Imperial Valley, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOE MAGGIO , INC., VESSEY & COMPANY, INC., and COLACE BROTHERS, INC., Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 79-CE-186-EC 79-CE-188-EC 79-CE-191-EC 79-CE-200-EC 11 ALRB No. 35 (8 ALRB No. 72)

SUPPLEMENTAL DECISION AND ORDER

On December 14, 1981, the Agricultural Labor Relations Board (Board) found that 28 members of an employer's bargaining group, including the three Respondents herein, who announced in February 1979 that they and their employees' certified bargaining representative were at impasse when in fact no valid deadlock existed, had thereby engaged in bad faith bargaining. The Board's remedial Order in that case required each of the Respondents to make whole its respective agricultural employees for any economic losses suffered as a result of their employer's failure or refusal to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW or Union). The period of makewhole liability for all Respondents was to begin on February 21, 1979, and to continue until such time as each of the employers commenced good faith bargaining which resulted in a contract or a bona fide impasse. (Admiral Packing Company, et al . (1981) 7 ALRB No. 43.)

Thereafter, on October 7, 1982, the Board found that

Respondents Maggio , Vessey and Colace participated in a series of common operative events, between November 20, 1979 and December 31, 1979, which served to continue the bad faith bargaining which had been demonstrated in Admiral, supra. Accordingly, the original remedial Order in Admiral was augmented by directing that Respondents make whole their employees for all losses suffered by them from February 21, 1979 through December 31, 1979, when Respondents again falsely declared impasse, and from January *I,* 1980 until -such time as each of them commenced good faith bargaining which would result either in a contract or a bona fide impasse. (Joe Maggio, Inc., Vessey & Company, Inc., & Colace Brothers, Inc. (1982) 8 ALRB No. 72.)

While the present Respondents' challenge to the Board's Decision in 8 ALRB No. 72 was pending before the California Court of Appeal, Fourth Appellate District, that same court vacated the Board's Admiral Decision. The court concluded that the parties' negotiations had reached a state of impasse notwithstanding good faith bargaining by the employers' group. (Carl Joseph Maggio, Inc . v. Agricultural Labor Relations Board (Admiral) (1984-) 154. Cal.App.3d 4-0.) Respondents herein immediately moved the court to vacate the Board's Decision and Order in 8 ALRB No. 72 on the basis of the Admiral reversal. However, the Board opposed the motion and proposed that the court remand the matter in order that the Board might first reconsider its findings in that case. The Board's request was granted on August 17, 198-4. (4 Civil No. 28397.)

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Pursuant to the provisions of Labor Code section 1146,[1/] the Board has delegated its authority in this matter to a three-member panel.[2/]

On October 18, 1985, the Board granted the parties the right to submit briefs on the issues presented by the court's remand. Respondent Vessey and Charging Party UFW timely submitted briefs and Respondent Maggio filed a response brief. In light of the briefs of the parties, the relevant case authorities and record in the case, we have decided to issue the following Order.[3/]

We believe our findings in 8 ALRB No. 72 were predicated upon the now-vacated Admiral Decision to such an extent that a de novo review of the entire record is now required. The issue under consideration is whether that record will support findings of bad faith or surface bargaining outside of the context of the Admiral case.

Preliminarily, we note that Colace Brothers, Inc. has settled all outstanding unfair labor practice charges alleged in the complaint in 8 ALRB No. 72. Therefore, all matters herein which pertain to Colace Brothers are now moot. Respondent Vessey & Company, Inc. consummated a formal settlement agreement with the UFW on March 14, 1985, which provides, inter alia, that any future

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

[2/] 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.

[3/] Member Carrillo did not participate in this proceeding.

assessment of makewhole liability within the meaning of section 1160.3 arising from 8 ALRB No. 72 (Case No. 79-CE-186-EC, et al.) will cease no later than January 1, 1982. The court found that Joe Maggio, Inc., as well as the other Respondents, validly declared impasse on February 28, 1979. Since the carrot harvest rate which Maggio subsequently implemented did not exceed its last preimpasse proposal, the alleged unilateral change, which was found as to Maggio in 8 ALRB No. 72, was not in violation of the Agricultural Labor Relations Act.[4/] We hereby dismiss all allegations against Maggio.

Thus, the only question before the Board at this time is whether Vessey's conduct between February 21, 1979 and December 31, 1979, constitutes bad faith bargaining. In accordance with the court's decision in Carl Joseph Maggio v. ALRB, supra,

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[4/] During all times pertinent herein, Maggio's carrot harvest rate of 34 cents per thousand was not in excess of its last bargaining table offer prior to the February 1979 impasse. Victor Carrillo, a Maggio employee called as a witness for the General Counsel, refuted General Counsel's contention that Maggio either raised wages to 36 cents or promised workers that they could expect such a rate by the end of the 1979-80 season. Admed Fadel, Maggio's carrot harvest foreman, also called by General Counsel, testified that he was authorized by the Company to hire workers for the start of the 1979 season in December of that year at a rate of 34 cents. He never heard any mention of a 36 cent rate. Moreover, in a brief in Case No. 79-CE-186-EC, entitled "Opposition to Respondent's Supplemental Brief" and dated February 16, 1982, the UFW states, at page 5, that when the Union and Respondents herein met on December 7, 1979, the "Union's offer to Maggio was different in that Maggio had not made any modifications of the February 21st [1979] wage proposal [citing to TR 1, p. 37, lines 6-10]." The Union added that it informed Maggio that the Company "would have to make some move responding to our last proposal [that of February 1979] in order to elicit further proposals from us." The Union also conceded that a proposed settlement offer, based on the September 1979 Sun Harvest Collective Bargaining Agreement, which had been extended to Respondents Vessey and Colace, did not include Maggio.

154 Cal.App.3d 40, we proceed on the premise that there was no bad faith bargaining by Respondent prior to February 21, 1979, that the impasse which was declared one week later by Respondent was based on a genuine deadlock in negotiations, and that the parties were still at a state of impasse upon conclusion of their next meeting on August 8, 1979.

There was no further contact between the parties until Respondent wrote to the UFW on November 20, 1979, in order to propose an increase in the start-of-season lettuce harvest piece rate for conventional ground pack to 75 cents per box. That amount was in excess not only of the prior season's prevailing rate of 57 cents per box, but also Respondent's last bargaining table offer prior to impasse of 61 cents per box. Vessey also indicated at that time that it was contemplating a change to a lettuce wrap operation and invited the Union to discuss all matters outlined in the letter. On November 26, UFW negotiator Ann Smith responded in writing, stating that the Union would be amenable to discussing the proposed changes, but only in the context of a comprehensive bargaining agreement. The parties had several telephone contacts and ultimately agreed to meet on December 7. Smith made clear to Respondent during that meeting that it had only two options: (1) either sign a Sun Harvest model agreement or (2) resume item-by-item negotiations from the point of the parties' respective preimpasse positions. Respondent objected to adopting Sun Harvest and maintained that it would be counterproductive for the parties to retreat to their preimpasse stance since the final Sun Harvest terms were considerably more palatable to Respondent than were the Union's

initial proposals. Upon conclusion of the meeting, the Union served Respondent with the unfair labor practice charge which is the basis of this proceeding accusing Respondent of unilaterally increasing wages on or about December 7 in violation of the statutory duty to bargain. On December 10, Respondent implemented the 75 cent rate which it had proposed in the November 20 letter, but did not alter its method of harvesting. Thereafter, on December 19, the Union submitted a written counterproposal which Respondent rejected on December 31 in conjunction with a new declaration of impasse.

Since the parties were validly at impasse prior to November 20, 1979, Respondent could have lawfully implemented its last preimpasse wage offer. (NLRB v. Katz (1962) 396 U.S. 736 [50 LRRM 2177].)[5/] However, on November 20, Respondent proposed a new wage rate, one which exceeded its last preimpasse offer and indicated a willingness to resume negotiations based on the new proposal, thereby breaking impasse with the result that it could not lawfully implement the proposed increase absent a new impasse, the consent of the Union, or the Union's waiver of its right to bargain over the proposed change. (United States Lingerie Corp. (1968) 170 NLRB 750 [67 LRRM 14-82]; National Labor Relations Board v. Pepsi Cola Dist. (6th Cir. 1981) 64-6 F.2d 1173 [107 LRRM 2252], cert. den. [109 LRRM 3368].) None of those mitigating factors is present here. Nor has Respondent come forward with a viable defense for its actions based on either past practice or economic

[5/] NLRB v. Landis Tool Company (3rd Cir. 1952) 193 F.2d 279 [99 LRRM 2255] suggests that even such changes require prior notice to and consultation with the Union.

necessity.[6/] (Airport Limousine Service, Inc. (1977) 231 NLRB 932 [96 LRRM 1177]; Glazer Wholesale Drug Co., Inc. (1974.) 211 NLRB 1063 [87 LRRM 1249].)

We find that Respondent engaged in unilateral action in violation of section 1153(e) and (a). Accordingly, we will order that Respondent, upon request of the Union, rescind the unlawful unilateral change and make its employees whole for any losses they may have suffered as a result of such action.

Notwithstanding our finding that the unilateral change in wages constituted an independent violation of the duty to bargain, we do not find evidence to support a further finding that such unilateral action, standing alone, was sufficient to have adversely affected the subsequent negotiation process between the parties during the remainder of the period covered by the record herein; i.e., December 10, 1979 through December 31, 1979. (See National Labor Relations Board v. Crompton-Highland Mills (194.9) 337 U.S. 217 [69 LRRM 2088].) Lacking evidendiary support, therefore, we dismiss the complaint insofar as it alleges that Vessey & Company, Inc. engaged in bad faith or surface bargaining.

ORDER

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

[6/] We affirm our Decision in 8 ALRB No. 72 insofar as we found therein that Respondent had not carried its burden with respect to either the past practice or business justification defense.

1. Cease and desist from:

(a) Changing its agricultural employees' wage rates, or other terms or conditions of their employment, without first giving the United Farm Workers of America, AFL-CIO (UFW) notice thereof and an opportunity to bargain over the proposed change.

(b) 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 Agricultural Labor Relations Act (Act).

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

(a) Upon the UFWs request, rescind its unilateral wage increase of December 1979 and thereafter meet and bargain collectively in good faith with the UFW over any proposed wage increases.

(b) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of the unlawful unilateral changes in their terms and conditions of employment, 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.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional

Director, of the makewhole amounts and interest due under the terms of this Order.

(d) 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.

(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 lettuce harvest season which commenced in December 1979.

(f) 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.

(g) 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 lettuce harvest employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the

question-and-answer period.

(h) 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 23, 1985

JYRL JAMES-MASSENGALE, Chairperson

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

NOTICE TO 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, Vessey & Company, Inc., had violated the law. After a hearing at which each side an opportunity to present evidence, the Board found that we did violate the law by changing our lettuce harvest employees' wage rates on December 10, 1979, without first negotiating with the United Farm Workers of America, AFL-CIO (UFW). The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

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

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

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

WE WILL meet with your authorized representatives from the UFW, at their request, for the purpose of rescinding the December 10, 1979 change in the lettuce harvest wage rate and thereafter meet and bargain collectively in good faith with the UFW over any proposed wage increases.

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW before implementing the 1979 change in the lettuce harvest wage rate.

Dated: VESSEY & COMPANY, INC.

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 9224-3. The telephone number is (714) 353-2130.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Joe Maggio, Inc.,
Vessey & Company, Inc.,
and Colace Brother, Inc.

11 ALRB No. 35
(8 ALRB No. 72)
Case Nos. 79-CE-186-EC,
et al.

COURT DECISION

The California Court of Appeal, Fourth Appellate District, reversed the Board's findings in Admiral Packing Company, et al. (1981) 7 ALRB No. 43, wherein the Board had found that 28 members of an employer's bargaining group, including the three Respondents herein, had engaged in bad faith bargaining beginning on February 21, 1979. Based on Admiral, and prior to the court's ruling in that case, the Board found in another case that Respondents Maggio, Vessey, and Colace had engaged in subsequent and independent violations of the duty to bargain which served to continue the bad faith bargaining found in Admiral. (Joe Maggio, Inc., Vessey & Company, Inc., and Colace Brothers, Inc. (1982) 8 ALRB No. 72.) While Respondents' appeal of the Board's Decision in 8 ALRB No. 72 was pending before the Court of Appeal, the Board requested and was granted a remand in order to reconsider that decision in light of the court's rulings in Admiral.

BOARD DECISION

The Board reversed its findings in 8 ALRB No. 72 insofar as it had found that each of the Respondents therein had engaged in bad faith or surface bargaining between February 21, 1979 and December 31, 1979. The Board also found, however, that the record in 8 ALRB No. 72 compels a finding that Respondent Vessey engaged in an independent per se violation of the duty to bargain when it unilaterally increased wages on December 10, 1979 to a level which exceeded its last preimpasse bargaining table offer to the United Farm Workers of America, AFL-CIO. The Board ordered Vessey to cease and desist from changing employees' wage rates, or other terms or conditions of employment, without first giving the Union notice thereof and an opportunity to bargain over the proposed change; to rescind the unilateral increase should the Union so request; and, to make whole employees who may have suffered economic losses as a result of the unlawful wage rate change.

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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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