the contract. Both Steele and Chapin were present at the meeting. The unresolved terms related to wages, retroactivity, and the use of trailers, boxes, and the like. The subcontracting term was not discussed.
>
> After pending terms were resolved, the parties acknowledged that an agreement had been reached on the entire contract. Notes taken by both Steele and Chapin at the June 11 session reflect that Tex-Cal agreed to the contract. The parties shook hands and congratulated each other. The record reflects neither discord nor equivocation on any contract term. The UFW agreed to type the formalized contract and send it to Tex-Cal for approval; the parties then were to set a date for signing the agreement.

(Footnote 6 continued----)

> told me, well, he wanted Sid to review the language. I told him that, just like I am now representing the Union, somebody else could come in and not agree to something that I had agreed to, and that everybody has their own -- their own way of interpreting things, or something like that. Or something I like, somebody else would not like. Maybe what he would agree to, Mr. Chapin would not agree to.
>
> (Tr. 1980:74.)

Nevertheless, The Court of Appeal found that Huerta agreed to Chapin's review. (135 Cal.App.3d 911.) At the 1980 hearing, no one asked Steele whether he in fact conferred with Chapin. The only person who testified concerning whether Steele talked to Chapin was Huerta who testified that he inferred that the two men talked because Steele did not sign the subcontracting article until four days after he had agreed with it in principle.

> The contract was typed by the UFW from all initialed and agreed-upon articles and was mailed to Tex-Cal on July 9. A cover letter from Huerta to Chapin contained the following request: "Once you have reviewed the new contract, please notify me as to any changes or corrections that may be needed or wether [sic] such contract meets the Company's approval as is."
>
> On July 31, Chapin called the UFW office and left a message for Huerta that the contract could be signed at Tex-Cal's office the following morning, August 1. Chapin raised no objection to the contract terms in his message.
>
> On August 1, Steele refused to sign the contract.

THE RE-OPENED HEARING

At the re-opened hearing, Chapin testified that when he reviewed Article 17 on August 1, "perhaps for the second time", he caught the phrase in Article 17 and called it to Steele's attention. Upon reading Article 17, Steele said, "No, that's not the language that I agreed to." Chapin then asked Huerta for the initialed copy of the article. (I:131-132.) The court opinion continues:

> Huerta could not locate the initialed articles at the union office, but returned with his notes from the bargaining sessions. He asked Chapin what the problem was, then accompanied Chapin, Steele, and another UFW representative into the company conference room. Chapin asked Huerta for the UFW's interpretation of the subcontracting article. Steele offered Huerta a hypothetical: If Tex-Cal had subcontracted 200 acres of raisins last year and were now planning to subcontract 1,000 acres of raisins, would the additional 800 acres be covered by the union contract? Huerta responded that they would be so covered and that Tex-Cal could not subcontract the additional acreage. According to Huerta, Steele then said, "[I]f that's what the language means, then I'm not going to sign any . . . contract," and stormed out of the room. Steele never returned.
>
> Steele's version of the discussion differed slightly:
>
> I asked for an example from Emilio, and the example was "if I laid 200 acres of raisins in 1979, and it was a subcontracted job, and I laid 300 acres in 1980, how much of that 300 acres is going to be covered by the bargaining unit. And he said 100 acres. And I said, so therefore, Emilio, you're telling me that whatever I did last year, I

have to do the same amount of acreage in the same amount of man-made hours; that whatever I do in 1980, I have to do it by the same amount of men, same--same amount of acreage and same amount of man-hours as I did in 1979. He said that's correct. I said, well, then, we don't have an agreement."

(135 Cal.App.3d at 912-913.)

At the re-opened hearing, Steele gave a more dramatic version of his rejection of the contract; according to him, after Huerta replied to his question, he "shoved [the contract] in Emilio's face and said--I think I told him to go get his lawyers, and I walked out of the room" (I:98.) Although Huerta testified at the original hearing, which took place about a month after the events in question, that Randy said he would not sign any "fucking contract" and stormed out of the room (Tr. 1980:63), at the re-opened hearing he did not seem aware of any particular animus in Steele's rejection of the contract: he testified simply that "Steele stated to me that he would not sign any contract which contained the Article 17 subcontracting language." (I:40.) Although Steele's present recollection and Huerta's contemporaneous one differ as to what Steele actually said, in both versions Steele reacted angrily and peremptorily to Huerta's answer and I so find.

After Steele left the room, Huerta turned to Chapin to ask "what the problem was with regard to the language." (I:41.) According to Huerta's uncontradicted testimony, Chapin said he didn't know. (Ibid.) Since Chapin was familiar with the company's initial position regarding subcontracting and by then knew that the language in Article 17 seriously undercut that position (after all, a few moments before he had pointed to the very language as a problem [I:128-131]), his denial must be considered untrue. Even if

untrue, however, his refusal to speak for Steele on the matter is consistent with his being surprised that Steele had agreed to such restrictive language since, having been absent during the session when Article 17 was discussed, he would likely be wary about commenting if he had not previously discussed the language of Article 17 with Steele. In the re-opened hearing, however, Randy testified that sometime between May 10 (when the language was agreed to) and May 14 (when the article was initialed) he asked Chapin what the language meant and that Chapin advised him it could limit the amount of subcontracting the company could do. (I:97.)

Relying on Steele's testimony, and on cases holding that dilatory tactics evidence bad faith, General Counsel argues that, since Steele knew before he initialed the article, that it was potentially mischievous from the company's point of view, his waiting for several months to object to it, indicates bad faith. If it were clear that Chapin had advised Steele about the scope of the subcontracting language before Steele initialed it, I would agree that Steele's "delay" in objecting to the article is strong evidence of bad faith, but it is not clear.

For one thing, Steele's recent testimony is at odds with his previous testimony when, in response to the ALJ's question, "At what point . . . did it occur to you that your understanding of the provisions [sic] in question was not the same as the UFW's, Steele answered, "August 1st." (Tr. 1980:107.) Second, I have already noted that Chapin's actions on August 1 were consistent with his late discovery of Article 17's restrictiveness. His testimony is equally consistent. At the re-opened hearing, Chapin (who didn't

testify at the earlier hearing) testified he looked at Article 17 for "perhaps the second time on August 1" and it was then that he called the implications of the Article to Steele's attention. (I:131.) And at the earlier hearing, Emilio Huerta testified he spoke to Chapin only a few days before August 1[7/] to ask him about how his review of the contract was proceeding and Chapin told him "[H]e had started, [but] he was [only] about halfway through. He had not finished going through it and that he would finish going through it and talk to Steele to see if everything was okay." (Tr. 1980:58-59.) (Emphasis added.) Huerta's and Chapin's testimony that Chapin was only halfway through the contract on July 28 and had not yet talked to Steele to see if "everything was okay" is consistent with the sense of Steele's original testimony that the reach of Article 17 was only pointed out to him by Chapin as the contract was about to be signed.

Finally, and critically, in order for Steele's testimony that he reviewed the language with Chapin prior to May 14 to be true, I must conclude it is more likely than not that certain other things, *** rake neither psychological nor strategic sense, are also true. Thus, if Steele learned from Chapin prior to May 14 that the language was susceptible to the interpretation Huerta so decisively gave to it -- as it plainly is -- it makes no sense for him to have meekly endorsed language the plain meaning of which enraged him several months later. Conversely, in view of the fact that Huerta's August 1st interpretation of the language is exactly

7. Huerta gave the date of the conversation as July 28, 1980. (1980:58.)

the same as that which Chapin is supposed to have given Steele prior to May 14, I could only conclude that Steele was willing to sign on May 14, if I could also conclude (as General Counsel urges me to) that Steele and Chapin planned to repudiate the agreement several months later, a plan which in view of the subtlety of Respondent's defense, must be considered somewhat risky for an attorney to recommend, albeit brilliant. Moreover, the mind that was capable of devising a strategy to exploit the failure to agree as a defense to the August 1st refusal to sign, would certainly be capable of seeing it as a reason to repudiate the agreement several months earlier. Thus, although I am troubled by Chapin's failure to specifically deny that he reviewed the language with Steele prior to the latter's initialing it -- which Steele not only said he wanted Chapin to do but which is, moreover, consistent with Chapin[1]s role as a principal negotiator -- I cannot overlook the logic of, as well as the circumstantial evidence relating to the events of August 1; the sense of Chapin's present testimony that he didn't know what Article 17 said until, at the earliest, the latter part of July; and, finally, Steele's earlier testimony to the same effect. All of these elements point to late rather than early discovery of the implications of Article 17. And when a lawful version of an act is as plausible as an unlawful version, General Counsel has simply failed to meet his burden of proving that the unlawful version was the one that took place.

In any event, Huerta spoke to Chapin by phone after August 1 and asked about the company's problems with the Article. Although Huerta testified that Chapin did not explain the nature of

the company's problems (I:44), Chapin testified that his conversations with Huerta focussed on how to resolve the problem in order to get the contract signed, since Huerta took the position that the company had a duty to sign the contract. (I:134.)[8/] I credit Chapin's recollection that the union was only interested in getting the contract signed that it thought it had negotiated. For one thing, Chapin's recollection is consistent with the position the union has persistently taken in this case.[9/] Although Huerta was an obviously sincere witness, I believe that his recall of events has been so colored by the union's disbelief in the existence of any ambiguity in the Article 17 language that it has become impossible for him to distinguish between what actually happened and the union's legal characterization of what happened. Huerta's testimony that Chapin couldn't tell him what the company objected to seems to reflect his continuing incomprehension about the supportability of Steele's position rather than any doubt as to what the position actually was.

There is no doubt that the company's position hardened after August 1. On August 5, Chapin advised Huerta that the company was going to terminate the existing contract and that Steele had no proposal to offer and he was not willing to sign anything (135

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8. See also, Huerta testimony, Tr. 1980: 64-65: "I then asked him whether the company was proposing any type of resolution to resolve this matter and have the contract signed." (See also 135 Cal.App. 3d at 913.)

9. See, e.g., Huerta's testimony at I:77 where, even at the re-opened hearing, he testifies there was an agreement on May 14.

Cal.3d at 914, Tr. 1980:66),[10/] after which the union filed a charge alleging that the refusal to sign the contract was an unfair labor practice. Prior to commencement of the original hearing, the parties (who had not met since August 1) were urged by the Hearing Officer to see if they could settle the matter. (I:135.) Accordingly, they had what would prove to be two unsuccessful settlement-cum-negotiation sessions on September 8-9, 1980.*

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10. Chapin's testimony that Huerta essentially wanted the contract with Article 17 signed fits so perfectly with the union's position in this case that it must be credited. Even Huerta's letter of August 8, 1980 is consistent with Chapin's testimony. Thus, memorializing a conversation between himself and Chapin, Huerta reminds Chapin, first, that he asked him on August 4 "if the company was proposing a resolution to resolve their disagreement of the negotiated language of Article 17" and, second, that on August 5 Chapin told him Randy refused "to offer any resolution to the company's objection to Article 17". (GCX 7.) Huerta does not write as though re-opening the question of subcontracting was at issue: the problem, as he puts it, was resolving Randy's objections to Article 17 as written.

Accordingly, I do not consider Steele's failure to make any proposals between August 1 and September 8 (when the ALJ urged the parties to try to settle the case) as evidence of bad faith. The union's insistence on the contract as written did not leave any room for bargaining.

Since the parties had agreed to everything but the subcontracting, which was probably the most critical issue between them, they might have been at impasse -- the deadlock arising from the union's insistence on Article 17 as written and what we might construe as the company's insistence upon Article 17 as explicated by Huerta. If so, the bargaining obligation would have been suspended and the company had no more obligation to come forward with a proposal than the union did. Nevertheless, I do not engage in such an analysis for two reasons: first, because Steele's silence is so ambiguous and second, because the company's unilateral change in the pension fund in June probably would have prevented impasse from being reached in the first place and its unilateral change in the medical plan after August probably would have broken impasse, had it been reached previously.

*The following narrative is drawn from the transcript of the meeting in evidence as G.C. 19.

Huerta began the first meeting by announcing that it was up to Respondent to make a proposal because he didn't know what the company's problems even were. When Chapin explained that the written language did not express Steele's intent, Huerta asked what the company was proposing. Chapin replied that the company would promise not to subcontract to the detriment of the bargaining unit. Huerta replied that such language in the past had not prevented problems from arising and he adverted to the existence of the pending grievances and the unfair labor practice charges. However, Huerta did acknowledge that until the grievances were settled, it couldn't be said that the language Chapin proposed <u>didn't</u> offer sufficient protection. Chapin then tried to pin down the union's intent in the subcontracting article in order to come up with mutually acceptable language. He also asked if there were any way to include flexibility in the proposal. Huerta said no, the language would have to pin everything down. After discussion centered on specific problems, Huerta returned to the previous year's acreage as a limitation on subcontracting rather than specification of the exempt crops and operations. Steele demurred to this proposal, claiming management rights. When Huerta asked what the company offered to resolve the difficulty, Steele proposed returning to the language of the old contract which listed the exempt crops and operations. Huerta asked, "What's in it for us." Steele said, "You have a contract." Huerta then asked, "How can we be guaranteed we don't lose any work." Steele said, "Because we're committed to table grapes for this year."

The union caucussed and returned with a tentative proposal

for discussion. The proposal featured a guarantee of unit work, a limitation as to the type of work that could be subcontracted and resolution of all pending grievances and charges over subcontracting. Huerta was not sure of the amount required to settle the grievances and charges, and he wanted time to review the grievances and come back with a package along these lines.

The parties met the next day. Huerta began by identifying all the grievances he wanted to settle. When he began discussion of the grievances, Huerta emphasized that even if the parties were not able to resolve the grievances he wouldn't "let that prohibit in any way the reaching of an agreement [that day] today if that [could] be done."[11/] Huerta then outlined the union's claims with respect to the grievances. It appeared that settlement along the lines Huerta proposed would exceed $70,000. Chapin then asked for specific language on Article 17, but Huerta said he hadn't come with any, that it could be worked out. However, he proposed deleting all references to past practices in the article as well as the whole part of Article 17 which had caused the difficulties, keeping the list of exempt crops and operations from the old contract, and including language which guaranteed that unit work in table grapes

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11. At the hearing, Chapin testified that Huerta conditioned union movement on Respondent's willingness to settle the outstanding grievances and ULP's. (I:136.) Huerta denied conditioning negotiations on the settlement, although he admitted to offering a proposal that was tied to "wiping the slate clean" of "all existing subcontracting problems." (I:46-47.) At the September 9 session itself Chapin acknowledged that Huerta's package was not an "all or nothing" deal. (G.C. 19, p. 40.) In light of Chapin's statement and Huerta's statement to the effect that he wouldn't let the issue of grievances interfere with agreement, it is clear Huerta was not conditioning agreement on settlement of the grievances.

would not be displaced by raisins. He also wanted the company to make up its delinquent payments to the Juan de la Cruz and Robert F-Kennedy Funds.

Steele asked if the union was trying to maintain work hours in the grapes or to stabilize the acreage and Huerta and Cervantes said man-hours. Steele and Chapin then said they couldn't guarantee man-hours, but they could more or less guarantee acreage. After this preliminary discussion, Chapin outlined the company's response. He told the union representatives that the $70,000 settlement price was very high and he was in no position to respond to that part of the proposal immediately. He then said that if the language of Article 17 were eliminated as proposed by the union, the article would essentially be the same as that of the previous contract. Finally, with respect to the funds, he told Huerta that Randy advised him the company was current. Chapin agreed to double-check on that point, however.[12/] Testimony at the re-opened hearing indicates the company was delinquent in its payments to the RFK fund from August to December 1980 and to the JDLC fund from June-December 1980. (I:10-16.)

Huerta told Chapin that the union insisted upon the

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12. According to the transcripts of the September session, the company was also still deducting dues from workers' paychecks, but not remitting them to the union. The company, of course, was under no obligation to deduct dues at all after termination of the contract. (Industrial Union of Marine and Shipbuilding Workers v. N.L.R.B. (3d Cir. 1963) 320 F.2d 615.) However, its continuing to deduct them and not turn them over to the union could be an unfair labor practice. Since there is insufficient evidence from which to conclude the deductions were not inadvertent, I will not consider the matter as evidence of bad faith. (See TMY Farms (L983) 9 ALRB No. 29.)

elimination of all references to past practices in the contract, and not merely deletion of the problem language, since it was the past practices which had caused the problem. After considering the proposal with Steele, Chapin told Huerta that the company would not compromise on the language: it was interested in retaining the language in the old article.

The parties went to hearing the following day.

ANALYSIS AND CONCLUSIONS

A.

Before discussing the parties' substantive contentions, I must note that Respondent has raised a preliminary question about the Board's authority to re-open these proceedings. Respondent argues (1) that because the General Counsel elected to treat the charge against it as evidence of a per se refusal to bargain, he is now barred by Labor Code section 1160.2 from re-trying it as evidence of bad faith bargaining; and (2) that General Counsel is estopped from litigating now what he might have litigated before. Whatever may be the merits of Respondent's arguments, my task is to take evidence and write my decision in conformance with the Board's order of September 6, 1984. Accordingly, I must perforce reject Respondent's contentions.

B.

Relying upon a variety of factors which include delay, the institution of unilateral changes, conduct away from the table and "going to the negotiating table with no intent to reach

agreement,"[13] General Counsel contends that Respondent must be found to have violated the Act. Respondent, of course, contends that it bargained in good faith.

Some of the factors General Counsel relies upon as proof of bad faith do not require much elaboration. Thus, absent proof of any of those conditions which have been held to justify unilateral action, it is clear that Respondent's unilateral discontinuance of payments to the Robert F. Kennedy medical plan and the Juan de la Cruz pension fund are per se violations of the Act. Such unilateral changes may also be used as evidence of bad faith. (Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36, p. 14.)

Other factors General Counsel points to as evidence of bad faith are of more doubtful character. Thus, I reject General Counsel's suggestion that Respondent's termination of the contract on August 5 evidences bad faith. Conceding that Respondent was under no obligation to continue extending the contract on a day-to-day basis, General Counsel nevertheless suggests that since only a single issue separated the parties, termination of the contract was so inconsistent with the spirit of cooperation which collective bargaining is supposed to be that it must be considered

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13. Although separately stated, this last "factor" is not really a separate element of bad faith, but one of the definitions of good faith, see N.L.R.B. v. Reed and Prince Manufacturing Co. (1st Cir. 1941) 118 F.2d 184, 185, the presence or absence of which is usually found by reliance on the other factors cited by General Counsel.

evidence of bad faith.[14/] General Counsel cites no authority for this proposition; I have not been able to find any and the contention appears unsound under general principles which I will quickly sketch. While it is true that collective bargaining requires cooperation, it does not follow that every indicium of lack of amity points to a failure of good faith. As the Supreme Court has pointed out, the collective bargaining process is only part of our system of labor relations:

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms--exist side by side. (N.L.R.B. v. Insurance Agents' International Union (1960) 361 U.S. 476, 489.)

Even in the restricted context of bargaining, the parties often resort to strategies that mask their true intentions in order to pressure their "opponents", see e.g., Stevens, Strategy and Collective Bargaining Negotiations (1963), so that "good faith" bargaining rarely approaches the sort of model of cooperation which

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14. According to General Counsel, letting the agreement lapse in accordance with the terms of the contract, "terminated its effectiveness." (Brief, p. 29.) This is a surprising conclusion since, except for the provisions of the contract governing the relationship between employees and the union, Bay Area Sealers (1980) 251 NLRB 89, the terms and conditions of employment survive expiration of the contract.

General Counsel posits it to be. Thus, whether seen as an economic weapon or as a bargaining tactic, terminating a contract legitimately exerts pressure on a union to accede to an employer's demands and I cannot consider it evidence of bad faith-

One other factor relied upon by General Counsel may also be quickly dealt with, namely, General Counsel's reliance on Randy Steele's purported September 1980 statement to Antonio Rodriguez to the effect that the union wasn't going to get any contract. In 8 ALRB No. 85, Administrative Law Judge Schoorl credited Rodriguez' testimony that Steele made such a statement. However, at this hearing General Counsel asked Steele whether he recalled making it and Steele denied that he did so. Since his denial appeared genuine, I find Steele did not make the statement and I do not rely on it in any way.

With the unilateral change as background,[15/] we are left with the need to examine the circumstances of Steele's refusal to sign the contract on August 1 and the company's subsequent conduct in order to determine whether Respondent violated the Act. So far as the August 1 refusal to sign is concerned, I have already

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15. As General Counsel points out, Respondent also has a history of unfair labor practices which I cannot ignore. Excluding those cases presently pending before the Board which I may not take into account, Respondent has been found guilty of a variety of unfair labor practices in 1975, see 3 ALRB No. 11, and one unfair labor practice in 1977, see 5 ALRB No. 29, after which, to all appearances, it had a reasonably harmonious contractual relationship with the UFW until 1979 when the unfair practices which were the subject of 8 ALRB No. 85 arose. I do not view the 1975 and 1977 issues as of much probative value in view of the apparent maturation of the collective bargaining relationship in 1978. The 1153(c) and 1153(e) violations of 1979 which are discussed in 8 ALRB No. 85 are another matter.

concluded there is insufficient evidence from which to conclude that Steele was advised by Chapin as to the plain meaning of the language of Article 17 prior to his initialing it so that I cannot conclude, as General Counsel urges me to, that Steele knowingly misled the union about the company's intentions to be bound by the agreement. Accordingly, I do not see the issue of delay in the same stark light as General Counsel does. Nevertheless, even if Chapin did not review the language with Steele prior to the latter's initialing it, there remains the question whether the failure of the company's principal negotiator to review for over two months those parts of the document he was not available to negotiate, comports with good faith.

In Sam Andrews (1982) 8 ALRB No. 64, our Board considered the negligence of one of Respondent's principals and its chief negotiator as bearing upon the question of good faith:

> In the instant case, it is evident that there has been negligence on the part of both principal Don Andrews and negotiator Tom Nassif. Respondent demonstrated a lack of seriousness toward the negotiations by failing to check its own proposals for accuracy and by paying no attention to communcations between its negotiator and the UFW. We find that Respondent's inattention to its own communciations with the Union evidences a lack of good faith and sheds doubt on the seriousness of Respondent's desire to reach agreement.
>
> A company's good faith may be tested by considering whether it would have acted in a similar manner in the usual conduct of its business negotiations. (Reed & Prince (1951) 96 NLRB 850, 852 [28 LRRM 1608].) That is, a company must treat the bargaining obligation as seriously as it would any other business transaction. The failure to devote sufficient time and attention to the bargaining obligation has been found to be disruptive and in derogation of the collective bargaining process. (Harry R. Pickett (1969) 174 NLRB 340, 342 [70 LRRM 1189]; Hemet Wholesale Company (Oct. 28, 1978) 4 ALRB No. 75.)
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> (8 ALRB No. 64 at 8.)

Despite these observations, the Board found that negligence of the kind exhibited by Respondents in that case (which was more exaggerated than that exhibited by Chapin here) was not sufficient to prove bad faith by itself.

General Counsel next contends that in the September negotiations Respondent presented a regressive proposal. To the extent General Counsel measures the regressiveness of Respondent's September 9 final offer against the language of the May 14th article which the court of appeal found Steele did not "agree to", the argument must be rejected. However, General Counsel also argues that the company's final proposal on September 9 was regressive in another way, namely, because it eliminated the language in which the company promised not to subcontract to the detriment of the bargaining unit. As noted earlier, Chapin had offered "non-detriment" language on September 8 and Huerta had rejected it standing alone, only to incorporate it as part of his package. But as flexible as Huerta revealed himself to be on September 9 with respect to the settlement of grievances, his package still called for deletion of the "past practices" clause which Respondent wanted. Since Respondent is not required to make any concessions, I cannot find evidence of bad faith in its preference for language the union wanted to alter as part of a package.

General Counsel's case, then, amounts to an apparently careless bit of bargaining over an issue which Respondent obviously felt strongly enough to be willing to violate the Act (as proved by 8 ALRB No. 85) coupled with some unilateral changes. I discount the unilateral change to some extent since I cannot find that they were

ever charged or tried as unfair labor practices. I cannot weigh heavily as evidence of union animus what the union was apparently willing to overlook.[16] On the basis of these elements, I do not think I can find that Respondent violated the Act in this case without essentially using the mere existence of previous unfair practices (which do not necessarily involve bad faith) as proof of a subsequent one (which requires bad faith).

Accordingly, I recommend that the complaint be, and hereby is, dismissed.

Dated: January 3, 1985

THOMAS M. SOBEL
Administrative Law Judge

16. Had this evidence been presented earlier, I would view it differently, but to treat such changes as powerful factors in proving the commission of an unfair labor practice which depends on bad faith four years later seems to exaggerate its importance. See also, Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36, in which the Board held that unilateral changes are not enough to prove bad faith when the conduct at the table does not otherwise offer persuasive evidence for it.