El Centro, California
Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 80-CE-143-EC 80-CE-232-EC 80-CE-250-EC 80-CE-251-EC 80-CE-254-EC 81-CE-144-D 81-CE-178-D 81-CE-191-D 81-CE-59-EC 11 ALRB No. 5

DECISION AND ORDER

On July 29, 1983, Administrative Law Judge (ALJ) Robert Le Prohn issued the attached Decision in this proceeding. Thereafter, Respondent, General Counsel, and the Charging Party, United Farm Workers of America, AFL-CIO (UFW or Union), each timely filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to

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

[2/] Chairperson James-Massengale and Member Carrillo did not participate in the consideration of this case.

affirm the rulings, findings,[3/] and conclusions[4/] of the ALJ as modified herein and to adopt his recommended Order as modified herein.

Analysis of Alleged Bad Faith

The ALJ concluded that Respondent violated Labor Code section 1153(e), which requires employers "to bargain collectively in good faith with labor organizations certified [as representatives of their employees]." Section 1155.2(a) defines bargaining collectively in good faith as:

> ... the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and

[3/] We affirm the ALJ's findings that discriminatees Marcos Jimenez, Enrique Castellanos, and Guadalupe Contreras were not rehired by Respondent for legitimate business reasons. However, we do not adopt the ALJ's legal analysis regarding the burden of proof in "dual motive" cases. Consistent with NLRB v. Transportation Management Corp. (1983) 459 U.S. 1014 [113 LRRM 2858], we hold that, once General Counsel makes out a prima facie case, the burden shifts to the Respondent to show by a preponderance of the evidence that the same action would have been taken against the employee even absent the employee's protected activity. (See Royal Packing Co. (1982) 8 ALRB No. 74.)

[4/] We reject the ALJ's conclusions that Respondent did not violate the Act by denying the UFW representatives access on August 19 and 21, 1981. The UFW was entitled to take post-certification access under the authority of our Decision in O. P. Murphy Produce Co., Inc. (1978) 4 ALRB No. 106, and the order of the Kern County Superior Court, dated August 20, 1981. In our view, the burden was on Respondent to prove, as a defense, that the particular access taken on those days was unreasonable or in excess of the court's order. Since it is unclear that the access taken was either unreasonable or excessive, we find that Respondent's interference with UFW access violated section H53(a). In view of the difficulty experienced by the UFW representatives in taking effective access, the size of Respondent's operations and land holdings, and Respondent's long history of denying the UFW access (see cases cited below at p. 6), we find that expanded access is an appropriate remedy in the instant case. (See Jasmine Vineyards, Inc. v. Agricultural Labor Relations Bd. (1980) 113 Cal.App.3d 968, 978 [170 Cal. Rptr. 510].)

> other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The basic principles we must apply in refusal-to-bargain cases are set forth at some length in our Decisions in O. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63, review den. by Ct. App., 1st Dist., Div. 4 (Nov. 10, 1980), hg. den. (-Dec. 10, 1980) and Montebello Rose, Inc./Mt. Arbor Nurseries, Inc. (1979) 5 ALRB No. 64, affd. 119 Cal.App.3d 1. As those cases indicate, the essential question we must answer is whether Respondent undertook negotiations with "a bona fide intent to reach an agreement if agreement [was] possible.' (Atlas Mills (1937) 3 NLRB 10, 1 LRRM 60.) To make this determination, we must examine the totality of Respondent's conduct, both at and away from the bargaining table, to discover whether Respondent discharged its statutory "obligation ... to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement."[5/] (Cox, The Duty to Bargain in Good Faith,

[5/] We agree with the ALJ's statement that, once a lengthy period of bad faith has been proved, only a significant break with the past course of conduct will persuade the Board that the respondent began hard bargaining in good faith. (See McFarland Rose Production (1980) 6 ALRB No. 18, review den. by Ct.App., 5th Dist. (April 26, 1982), hg. den. (June 16, 1982).) That principle is not applicable in this case, however, since Respondent's conduct after December 28, 1979, consistently indicates bad faith with no "eleventh hour" burst of apparent hard bargaining. Contrary to Member McCarthy's assertion, we are not finding that Andrews was engaged in surface bargaining prior to December 28, 1979. In fact, we have found that Andrews did not engage in surface bargaining until December 28, 1979, and continuing thereafter with no significant change in negotiation posture on the record of this case.

(1958) 71 Harv.L.Rev. 1401, 1413; NLRB v. Stevenson Brick &• Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 2086]; Milgo Indus. , Inc. (1977) 229 NLRB 25 [96.LRRM 1347].) In making this determination, the Board must evaluate all of Respondent's conduct, including any history of anti-union animus. The Board may not focus on the negotiations in isolation from Respondent's overall attitude toward the Union and the concept of collective bargaining. (Local 833, UAW AFL-CIO (Kohler Company) v. NLRB (D.C. Cir. 1962) 300 F.2d 699 [49 LRRM 2485]; Imperial Machine Corp. (1958) 121 NLRB 621 [42 LRRM 1406].)

Based on our review of the totality of the circumstances, we agree with the ALJ's finding that the UFW was not sufficiently serious about concluding an agreement, prior to November 1979, to test Respondent's good faith. (Bruce Church, Inc. (1983) 9 ALRB No. 74; Times Publishing Company (1974) 72 NLRB 676, 683 [19 LRRM 1199].) We also agree with the ALJ's finding that, as of Respondent's unlawful unilateral change in wage rates on December 28, 1979, Respondent did not intend to reach agreement with the UFW. On the contrary, we find that Respondent engaged in a "sophisticated pretense in the form of apparent bargaining" that does not satisfy Respondent's statutory duty to bargain in good faith. (Montebello Rose, Inc./Mt. Arbor Nurseries, Inc., supra, 5 ALRB No. 64 at p. 7; Continental Insurance Company v. NLRB (2nd Cir. 1974) 495 F.2d 44 [86 LRRM 2003].)

While we adopt the ALJ's analysis, we also find that Respondent furthered its effort to engage in fruitless surface bargaining by failing to meet or to provide a negotiator at reasonable

times and places.[6/] (See McFarland Rose Production, supra, 6 ALRB No. 18; NLRB v. Milgo Indus., Inc., supra, 229 NLRB 25.) Although there were periods, such as April 8 to July 7, 1981, when Respondent was regularly represented by an attorney/negotiator and a company principal, long periods passed during 1980 and early 1981 when Respondent's attorney/negotiator was unavailable for meetings. Given the UFW's need to assemble its employee bargaining committee and Tom Nassif's awareness of Ann Smith's other concurrent negotiations, we do not find Nassif's occasional offer to negotiate the next working day to be a good faith effort to meet with the Union. It is not sufficient for Respondent to argue that its negotiator had other matters of higher priority to attend. If Nassif was unavailable for a long period of time, then it was Respondent's responsibility to find another, more available, negotiator. (Ibid; O. P. Murphy Produce Co., supra, 5 ALRB No. 63.) Further, these long gaps in the bargaining often occurred at points when Respondent was supposed to be caucusing to consider a significant new proposal by the Union. For approximately five months in late 1980 and early 1981, Nassif was unable to say what his principal's position was, indicating that Don Andrews simply had not yet thought about the issue. Such unreasonable delay in submitting a response or counterproposal shows a lack of good faith. (Montebello Rose, Inc./Mt. Arbor Nurseries, Inc., supra, 5 ALRB No. 64.)

Finally, while the ALJ noted Respondent's misconduct away

[6/] It also appears that Respondent's negotiator engaged in some artful game-playing with the Union by repeatedly suggesting meeting dates that were known to be unavailable to the Union negotiator.

from the table, such as unilateral wage changes and access denials, Respondent also has a history of anti-UFW animus going back to November 1975, when it favored the Teamsters over the UFW in an early election. (Sam Andrews' Sons (1977) 3 ALRB No. 45, review den. by Ct.App., 2nd Dist., Div. 1 (Nov.14, 1984).) During that first organizational period, Respondent unlawfully fired eight UFW activists, demoted the UFW's election observer, denied UFW organizers field and labor camp access, campaigned for the Teamsters, and engaged in various acts of interrogation, surveillance, and intimidation of UFW supporters.

Despite all that unlawful activity in 1975, the UFW won a rerun election in July 1977 (without the Teamsters) by a vote of 456 to 98 for no-union. (Sam Andrews' Sons (1978) 4 ALRB No. 59.) Immediately following that election, Respondent assigned more onerous work to one UFW activist, suspended another, demoted a third, and refused to recall two more. (Sam Andrews' Sons (1979) 5 ALRB No. 38.) Respondent has also committed such subsequent violations as the refusal to rehire a UFW activist in April 1979 (Sam Andrews' Sons (1980) 6 ALRB No. 44); refusal to rehire the same activist in July 1981, plus harassment of that activist by engaging in a high-speed car chase (Sam Andrews' Sons (1982) 8 ALRB No. 69); denial of labor camp access to UFW organizers (Sam Andrews' Sons (1982) 8 ALRB No. 87); threatening employees with job loss in October 1979; and miscellaneous unilateral changes without bargaining (Sam Andrews' Sons (1983) 9 ALRB No. 24). Such a history of anti-UFW animus reinforces our conclusion that Andrews lacked genuine desire to bargain and reach an agreement with that

organization. (Imperial Machine Corp. (1958) 121 NLRB 621 [42 LRRM 1406].)

Based on the foregoing analysis and the analysis of the ALJ that is consistent with the foregoing, we find that from December 28, 1979, until May 5, 1982, the date of the close of the hearing in this matter, Respondent refused and failed to bargain in good faith with the UFW and thereby violated Labor Code section 1153(e) and (a).

ORDER

By authority of Labor Code section 1150.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Sam Andrews' Sons, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW or Union), the certified collective bargaining representative of its agricultural employees.

(b) Making crop decisions which have as their object retaliation for engaging in union or protected concerted activities.

(c) Instituting unilateral changes with respect to its employees' wages without first notifying the UFW and affording the UFW, as the certified collective bargaining representative of Respondent's agricultural employees, a reasonable opportunity to meet and bargain with Respondent as to such proposed changes.

(d) Engaging in surveillance of union organizers and workers during lunch break union meetings or creating the impression

it is engaged in such surveillance.

(e) Denying UFW representatives reasonable post-certification access.

(f) 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) Rescind, upon request of the UFW, the certified bargaining representative of Respondent's agricultural employees, the wage increases given in June 1980, October 1980, and September 1981.

(b) Upon request, meet and bargain collectively in good faith with the UFW, as the exclusive certified collective bargaining representative of its agricultural employees, and if agreement is reached, embody such agreement in a signed contract.

(c) Make whole its agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's refusal to bargain and by its failure to bargain in good faith for the period from December 28, 1978, until May 5, 1982, and from May 6, 1982 and thereafter until such time as Respondent commences good faith bargaining with the UFW which leads to a contract or a bona fide impasse; 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.

(d) Make whole all agricultural employees who lost work as a result of Respondent's decision to discontinue its 1980 cantaloupe crop for all economic losses suffered by them; 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 for the period from five days after the date of issuance of this Decision and Order until: (1) the date Respondent reaches an agreement with the UFW regarding its decision; or (2) the date Respondent and the UFW reach a bona fide impasse; or (3) the failure of the UFW to request bargaining about the decision within five days after the date of issuance of this Order or to commence negotiations within five days after Respondent's notice to the UFW of its desire to so bargain; or (4) the subsequent failure of the UFW to meet and bargain in good faith with Respondent about the matter.

(e) Permit UFW representatives to meet and talk with Respondent's agricultural employees on the property or premises where they are employed at times agreed to by Respondent and the UFW, and in the absence of such an agreement, during the time when said employees take their lunch break and during the periods one hour prior to the commencement of work and one hour after the completion of work, for purposes related to the UFW's responsibilities as exclusive bargaining representative. Four representatives for each crew employed shall be permitted to exercise access rights, provided that if there are more than 30 employees in a crew, there may be two additional representatives for every 15 additional employees. The Union shall, before taking access, provide

Respondent with information as to the number and names of the representatives who will be taking access, and the times and locations of the intended access.

(f) 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 period and the amounts of makewhole and interest due under the terms of this Order.

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

(h) Provide a copy of the attached Notice, in all' appropriate languages, to each employee hired by Respondent during the twelve month period following the date of issuance of this Order.

(i) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time subsequent to December 28, 1978, until such time as Respondent commences good faith bargaining with the UFW which leads to a contract or a bona fide impasse.

(j) 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.

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

(l) Notify the Regional Director in writing, within 30 days 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: March 5, 1985

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

MEMBER McCARTHY, dissenting:

I disagree with the majority's treatment of the good faith bargaining issue for several reasons. First, in affirming the ALJ's Decision, the majority relies upon an erroneously founded evaluation of Respondent's bargaining conduct. Second, as stated in my dissenting opinion in the previous Sam Andrews case, 9 ALRB No. 24, I find that a legitimate impasse in the negotiations did exist when declared on December 28, 1979, and therefore, I would conclude that much of Respondent's unilateral action after that date was perfectly lawful and not indicative of surface bargaining. Finally, I find that Respondent's overall conduct was more indicative of a good faith attempt to reach accord with the Union than it was of any effort to thwart negotiations.

APPLICATION OF IMPROPER STANDARD

Because of the ALJ's misreading of 9 ALRB No. 24, Respondent was placed in the position of having to demonstrate that it was not engaged in a continuation of prior surface

bargaining. The ALJ apparently read 9 ALRB No. 24 as holding that Respondent's unilateral actions, found by the Board to be in violation of section 1153(e) of the Act, constituted surface bargaining. In actuality the Board had drawn no such conclusion with respect to the conduct addressed in 9 ALRB No. 24; it merely found Respondent's actions to be independent per se violations of section 1153(e). Moreover, the Board there took note of the "complete discussion" of the ensuing phase of negotiations (January 24, 1980, to October 1980) which appears in Sam Andrews' Sons (1982) 8 ALRB No. 64. In that earlier case, the Board had ruled that there were "too few circumstances to support such a finding [of bad faith bargaining]." (8 ALRB No. 64 at p. 9.) In fact, until the decision in this case, Respondent had never been found to have engaged in bad faith bargaining. Thus, in no way can it be said that Respondent began the conduct here in question while bearing the stigma of a party that was seeking to avoid agreement.

The ALJ compounded his error by requiring Respondent to overcome a presumption that the conduct in this case was a continuation of the prior "surface bargaining." (ALJD, p. 157.) Application of this erroneous standard from the outset cannot help but have tainted the ALJ's entire analysis of Respondent's conduct.[1/] With a few embellishments, the majority has adopted

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[1/] The complexion of the ALJ's analysis changed dramatically at the point where he assumes the Board to have found Respondent to be engaged in surface bargaining. Just prior to that, he had cited a number of acts by Respondent that he acknowledges as being indicative of a desire to reach a contract.

that analysis. Those embellishments, including a recitation of every unfair labor practice committed by Respondent over the last ten years, whether related to bargaining or not, merely reflect the basic weakness of the case against Respondent.[2/] When viewed in the absence of the prejudicial standard employed by the ALJ, Respondent's conduct is seen simply as hard bargaining.

NATURE OF THE EMPLOYER'S BARGAINING CONDUCT

Respondent made it clear from the outset that, for various reasons which it explained to the Union, certain provisions of the precedent-shattering SunHarvest agreement were unacceptable and that the terms of any contract it signed had to be more favorable than those of SunHarvest. This was simply a forthright statement of a position it was entitled to take.[3/] Likewise, although making a contract very difficult to achieve under the circumstances, the Union was entitled to cling to its position, which was that it would not bargain down from an already negotiated agreement (SunHarvest).[4/] (See NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229, 231 [45 LRRM 2829].)

For each of the issues raised by the Union, Respondent

[2/] It should be noted that during this 10-year period, over 50 of the charges that were filed against Respondent were ultimately dismissed.

[3/] Respondent's position was not in effect a precondition to bargaining because it did not foreclose other viable approaches to a contract, such as a blend of certain SunHarvest provisions with other terms geared to Respondent's particular situation.

[4/] Respondent had reason to believe that the Union might accept a contract less favorable than SunHarvest because, unlike other SunHarvest signators, Respondent grew substantially more than just vegetables and the Union was not insisting on SunHarvest for other types of growers (e.g., grape growers).

set forth its position and provided a supporting rationale. A complete picture of where Respondent stood was evident at an early point in the negotiations and the Union was specifically told that Respondent had little room for further movement. Nevertheless, the Union continued to act as if it expected Respondent to make major concessions, apparently hoping that occasional movement on its part would cause Respondent to acquiesce.

Respondent had, from early on in the- negotiations, offered terms that were remarkably substantial. Many of the provisions of the master agreement which preceded SunHarvest were accepted by Respondent. After SunHarvest was inked, Respondent proposed adoption of the wage rates contained therein for all its workers except those involved in non-SunHarvest types of work (i.e. , flat crop production; later reduced to just cotton production). Respondent also agreed to the trust fund proposals (RFK, MLK and Juan de la Cruz) that had often proved to be serious bones of contention between the Union and other growers. Neither did Respondent cavil with respect to either a union security clause or a non-discriminatory hiring provision that appeared in other UFW contracts. Moreover, Respondent's negotiator displayed a willingness to meet for negotiations regularly, and even on an accelerated basis if that would be helpful in producing an agreement. For all that appears, the Union could easily have obtained a contract but for its decision not to accede to Respondent's firm position on certain issues.

TREATMENT OF IMPASSE

As previously indicated, the ALJ relied heavily on the Board's findings in 9 ALRB No. 24 that the impasse declared by Respondent in December 1979 was not valid and that the subsequent unilateral wage increase in January 1980 was a violation of section 1153(e). He regarded those acts as having placed Respondent in an initial posture of surface bargaining and that Respondent's conduct in the instant case evidenced a continuation of that bad faith posture.

Further unilateral wage changes by Respondent played an important part in the ALJ's conclusion that Respondent's posture remained unchanged. During the year that followed the declaration of impasse and the January 1980 wage hike for certain lettuce harvesters, Respondent implemented two more wage increases after notice to the Union--one in June 1980, affecting lettuce and watermelon harvesters, and one in October 1980, affecting all remaining classifications. All three of these increases were within the parameters of Respondent's November 1979 proposal at the bargaining table. Thus, if the December 1979 declaration of impasse was valid, all of the 1980 wage changes were lawful and could not serve, as they did for the ALJ, as evidence of bad faith bargaining.

In my Dissent in 9 ALRB No. 24, I argued that the December 1979 declaration of impasse was indeed valid, citing the same reasoning that I used in my Dissent in Admiral Packing Company, et al. (1981) 7 ALRB No. 43: An impasse may be said to exist where the parties, although having room for movement on certain issues, are deadlocked on one critical issue and further discussion in

the areas where movement can take place are not apt to break the deadlock. (See N.L.R.B. v. Tomco Communications, Inc. (9th Cir. 1978) 567 F.2d 871, 888 [97 LRRM 2660]; American Fed. of Television & Radio Artists v. NLRB (D.C. Cir. 1968) 395 F.2d 622 [67 LRRM 3032].)

On review before the Fourth District Court of Appeals in Carl Joseph Maggio, Inc. v. ALRB (Apr. 1984) 154 Cal.App.3d 40, the Board's Admiral Packing Decision was overturned. The court reached the following conclusion with respect to the issue of whether the declared impasse was legitimate:

> We conclude the failure to negotiate the less important issues does not preclude a finding there was an impasse when this single issue of economics was the real cause of a stalemate. (154 Cal.App.3d at 59.)

Similarly, in 9 ALRB No. 24, the wage rate issue was the major obstacle that was keeping the parties apart. The Union had refused to accept any change in its wage proposal (which called for increases of thirty-cents per hour above the recently signed SunHarvest contract, plus a cost-of-living allowance), while the employer, who wanted to go no higher than the SunHarvest rates, was insisting on a wage differential for flat crop production, a concept to which the Union was "unalterably opposed." The ALJ in the instant case noted that the Board in 9 ALRB No. 24 had recognized that "Impasse may be reached as to certain crucial issues, while agreement is still possible in other areas," but also that the Board had limited application of that doctrine to impasse situations which "centered on a matter of principle" rather than the economic cost of the contract.

The court's decision in Maggio makes it clear that an impasse can center on the single issue of economics, matters of "principle" being beside the point. Had the ALJ had the benefit of that holding at the time he wrote his decision, he would have been compelled to begin his analysis with the parties being at impasse rather than Respondent being in an initial posture of bad faith. He would also have had to conclude that at least three of the unilateral increases that form a major underpinning of his decision were in fact lawful and not at all indicative of bad faith. The Board could have taken this opportunity to rectify its prior erroneous ruling, but instead it has reaffirmed the existence of an invalid impasse and has approved the ALJ's use of that finding as a springboard to an ultimate finding of surface bargaining.

EVIDENCE OF SURFACE BARGAINING/TOTALITY OF THE CIRCUMSTANCES

Even without finding that the impasse was valid, the Board did not have sufficient evidence to conclude that Respondent was engaged in surface bargaining. Those aspects of Respondent's conduct which the ALJ found to be indicative of bad faith were: (1) declaration of impasse in December 1979, followed by a unilateral wage increase (discussed supra); (2) delay in providing information regarding the termination of the 1980 melon crop, (3) unilateral changes in pay rates in June and October 1980 (discussed, supra) and September 1981; (4) unprepared negotiator in 1981; (5) mistaken submission and subsequent withdrawal of proposals in March 1980; (6) failure to cost out the UFW's economic proposal in May 1981; (7) failure to respond with countermovement

upon easing of Union's position on May 5, 1981; and (8) proposal on July 1, 1981, that labor contractor employees be excluded from the bargaining unit.

With respect to item (2) above, there was no showing by the General Counsel that the decision to terminate the melon crop had any direct relevance to the issues that were then holding up conclusion of a collective bargaining agreement. Prompt compliance with the information request on this matter would not have advanced negotiations. Moreover, as conceded by the ALJ, some of the Union's information requests were revealed as having harassment as their objective. This fact could understandably have influenced Respondent's reaction to information requests generally.

Concerning item (3), Respondent had notified the Union of its plans for a wage increase' in September and offered to meet with the Union to negotiate the matter. As with prior wage changes during the course of negotiations, the Union's position was that it would agree to no such changes in the absence of total agreement on a contract. It is difficult to see how bad faith can be inferred from a situation where notice and opportunity to bargain are given, but the Union rebuffs the offer because such response is dictated by its own bargaining strategy.

Item (4.) is another dubious ground for inferring bad faith. The ALJ fails to take into account the fact that both sides changed negotiators in 1981 and that the new union negotiator, unlike his counterpart for the employer, had done very little to familiarize himself with the bargaining history of the parties.

This lack of preparedness on the part of the union negotiator resulted in an undue consumption of time. Although Respondent's negotiator can be faulted for not making sure that company principals who were present provided a response to the occasional question he could not answer, this shortcoming bears no indicia of any conscious effort to slow down or thwart negotiations.

Item (5) was dealt with in an earlier Sam Andrews case, 8 ALRB No. 64. While found to be the result of negligence and to constitute some evidence of a lack of good faith, it was not deemed to be part of an overall scheme of bad faith. As pointed out in my footnote dissent at pages 8-9 of 8 ALRB No. 64, an inference of illicit motive should not automatically be drawn from a mistake in collective bargaining when, as is the case here, one could expect a similar mistake to occur just as easily in other business contexts. There is nothing to indicate that, in failing to notice a transcription error which ultimately resulted in having to withdraw a proposal, Respondent was exercising a lesser standard of care than it would have in connection with any of its other important business affairs.

Item (6) is an example of taking issue with an employer's refusal to engage in a meaningless exercise. Respondent had already indicated that it was unwilling to go beyond the SunHarvest wage rate. It is unclear to me what purpose would have been served by costing out a proposal that called for an increase of 35 cents an hour over that rate, plus a cost of living allowance. Had Respondent been pleading an inability to pay, the cost of the contract would have become relevant and Respondent would have had

to demonstrate that it could not absorb the additional cost. But that was not the case here.

The movement by the Union referred to in Item (7) was not something by which Respondent's good faith could be tested. First of all, the offer was not unconditional; it was made in "what if ..." terms and was the quid pro quo for which the Union apparently expected Respondent to back down from firmly-held positions on certain key issues such as subcontracting, paid representatives, and cost-of-living allowance. Second, the ALJ touts the significance of the cotton differential that the Union indicated it might agree to; but, because of the new SunHarvest rates that it would be applied to, it was not, on a percentage basis, that much greater than the differential which obtained under Respondent's old contract with the Teamsters. Third, Respondent provided a comprehensive response to the Union proposal, and, in so doing, indicated where it did or did not have room for movement. It was then up to the Union to propose specific trade-offs that might have seemed feasible at that point. For the ALJ to require more of Respondent under these circumstances is to require Respondent to make actual concessions, beyond those it had already made; the Act does not compel the making of concessions and the Board is not permitted to sit in judgment of the substantive terms of a contract. (H. K. Porter Co.,Inc. v. NLRB (1970) 397 U.S. 99 [73 LRRM 2561].)

Item (8) is given undue significance by the ALJ. Respondent's overriding concern in the area of subcontracting was that any collective bargaining agreement should not overly restrict

its ability to use subcontracting as it had in the past. This was a position that had been established early in the negotiations when different negotiators were present. In trying to make subcontracting palatable to the Union, Respondent had always emphasized that employees brought in by labor contractors would still be covered by the collective bargaining agreement, as they were by law part of the bargaining unit. There is no reason to believe that Respondent suddenly wanted to go beyond its previously stated position on subcontracting and achieve a result (arbitrary exclusion of certain employees from the bargaining unit) that would have been unlawful anyway. Both sides displayed confusion over this issue when the statement was made. In view of all the circumstances, the serious import which the ALJ ascribes to the statement is not warranted.

The majority attempts to bolster the ALJ's Decision by faulting Respondent for the failure of its negotiator to be completely available for negotiations during certain segments of the parties' three-year bargaining history. The majority neglects to mention that the availability problem was created by the need for Respondent to defend itself in unfair labor practice proceedings initiated by the UFW (with some of the charges involving alleged bargaining violations), that Respondent wanted bargaining to proceed apace but the Union would not agree to a continuance of the unfair labor practice hearing, and that the Union negotiator was herself unavailable for meetings to a significant degree. In addition, the majority seems to suggest that Respondent was required to accommodate the Union's scheduling and logistical problems, but

that the Union was under no obligation to do likewise for the Respondent. Respondent's negotiator frequently offered to meet on short notice, but the majority scoffs at those offers because they were inconvenient for the Union and its representative. On the other hand, the majority expects Respondent to change negotiators when the Union's insistence on a certain schedule would affect the availability of Respondent's representative.

The majority also faults Respondent for a five-month lapse in negotiations from late 1980 through early 1981. Again the majority's assessment is one sided. Because of other involvements, the Union's negotiator allowed the negotiations to become dormant, making only occasional informal inquiries that revealed no change in Respondent's position. When a formal inquiry was finally made in March, Respondent replied with an indication of the areas where some movement might still be possible. Negotiations then recommenced, but neither side was prepared to move far enough to satisfy the other. The hiatus, which had no apparent effect on the course of negotiations, was no more attributable to Respondent than it was to the Union.

The ALJ's and the majority's inferences of bad faith are at best extremely strained. A proper assessment of good faith requires that the totality of the circumstances be considered. (Continental Insurance Co. v. N. L.R.B. (2d Cir. 1974.) 495 F.2d 44, 48 [86 LRRM 2003].) To the extent that any of Respondent's actions fall short of ideal bargaining conduct, they pale in significance when compared to other actions by Respondent which evince a genuine interest in reaching agreement with the Union (see discussion,

supra). The totality of circumstances also entails a consideration of those external factors which demonstrate that it was legitimate hard bargaining, rather than surface bargaining, that was taking place. The ALJ and the majority failed to give any weight to the fact that Respondent successfully weathered the Union's intermittent work stoppages in October and November of 1979 and the full-scale strike in July and August of 1981. Naturally, this strengthened Respondent's hand at the bargaining table since it showed that the Union's economic weaponry would not be sufficient to produce capitulation to its demands. Is it any wonder then that, having already made considerable movement at the outset, Respondent saw little need to back down from its early positions?[5/] The fact that negotiations dragged on interminably was at least as much a result of the Union's failure to come to grips with the realities of the situation as it was the result of any action or inaction on Respondent's part.

CONCLUSION

The majority arrives at its conclusion that Respondent was engaged in surface bargaining by following a path whose stepping stones include an erroneous standard, a failure to heed a key tenet of the landmark Maggio Decision, a series of strained inferences, and a deficient view of the totality of circumstances. The majority's conclusion is therefore untenable on both legal and

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[5/] If an employer concludes that its bargaining position has improved as a result of an economic strike, it may even withdraw proposals it has previously made to the union. (NLRB v. Alva Alien Industries, Inc. (8th Cir. 1966) 369 F.2d 310, 318.)

factual grounds. That portion of the complaint alleging a refusal to bargain in good faith should have been dismissed.

Dated: March 5, 1985

JOHN P. McCARTHY, 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 have violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by unilaterally changing our employees' wages without notifying or offering the United Farm Workers of America, AFL-CIO (UFW) a chance to bargain, by discontinuing our 1980 Imperial Valley cantaloupe operation in retaliation for workers' exercise of rights granted by section 1152 of the Act; and by engaging in unlawful surveillance of employees and UFW organizers, and by denying UFW representatives access to our fields to talk to employees. 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 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 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 change in your wages or working conditions without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed changes.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement. In addition, we will reimburse all workers who were employed at any time during the period from December 28, 1978, to the date we began to bargain in good faith for a contract for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW plus interest.

WE WILL NOT interfere with the rights of our employees to talk freely and privately with representatives of the UFW on our premises.

WE WILL NOT eliminate the production of any crops except for business reasons, and we will not fail or refuse to bargain with the UFW regarding the effects of such a decision upon bargaining unit members.

SAM ANDREWS' SONS

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 92243. 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

Sam Andrews' Sons
(UFW)

11 ALRB No. 5
80-CE-143-EC,
et al .

ALJ DECISION

The ALJ found that the Employer engaged in unlawful surface bargaining beginning on December 28, 1979. The ALJ also found that several unilateral changes in wage rates violated Labor Code section 1153(e) and that various company proposals or responses on certain issues, including the Company's responses to the Union's information requests, did not violate the Act. In addition to the bargaining questions, the ALJ found that Andrews did not unlawfully discriminate against three specific employees and one entire crew. As to allegations of surveillance and unlawful access denials, the ALJ recommended finding some to be violations of the Act and dismissing others.

BOARD DECISION

The majority adopted the ALJ's finding, conclusions, and recommended remedies with the exception of two allegations regarding access denials. On those allegations, the Board held that the denials were unlawful in that Andrews failed to prove the access was excessive.

DISSENT

Board Member John McCarthy dissented from the majority's treatment of the surface bargaining issue for several reasons. The ALJ apparently assumed from an earlier case that Respondent was already engaged in surface bargaining at the beginning of the relevant bargaining period in this case. Member McCarthy believes that this erroneous assumption tainted the entirety of the ALJ's analysis, an analysis which the majority has adopted. He also believes that a legitimate impasse in negotiations did exist at the outset of this case and that therefore much of Respondent's subsequent unilateral action must be considered lawful and not indicative of surface bargaining. Finally, he contends that Respondent's overall conduct was more indicative of a good faith attempt to reach a contract with the Union than it was of any effort to thwart negotiations. He would have dismissed that portion of the complaint alleging a refusal to bargain in good faith.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 80-CE-143-EC
	)	80-CE-232-EC
SAM ANDREWS' SONS,	)	80-CE-250-EC
	)	80-CE-251-EC
Respondent,	)	80-CE-254-EC
	)	81-CE-59-EC
and	)	81-CE-144-D
	)	81-CE-178-D
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	81-CE-191-D
	)	
Charging Party.	)	

Appearances:

Patricia Rynn, Esq.
Dressier, Quesenbery, Laws & Barsamian
Newport Beach, California for
the Respondent

Jryl James, Esq.
Gary Moss, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
Los Angeles, California for
the Respondent

Marcos Camacho
Keene, California
for the Charging Party

Maria Maldonado, Esq.
Salinas, California for the
General Counsel

Juan Arambula, Esq.
Delano, California
for the General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Judge: This case was heard before me for 23 days commencing December 14, 1981 and concluding May 5, 1982. As an accommodation to the parties and their witnesses, the hearing was held in Delano, El Centro, Salinas, Bakersfield and Los Angeles, California.

On March 12, 1980, the United Farm Workers filed and duly served the charge in Case No. 80-CE-143-EC. It was the first of eighteen charges filed against Respondent which ultimately went to complaint and were consolidated for hearing.[1/] A Consolidated Complaint in Cases No. 80-CE-143-EC, 80-CE-232-EC and 80-CE-250-EC issued on June 16, 1981. Respondent filed and duly served its Answer on June 23, 1981. A Second Consolidated Complaint issued August 5, 1981, which consolidated Cases No. 80-CE-251-EC and 80-CE-254-EC with those cases covered by the initial complaint.

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1. The remaining charges were filed and duly served or. the following dates:

Case Number	Filed	Served
80-CE-232-EC	September 4, 1980	September 1, 1980
80-CE-250-EC	November 18, 1980	November 18, 1980
80-CE-251-EC	November 18, 1980	November 18, 1980
80-CE-254-EC	November 21, 1980	October 21, 1980
81-CE-59-EC	June 10, 1981	June 10, 1981
81-CE-144-D	July 16, 1981	July 14, 1981
81-CE-178-D	August 27, 1981	August 27, 1981
81-CE-191-D	September 3, 1981	September 3, 1981
81-CE-211-D	May 9, 1980	May 5, 1980
81-CE-30-EC	February 20, 1981	February 20, 1931
81-CE-251-D	October 29, 1981	October 29, 1981
81-CE-253-D	October 30, 1981	October 30, 1981
81-CE-257-D	November 5, 1981	November 5, 1981
81-CE-266-D	November 19, 1981	November 19, 1981
81-CE-269-D	November 27, 1981	November 25, 1981
81-CE-144-1-D	September 3, 1981	September 3, 1981

Respondent answered the Second Consolidated Complaint on August 10, 1981. General Counsel filed a Third Consolidated Complaint on August 20, 1981, adding Case No. 81-CE-59-EC to those cases consolidated. On September 4, 1981, a First Amended Consolidated Complaint issued which added Case No. 81-CE-144-D to those charges already consolidated for hearing. A Second Amended Consolidated Complaint issued on October 6, 1981, adding Cases No. 81-CE-178-D and 81-CE-191-D to those previously consolidated. Respondent answered the Second Amended Consolidated Complaint on October 19, 1981. The Third Amended Consolidated Complaint filed December 10, 1981, consolidated an additional nine charges for hearing.[2/] A Third Amended Consolidated Complaint issued December 21, 1981; this pleading brought together amendments previously made into a single document and is the pleading upon which the cases went to trial. It will hereafter be referred to as the complaint. Respondent answered the complaint on December 22, 1981.

The United Farm Workers of America (UFW or Union), as Charging Party, moved to intervene in the proceedings. Its motion was granted.

All parties were given full opportunity to participate in the proceedings, and all parties filed post-hearing briefs.

Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs filed by the parties, I make the following:

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2. The following charges were added by the Third Amended Consolidated Complaint: 80-CE-211-EC, 80-CE-30-EC, 81-CE-251-D, 81-CE-253-D, 81-CE-257-D, 81-CE-266-D, 81-CE-269-D and 81-CE-144-1-D.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Respondent admits it is an agricultural employer within the meaning of Labor Code section 1140.4(c) and further admits that United Farm Workers of America, AFL-CIO (hereafter UFW or Union) is a labor organization within the meaning of Labor Code section 1140.4(f).[3/]

It is admitted that the UFW was certified on August 21, 1978, as the exclusive bargaining representative of Respondent's agricultural employees and that the UFW was at all times material the certified bargaining representative for Respondent's agricultural employees.

II. RESPONDENT'S OPERATIONS

Sam Andrews Sons is a partnership engaged in farming operations primarily in the Bakersfield and Imperial Valley areas.[4/] It has substantial acreages in both areas upon which it grows lettuce, melons and other vegetable crops as well as cotton and other flat crops. During 1981 Respondent was also engaged in harvesting lettuce in the Salinas Valley area.

Among the partners, Don Andrews is primarily responsible for labor relations and is the partner who participated in the negotiations between Respondent and the UFW.

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3. Respondent has on several prior occasions been charged with violating the ALRA. See 3 ALRB No. 45 (1977); 4 ALRB No. 49 (1978); 5 ALRB No. 68 (1979); 6 ALRB No. 44 (1980); 3 ALRB Mo. 64 (1982) and 8 ALRB No. 87 (1981); 8 ALRB No. 69 (1982); and 9 ALRB No. 24 (1983); and 9 ALRB No. 32 (1983).

4. See Sam Andrews' Sons (1983) 4 ALRB No. 24, ALJ Op. 5-' for additional description of Respondent's operations.

Prior to the certification of the UFW in August 1978, Respondent's agricultural employees were covered by a collective bargaining agreement between Respondent and the International Brotherhood of Teamsters.

Respondent's lettuce vacuum cooling plant employees in the Imperial Valley have been covered for many years by successive agreements between Respondent and the Fresh Fruit and Vegetable Workers Union. Respondent also has an agreement with the Teamsters which covers employees involved in the trucking of produce.

III. THE UNFAIR LABOR PRACTICES

The complaint alleges that since on or about November 1979, Respondent has been engaged in surface bargaining as manifested by the following course of conduct: (1) the failure and refusal since February 1980 to provide the Union with requested information relevant and necessary to bargaining; (2) the failure and refusal to bargain about either its decision not to plant cantaloupes during the 1980 season or the effects of that decision upon unit employees; (3) effecting unilateral wage increases; (4) failing and refusing to respond to certain contract proposals made by the Union; (5) commencing November 1979, failing or refusing, without explanation, to consider or to make concessions respecting UFW proposals; (6) effecting a unilateral change in conditions of employment regarding hiring of King City lettuce crews; and (7) effecting unilateral changes in working conditions of lettuce thin and hoe workers.[5/]

5. Paragraph 7(h), alleging a unilateral change in conditions of employment of machine shop employees was dismissed on motion of General Counsel following completion of its case in chief.

Additionally, the complaint alleges discriminatory layoffs and refusals to rehire or recall, and acts of surveillance or creating the impression of surveillance.

IV. RESPONDENT'S ALLEGED FAILURE AND REFUSAL TO BARGAIN

A. Background

It is Respondent's conduct since November 1979 which is alleged to manifest surface bargaining; however, to determine whether Respondent's course of conduct following November 1979 violated section 1153(e) requires consideration of the totality of the circumstances of the negotiations.[6/] Therefore, it is necessary to review events for the entire period during which negotiations occurred.

B. Chronology of Negotiations

(1) January -- July 1979 (Nassif-Paul Chavez Period)

Following its certification as bargaining representative for Respondent's agricultural employees on August 21, 1978, the Union directed a letter to Respondent on August 23, 1978, requesting a meeting. The letter was accompanied by the Union's standard form Request for Information[7/] and by its customary request that the information be provided within ten days. Respondent forwarded a copy of the Union's August 23rd letter and enclosure to Thomas A.

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6. Eto v. Agricultural Labor Relations Bd. (1981) 122 Cal.App.3d 41.

7. The Request seeks detailed information regarding bargaining unit members; the employer's fringe benefits programs for unit and non-unit employees; copies of contracts with other labor organizations; detailed production data; a list of pesticides used; and a list of all mechanical equipment used by Respondent in the production of its crops.

Nassif its negotiator.[8/] Between August 1978 and January 1979 Nassif tried unsuccessfully to contact the Union to apprise it that he represented Andrews and to. obtain information which would enable him to respond to the Request for Information.

On January 2, 1979, Nassif directed a letter to UFW representative Gilbert Padilla which provided the following information: the name, address, social security number, age, birthday, sex and job classifications of all Andrews agricultural employees; the current wage rates paid by Andrews; the schedule of benefits under the Western Growers Assurance Trust Plan; a copy of an employee handbook containing fringe benefits provided agricultural employees; copies of Andrews collective bargaining agreements with other labor organizations; a list of crops grown and harvested by Andrews in both the Bakersfield and Holtville areas as well as those crops either grown or harvested in each area; a partial list of equipment used in crop production together with a list of certain hand tools and protective clothing provided employees; and a list of pesticides used in Holtville and in Bakersfield.

The response further noted that Respondent had no information regarding its employes' spouses; that it provided no fringe benefits not set forth in the Employee Handbook, and that the claims experience information requested could be obtained from the

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8. At that time Mr. Nassif, an attorney, was practicing in El Centro with the firm of Byrd, Sturdevant, Nassif & Pinney. He subsequently became a member of Gray, Carey, Ames and Frye; the sane firm in which his immediate successor as Respondent's negotiator is a partner.

Western Growers Association.

January 26, 1979

The initial bargaining session was held January 26, 1979. The UFW was contemporaneously engaged in multi-employer vegetable negotiations with Salinas and Imperial Valley Growers. Respondent stated its reasons for not participating in those negotiations. UFW negotiator, Paul Chavez, stated the absence of a settlement in industry negotiations would impede UFW negotiations with Andrews since he had no authority to break new ground.

Following the meeting Chavez sent Nassif a letter dated January 29th requesting the following additional information be supplied by February 5th: an updated classification seniority list; a list of current employees and their marital status; the company's managerial structure; detailed production data by geographic area; the formula used for establishing piece rates; a copy of Respondent's expired contract with the Teamsters union; and a yearly schedule of operations performed on each crop.

February 5, 1979

At the outset of the meeting, Respondent produced the following information requested in the Chavez letter of January 29th: an updated classification seniority list for Holtville and the Imperial Valley; the current payroll lists for Holtville and Bakersfield; Respondent's company structure; the production data requested in the form in which Respondent had it available; a document issued by the Imperial County Department of Agriculture setting out a yearly schedule of operations on each crop, a copy of the Teamster agreement; and an explanation of how lettuce harvesting

piece rates were determined.

Nassif asked Chavez to advise him in writing if anything additional was required and was told that it seemed Respondent had provided everything requested.

Chavez again asked why Andrews opted not to participate in the industry negotiations. Nassif stated Respondent's flat crop operations distinguished it from vegetable industry growers and that it had large Bakersfield operations where its competitors were unorganized by the UFW.

The Union withdrew its initial non-economic proposal and submitted a new one to bring its position vis-a-vis Andrews in line with its current position in industry negotiations.

Nassif recited his efforts by way of several letters to which no responses were received to get negotiations under way. Chavez acknowledged those efforts; however, he wanted to know why Andrews took so long to respond to the Request for Information. Nassif said the Request was the UFW standard form and not directed to Andrews specifically; he said he wanted to find out what the UFW really wanted before responding, citing the cost of preparing a response. He also noted that the necessary records were tied up in unfair labor practice proceedings; thus, preventing an earlier response.

While expressing a preference for having a complete contract proposal from the UFW before making its initial counterproposal, Respondent stated a willingness to submit a complete counterproposal before receipt of the UFW[1]s economic proposal. Chavez expressed a preference for dealing immediately

with the UFW's non-economic proposals. Nassif agreed to this procedure and suggested Chavez proceed to explain the proposal. Chavez said Nassif understood the proposal and could explain it to Don Andrews on his own time. After some discussion, Chavez proceeded through the proposal article by article. There was extended discussion of UFW proposals regarding Recognition, Union Security, Hiring Halls and Seniority.

February 16, 1979

By letter dated February 15, Paul Chavez made a further request for information, reiterating the Union's demand for detailed crop production data. The letter was apparently presented to Nassif at the meeting on the 16th; its presentation was followed by a discussion regarding what was being requested. Chavez was told how to ascertain the melon harvest rates in the Teamster contract. Respondent provided a corrected seniority list for Bakersfield irrigators.

Nassif asked whether any information other than that sought in Chavez' February 15th letter had been requested and not received. Chavez responded the Request had been answered "very well". However, he noted the wage rates for mechanics, welders and miscellaneous workers had not been provided. He also said he was unable to locate the thinning seniority list for Bakersfield.

Nassif requested a copy of the UFW Constitution; Chavez stated it would not be supplied. Massif's request purported to be made because the UFW's union security proposal required membership in good standing as defined in the UFW Constitution as a condition of employment. Chavez would not discuss or disclose the

Constitution's good standing requirements, stating the UFW regarded good standing as an internal union matter.

There was discussion of specific paragraphs in the UFW's union security and hiring hall proposals.

Discussion turned to Andrews' initial non-economic proposal. Chavez said the UFW could accept three proposed articles: Discrimination, Modification and Savings Clause.[9/] After a short discussion Respondent's Bulletin Board and Location of Company Property proposals were accepted. After discussion and modification, Respondent's proposed Access to Company Property language was accepted.

There was discussion without resolution of problems relating to supervisors performing bargaining unit work.

Chavez then requested an early response to the UFW's proposals on Hiring, Maintenance of Standards, Workers Security, Records and Pay Periods, Union Label, Successor, Family Housing, and Reporting of Dues and Contributions. No mention of these subject matters was contained in Respondent's proposal. By way of explanation Nassif stated those proposals had economic implications. He promised a response by the next scheduled meeting.

The parties discussed Respondent's opposition to language in the UFW's proposal which merely reiterated provisions of the ALRA; Respondent opposed such provisions because they created an additional forum for litigating alleged violations of the Act.

Respondent's opposition to several paragraphs of the UFW's

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9. Respondent's proposals were identical to provisions found in the UFW's "Master Agreement".

recognition proposal was extensively explained. There was extended discussion and explanation of position by both Chavez and Nassif regarding the UFW proposal requiring supervisors to apologize for remarks which disparage, denigrate or subvert the Union.

Nassif's scheduling problems vis-a-vis industry negotiations were discussed. He was prepared to increase the number of Andrews meetings per week if Chavez could get the UFW's industry negotiator to meet fewer days per week.

Twelve Articles proposed by Andrews were rejected, some without discussion.

February 16, 1979

Nassif supplied Chavez separate lists for Holtville and Bakersfieid showing all Andrews' crop operations and whether those operations were performed by Andrews or by other companies.

Respondent's proposals on Hiring, Maintenance of Standards, Worker Security, Union Label, Records and Pay Periods, Recording of Pay Deductions, Family Housing and fringe benefits were presented.

There was discussion of wage rates which had been requested, but which Chavez contended had not been supplied. Don Andrews repeated an explanation given at an earlier meeting regarding how current rates could be obtained by applying the increases in the Teamster contract which Andrews had given Chavez.

Chavez again requested rates for mechanics, welders and other classifications not set forth in the Andrews handbook, and for the first time, requested wage rates for gardeners, a carpenter and a barracks custodian. Respondent had no position regarding the unit placement of these classifications. Nassif lacked sufficient

information to form an opinion regarding their status.

The following provisions were signed off: Access to Company Property, Bulletin Boards, Location of Company Property, Discrimination, Modification, and Savings Clause.

Respondent was opposed to the UFW's New or Changed Operations proposal because of its arbitration provisions. Andrews did not want an arbitrator determining wage rates without having some standard spelled out in the agreement. Chavez responded that the UFW language was "negotiators" language, and he didn't want to change it. After a recess, Respondent modified its position by proposing that the arbitrator be allowed to determine a reasonable rate in terms of other rates under the contract. There followed a discussion of reasonableness; the UFW rejected Respondent's Modified Proposal.

Supervisors doing unit work was again discussed. Nassif proposed grandfathering work done by Andrews supervisors so long as no full time jobs were eliminated, and no one was prevented from coming off layoff. Chavez sought a list of duties performed by supervisors as a way of reducing the vagueness of the provision.

There was an extended discussion of the UFW's Worker Security (picket line observance) proposal, illustrated by example and exposition of how the Union envisioned the article would work.

The "verbal apology" language in the Recognition proposal was discussed and earlier arguments reiterated. Chavez was unsure he could resolve the question until industry negotiations had done so. Nassif and Chavez agreed that each understood the others position and should move on to other topics.

Subcontracting was discussed at length. The UFVJ predictably proposed no subcontracting; Respondent, just as predictably, proposed no limitation on its right to subcontract. Nassif explained Respondent's past practice. Respondent's objections to the "good standing" language in the UFW's Union Security proposal were reiterated.

The meeting ended with a discussion of scheduling problems. Chavez left unanswered a question regarding the UFW's willingness to sign with Andrews prior to settling the industry agreement.

March 5, 1979

Nassif provided a detailed statement of bargaining unit duties performed by Respondent's foremen, indicating which foremen customarily did what kind of work. Respondent also provided the wage rates for the various classifications involved in the Bakersfield watermelon, banana squash, cranshaw, honeydew and canary melon harvests.

Nassif stated Respondent did not regard the gardner servicing the yards of company houses or the camp custodians as unit employees. He suggested filing a Union Clarification Petition to ascertain whether the shop employees were agricultural employees. Neither party filed such a petition.

Following a discussion of grievance matters Chavez wanted to discuss the Recognition article. He proposed the old Interharvest language without reference to a foreman's apology.[10/] Nassif accepted the Union proposal; Chavez was to write it up for

10. The reference is to the agreement which preceded the current Sun Harvest (Master) agreement.

signing off at the next meeting.

At Chavez[1] suggestion, there was a discussion of the New or Changed Operations Article with respect to the standard to be used by an arbitrator to determine the applicable rate. Following a caucus, Respondent agreed to the old Interharvest language, as proposed by the Union. The Article was to be reduced to writing and signed off at the next meeting.

The next topic selected by Chavez for discussion was Leave of Absence. Leaves for educational purposes were discussed, particularly whether such leaves were beneficial to the company, and whether they should be limited to increasing an individuals ability to perform work offered by Andrews.[11/] Respondent opposed extended leaves because of the adverse effect on replacements who would have no job security if faced with the return of workers on leaves of absence.

Maternity leaves and leaves for union business were discussed; Respondent understood the concept of granting a leave to persons elected or appointed to union office.

After a caucus, Respondent proposed that temporary leaves for union business be granted to 10% of the workers in each job classification provided no disruption of work or harm to crops would result. Andrews proposed no leaves for harvest employees during a harvest season not exceeding 60 working days. After discussing all aspects of the UFW's proposal, Respondent set out its position on each paragraph. Chavez requested the proposal be reduced to writing

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11. The crux of the leave of absence discussion was retention of seniority while on a leave.

for his review.

Chavez turned the discussion to the UFW's Union Label proposal. Respondent had proposed that use of the label be discretionary rather than mandatory, arguing that giving the Union the name and number of its labels sufficed to meet the Union's needs. Differences on the Article were not resolved.

March 12, 1979

At the outset of the meeting, the Recognition and New or Changed Operations articles were signed off. A draft of Respondent's Leave of Absence language was given Chavez.

Chavez suggested the Grievance and Arbitration language be discussed. He had a list of questions regarding the old Master Agreement language. The parties proceeded through the article paragraph by paragraph with detailed discussion by both negotiators. Thereafter, the UFW caucussed and then proposed a modified version, of the old Master Agreement language. The proposal was discussed.

Chavez submitted a modified position on Leave of Absence. There was an extended discussion regarding whether leaves without pay should be mandatory or discretionary. Nassif argued that language in other UFW agreements made granting of leaves discretionary. The UFW stood on its proposal that granting leaves be mandatory.

Nassif contended the Union had made no movement while Andrews had modified its position with respect to several aspects of the proposal to conform to requests by the Union. Chavez was concerned about the "disruption of work" language. Nassif responded that the standard for applying those terns was good faith. He noted

that Respondent's proposal was more liberal than language in the industry agreement.

The discussion moved to Records and Pay Periods. Accumulation of hours worked was done by computer in Bakersfield and manually in Holtville. The Union proposed no change for Bakersfield, and if Holtville were computerized, Respondent would accumulate hours. Respondent wanted any computerized Holtville operation uniform with its Bakersfield system. The UFW said it would accept Respondent's proposal if the requirement for a written notice in order to inspect the records were deleted.

March 22, 1979

The meeting opened with discussion of Records and Pay Periods. The Union proposed continuation of the existing practice in the Bakersfield area and application of that system to Holtville when Holtville was computerized. Nassif proposed that if Respondent computerized Holtville, it provide the same information as in Bakersfield and deleted the language requiring written consent of the worker before the Union could review his production records. Chavez forthwith rejected the proposal.

Respondent's opposition to the UFW's proposal rested on the requirement that the company continue performing in a particular 'manner; it would agree that if it went to a computer in Holtville, the same information would be available for both areas.

Discussion moved to Leaves of Absence. Generally speaking the UFW proposal adopted various paragraphs and sections of the Master Agreement. There was an extended discussion regarding the UFW's proposal mandating that up to 10% per classification could be

on a leave without pay for Union business. Andrews opposed this proposal, citing the necessity to maintain its market position and perhaps to harvest its crops; that is, it did not want the work force decimated in particular classifications. The Union maintained its position that Respondent be permitted no discretion in granting leaves.

Nassif proposed discussing the Management Rights article. The discussion turned on what Nassif regarded as management's inherent right to establish work rules. As illustrative of reasonable work rules, Nassif cited rules requiring workers to come to work on time, to go home at the proper time, to take and return from lunch breaks on time. Chavez wanted time to consider the proposal.

The discussion moved to contracting. Chavez asked whether Andrews was planning to stick with its current subcontracting proposal. Nassif stated the proposal was negotiable, as was every other article which had been proposed, but he had to know what the Union needed to have by way of subcontracting.

Nassif explained the reasons Respondent subcontracted: no proper equipment, not wanting to buy appropriate equipment, or not having workers with the skills required to perform certain tasks. He said Andrews had made management decisions regarding how it wanted to operate and found it was more economical to contract for harvesting when the equipment, if owned, would be used only part of the year. Andrews' main concern was to continue to conduct its business as in the past, and it had no present intention of subcontracting work other than what had been subcontracted in the

past. If its position changed, the Union would be notified. Chavez kept reiterating the need to protect bargaining unit work.

When Chavez requested a list of the operations in which Andrews was currently involved in a grower-shipper arrangement, Don Andrews said the Grower-Shipper language had no application to his business because Andrews was not primarily a vegetable grower.

The discussion turned to union security. Respondent restated its agreement that Union membership be a condition of employment and that everybody had to become a member within five days of hire. The major remaining problem was "good standing" as defined in the UFW Constitution. Nassif said there was room for some movement, and if the good standing issue were resolved, a lot of other issues could be resolved. He again asked for a copy of the UFW Constitution.

At this point Nassif made a statement regarding the posture of negotiations. He said nothing was being accomplished. He said Andrews had made proposals on Subcontracting and Grower-Shipper and had asked whether the UF/J needed further information in order to respond and been told no. He argued that Chavez failed to respond to Andrews' proposals, and he asked whether Chavez was empowered to negotiate those articles. If not, why not. He also said that if Chavez needed any information, he would like to be so advised.

Nassif continued by saying that every article about which Chavez wanted to talk had been discussed. Each was an item which the UFW rather than Andrews wanted in the contract. He said that this was the first time Respondent sought to talk about specific aritcles, and it was because no responses had been received to their

proposals. He further stated the articles which Andrews wished to discuss were in every UFW agreement in California.

Nassif stated the-company had made it clear it opposed leaves of absence for training and education when the Union was unwilling to say the training and education would be job related; and until Andrews received a response directed to the problems it raised in this connection, there would be no movement on the issue. He said that Respondent did not want to lose 10 percent of every job classification in its work force at one time; that UFW had stated it didn't intend such a result but was unwilling to say so in writing; that the UFW stated it won't take more than seven people from Andrews to go to a UFW convention but was unwilling to put the commitment in writing; and that the Union says it won't do anything to jeopardize market conditions or prices of Andrews commodities but won't put such a commitment in writing.

Chavez replied that Andrews wasn't doing any kind of pioneering; the leave of absence proposed was pretty standard everywhere.

Nassif replied that Andrews was negotiating its first contract with the UFW, and was being asked to accept contract language not found in other UFW agreements. He asked why there were problems with the Management Rights clause, contending that he had never had a problem with clause with anyone with whom he had negotiated at the UFW. When Chavez responded by suggesting that negotiations were being slowed because Andrews was failing to make concessions, Nassif ticked off the items which had been proposed by the UFW and accepted by Respondent. He then reiterated that the

Management Rights proposal was the only thing the Company sought, and the UFW was unprepared to agree to the proposal despite the fact that other employers with UFW contracts had no difficulty in obtaining the same language.

April 2, 1979

Nassif presented Respondent's proposals .on the following subjects: Hiring, Management Rights, Records and Pay Periods, Leave of Absence, and Agricultural Agreements, which he characterized as a revision of the Grower-Shipper clause.

Chavez orally stated the UFW[1]s current position on Leave of Absence. There was renewed discussion regarding whether granting leaves should be mandatory or whether the discretionary word "may" should be used. Nassif explained at length that discriminatory refusals, to grant leaves would be prohibited even if "may" were used, and that any refusal to grant a leave which the Union regarded as disparate treatment would be subject to the grievance procedure. Nassif added that the Union had stated two weeks in a row that it would prepare language found in a supplement with Maggio making leaves discretionary but had not done so. Chavez responded that the committee would submit a proposal encompassing the Master Agreement language and the Maggio supplement.

Management rights was briefly discussed; the UFW stood on its prior proposal; however, Chavez said Nassif's new proposal would be reviewed.

Chavez presented a Grower-Shipper proposal based on the old Master Agreement language. Nassif responded that his Agricultural Agreements proposal more closely met Andrews' needs.

Nassif presented a draft of a Records and Pay Periods provisions reflecting Andrews' position of the prior week. It was signed off during the course of the meeting.

Nassif has submitted a hiring proposal which basically placed hiring in the hands of the company. It was rejected out of hand. Nassif responded that the Andrews' proposal was one which is operative in just about every industry in the United States. He noted that his experience was that the Union really wasn't interested in a hiring hall; but rather its proposal was used as a basis for negotiating other provisions into a contract. Nassif explained Andrews' current hiring practice: Chavez said that there had to be a hiring procedure. Nassif asked what guidelines Chavez wanted, stating he could not understand the UFW's concern with the hiring process so long as it was done on a nondiscriminatory basis.

Chavez asked whether people working for a labor contractor would be covered by the agreement; Nassif said all the provisions of the agreement would apply to such individuals.

Chavez was scheduled to provide a Leave of Absence proposal, a Subcontracting proposal, and a Hiring Proposal at the next meeting.

There were preliminary discussions of seniority; Nassif suggested that Respondent make a seniority proposal at the next meeting.

April 23, 1979

Initially, there was an extended discussion regarding workers from Bakersfield leaving early or not working on Saturday so that they could return to Imperial Valley for the weekend. A group

of workers incited the crews to stop at 10:30 or Saturday when Respondent had planned to work until noon. As a result, Respondent was 5,000 cases short of filling its orders. Don Andrews told Chavez that Respondent would determine how many hours would be worked and any changes would be negotiated with the Union. Andrews said the workers were subject to discharge for taking matters into their own hands.

Chavez apprised Nassif of problems concerning living conditions. The workers wanted additional toilets in each barracks; they were unhappy with bunk beds and wanted a pay telephone in each barracks.

Nassif presented a Seniority proposal. Chavez submitted the UFW's subcontract proposals and a Leave of Absence proposal together with a side letter. He told Nassif that Andrews' last proposal on hiring was rejected and that the UFW resubmitted its proposal. Chavez had some questions regarding Respondent's Agricultural Agreements proposal.

The parties again discussed Leave of Absence. Because the word "confirmed" as opposed to "granted" was used in the Master Agreement, Chavez insisted it be used in the Andrews agreement. Nassif saw no reason for perpetuating unclear language merely because it had been used in the past. He asked why the UFW deleted limitations on leaves for further training or education and reiterated Andrews basic opposition to such leaves, noting that of its workers did not work 12 months a year and could obtain whatever training or education they desired on their own time.

The discussion moved to subcontracting. Nassif said the

company wanted to continue its past practices. It did not anticipate taking unit work from its employees, nor did it want to do so. The UFW had been provided with a list of the jobs performer by subcontractors, custom harvesters or custom applicators. As he had on an earlier occasion, Chavez asked whether people working for labor contractors would be covered by the contract. As before, Nassif responded that they are employees of the company under the ALRA and would be covered by the contract. Chavez asked why, rather than using a labor contractor, Andrews didn't hire more people. Nassif responded Andrews did not always have a foreman available on a temporary basis to supervise the additional employees.

The parties then proceeded through Respondent's seniority proposal. Nassif briefly explained the company's philosophy regarding seniority. The primary reason for Company seniority was for benefits such as vacations. It was also a determinant, together with qualifications, in situations in which neither contender for a new job had classification seniority. Classification seniority was used for purposes of lay off and recall. With a switch in classifications, one's classification seniority date would be the date of employment in the new classification. No classification seniority would be retained in the former classification. Classification seniority was by area. A tractor driver from Holtville would not be able to bump a driver in Bakersfield. Separate seniority lists are maintained.

Crew seniority was discussed. Crew No. 1 is the crew with highest seniority. Bumping to a higher seniority crew is not permitted irrespective of one's classification seniority. When

vacancies occur in a higher seniority crew in the loader and closer classification, the loader and closer with the greatest classification seniority is entitled to move to the higher seniority crew; however, if the opening were for a cutter, a move was dependent upon whether the workers in the higher seniority crew were prepared to accept the worker. Cutters don't necessarily want the highest seniority person because he may be the slowest cutter. It is the most productive cutter or packer who gets the vacancy in the higher seniority crew.

Nassif said Respondent didn't care how layoffs and recalls were handled. It was prepared to do whatever the workers regarded as fair. The main concern was having qualified people to do the work.

Respondent's proposal that the grievance and arbitration procedure not be applicable to probationary employees was discussed. A 30-day probationary period was proposed.

Respondent presented a counterproposal on Leaves of Absence which adopted much of the UFW's latest proposal; however, there were still areas of disagreement.

Nassif stated the UFW's proposal on Subcontracting, the Master Agreement language, was okay, except Respondent wanted to add a paragraph permitting it to utilize subcontractors, labor contractors, custom harvesters or custom applicators in accordance with their past practices.

Chavez again asked whether a labor contractors employees would be covered by the agreement. Nassif responded yes, including the hiring provisions if Respondent did the hiring.

April 30, 1979

The meeting commenced with a discussion of subcontracting. Chavez reviewed again Respondent's past practices and asked again whether Andrews wanted to continue those practices. Nassif said yes. Chavez again asked about coverage under the agreement of people supplied by labor contractors. Nassif responded that all employees of a labor contractor are considered to be employees of the company. However, employees of a subcontractor, for example, employees of the subcontractor digging carrots for Andrews, would not come under the terms of the contract.

Chavez then moved to the Leave of Absence section and asked the reason for substituting the phrase, "unreasonably disruptive work" for the phrase "significant disruption of work". Nassif responded that "unreasonably" was a popular word in contracts and in the law, and a term understood by any arbitrator or judge. He said it was the reasonable man test. There was a reiteration of the discussion about "granted" versus "confirmed". Chavez said he was more confortable leaving the work confirmed in the language, however, he agreed that "confirmed" in the context of the article meant "granted". Nassif said that was the reason he wanted to change the word. Chavez said he thought the side letters covered the meaning of confirmed. Nassif agreed to use confirmed in the conttractual language so long as the parties understood what it was intended to mean.

The discussion then shifted to subcontracting and the use of labor contractor employees. The UFW was opposed to utilizing such employees to perform work which Andrews employees were capable

of performing. As he had earlier, Nassif explained that such employees were utilized only for short periods of time in situations in which Respondent did not have supervisory employees available. Chavez stated that even if Andrews had not been performing certain kinds of work which its employees were capable of performing, e.g., garlic growing and harvesting, such work should be done by Andrews employees rather than by labor contractor employees.

The Union wanted Andrews employees used in tomato harvesting in conjunction with a mechanical harvester; a demand foreign to any practice Andrews previously followed.

May 21, 1979

Agreement was reached on the Management Rights clause.

June 4, 1979

Chavez distributed UFW proposals on the following articles: Union Label, Supervisors, Subcontracting, Discipline and Discharge, Maintenance of Standards, and Workers Security.

The UFW rejected Respondent's proposal that supervisors be permitted to continue doing work which they had done in the past. Chavez said that permitting supervisors to do unit work took money from the workers. He also contended the Union did not know what unit work foremen were doing.

Nassif responded that one purpose of Andrews proposal was to avoid featherbedding, i.e., to avoid having to hire an additional person for a job which a foreman could perform in 5 minutes. He said Andrews was not talking about taking work from unit employees. If work had customarily been done by bargaining unit people, it could not be done by supervisors. If workers are normally recalled

to perform certain work, they would still have to be recalled; nor could the employer lay off unit workers and let a supervisor do the work.

The UFW rejected Respondent's last proposal on subcontracting and resubmitted its April 23rd proposal. The UFW proposal limited subonctracting to situations in which Respondent lacked the necessary equipment and prohibited use of labor contractors despite Respondent's past practice. Chavez said the bulk of the labor contractor crews were undocumented workers who tended to depress wages. Nassif asked how they could depress wages when they're working under the collective bargaining contract. He asked for specific complaints regarding any labor contractors used by Andrews.

Respondent's garlic operation was discussed. Andrews has a contractual relationship with the processor who supplies the employees and machinery to plant, grow and harvest the product. Similarly, when tomatoes are mechanically harvested, the contractor comes in with the harvester and the people working on the machine.

The discussion turned to the picket line clause (Workers Security). Respondent's proposal permitted observance of sanctioned UFW picket lines. The UFW proposal permitted observance of any picket line sanctioned by the UFW. Nassif said he could understand why the UFW didn't want to break the strike of another union, but he could not understand why the UFW should refuse to work in the fields because a packing shed was on strike. He said nobody expected unit people to do struck work, and they would not be asked to do so. Nassif said there should not be a provision permitting the UFW to

observe another union's picket line established at a field of a grower under contract with the UFW.

The UFW's Maintenance of Standards proposal was discussed. Nassif had problems regarding use of the term highest standards in effect. He prepounded some hypothetical to which Chavez could not give clear answers, saying you have to look at the circumstances to determine what is meant by the highest standard. Chavez suggested setting the article aside.

The Union Label proposal was discussed. The UFVJ maintained its prior position and rejected language Nassif had previously presented. The parties were unable to make any progress because of differences with respect to whether employees of subcontractors and custom harvesters came within the definition of non-union labor as used in the section.

Chavez had a new proposal on discharges. He objected to issuing warning notices. Nassif explained the need for written warning notices as a basis for effecting discharges, saying that arbitrators are not satisfied with testimony regarding oral warnings. The use of a written warning enables the presentation of a more satisfactory case. Similarly, the use of warning notices gives the union adequate notice that an employee is unsatisfactory. Chavez said warning notices are used to harass people; their use is cruel because people get worried and scared about receiving one more warning. Nassif replied that Respondent would agree to a provision permitting it to suspend or discharge employees for just cause without having issued a written warning notice. He also noted that even if the Union didn't want a warning notice system, Andrews would

still issue such warnings. The Union could not prevent them from doing so.

After a caucus, Chavez returned to a discussion of a warning notice system. He said the UF*J was not opposed to some written evidence that an individual had been warned; however, it was opposed to a system in which an employee could be fired after three warning notices.

Andrews accepted the Union's proposal on Management Rights. It was Master Agreement language.

Respondent accepted the union proposals on Credit Union Withholding and Income Tax Withholding subject to a provision to hold Respondent harmless for failure to deduct money paid to the employee rather than withheld.

Nassif suggested that at the next meeting Chavez gave him a list of all proposals which the Union did not intend to negotiate because they were in the Master Agreement. He said this would save time; Respondent could say either yes or no to such proposals.

There followed an extended discussion regarding which side had made concessions. Nassif stated that when the Union agreed to Master Agreement language, it contended it was making a concession; but when Andrews agreed to Master Agreement language, Chavez did not regard Andrews as having made a concession.

There followed acrimonious discussion between Nassif and Chavez; the kind of discussion which is not uncommon in the collective bargaining process.

June 10, 1979

As the result of an unannounced UFW strike of Respondent's

melon crop in Imperial Valley, there was a meeting on June 10 with the object of resolving the strike. The UFW proposed that Respondent sign a "me too" contract committing it to adopt the results of the industry-UFW negotiations. Andrews responded it would agree to a "me too" on the lettuce rates only. No agreement was reached.[12/]

June 11, 1979

This was a previously scheduled bargaining meeting. Credit Union Withholding, Income Tax Withholding and Management Rights articles were signed off.

Nassif then stated he wanted to put on the record what had transpired at the off-the-record meeting the previous night. He stated the UFW stuck Respondent's melon operations without giving Respondent an opportunity to negotiate a new melon rate. Respondent said that it didn't expect the rate to be binding on the Union, but that it wanted to give the workers an interim wage increase to equal the prevailing rate.

Don Andrews was upset because Respondent had never received a wage demand for the melon harvest. It had expected to negotiate a rate rather than take a strike. Nassif, Andrews and Chavez had an extended interchange regarding the strike and the UFW's alleged misconduct. Respondent conceded the Union had a right to use the strike under appropriate circumstances as an economic weapon, however, it did not believe that the Union has a right to use violence or to threaten the employer's agents, whether they are

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12. See Sam Andrews' Sons (1983) 9 ALRB Mo. 24, ALJ Op. 20-22 for discussion of what transpired at the June in meeting.

contractors, subcontractors or employees. Nassif contended the union was aware of what had happened and was encouraging such conduct.

Don Andrews then related things which happened between June 10 and June 11, including trespass in violation of access agreements; threatening truck drivers and their equipment; depositing spikes on the road and flattening tires; physically attacking and threatening foremen; threatening destruction of equipment by fire; pounding on buses and terrifying workers/- throwing bottles through windshields of the melon trucks, resulting on one occasion in glass being lodged in the driver's eye; cutting off the finger of a driver in the door of a truck; and shooting at a driver with a pellet gun.

Chavez denied any knowledge of the incidents. Andrews responded that it was difficult to sit negotiating with him when he knew nothing of the terror and destruction wreaked upon Respondent. Finally, Don Andrews said he thought further discussion in the matter was unnecessary because he and Chavez had each expressed his respective feelings, and the main thing was to make progress in negotiations.

Richard Chavez said that Andrews had to understand that he had to learn how to respect the workers' rights. He said that every time something happens it was always charged to the UFW. He told Andrews he had to learn to respect the workers rights as human beings instead of trying to screw them.

The discussion turned to subcontracting. Nassif asked whether Chavez had any specifics regarding his allegations that

Andrews was using illegal aliens to depress wages. Chavez had none.

The picket line clause and its applicability to non-UFW strikes was again discussed. Chavez said the UFW Executive Board had to sanction all observances of picket lines and would not go off "half cocked" in sanctioning non-UFW lines. Nassif said this assurance was really no protection.

Nassif cited the example of a lawful Teamster economic strike in which the Teamsters picketed Andrews fields. Chavez said that the UFW couldn't be expected to break the IBT strike. Nassif agreed, but if the UFW had a contract with a no-strike clause, then the UFW should not be able to say they weren't going to work because the Teamsters set up a picket line at the field.

Chavez said a no-strike clause in the UFW contract imposes certain obligations on the Union and that those obligations would be taken into consideration when determining whether the picket line of another union would be sanctioned. Nassif explained that even with a non-strike clause, the picket line clause it proposed, would permit it to sanction the strike of another union and to advise its members to observe the line.

Nassif inquired why the Union was deviating from the Master Agreement picket line language; Chavez responded he was trying to clarify the language. Nassif asked whether there was a problem with the Master Agreement language. The response was no.

Nassif said Respondent could accept the Master Agreement language with a clarification which would cover a contract provision entitled Agricultural Agreements rather than Grower-Shipper provided the provision was captioned Agricultural Agreement rather than

Grower-Shipper in the Andrews contract.

Repsondent resubmitted its last proposal regarding supervisors performing bargaining unit work. There was a rehash of previously stated positions; the UFW would prohibit all unit work by supervisors, Respondent would have them do what they had done in the past.

Regarding Discipline and Discharge, Respondent agreed to the Master agreement language without prejudice to its right to establish work rules regarding warning notices.

Respondent re-submitted its last proposal on Maintenance of Standards.

Respondent accepted the UFW's June 4 proposal on Union Label. Thereafter the Union wanted to modify its accepted proposal to provide that if Respondent opted to use the union label, it would give the UFW two weeks notice. Nassif couldn't understand the proposed addition; he said that if there were a boycott, it would be to Respondent's advantage to notify the UFW it was using the label. Thus, the two week notification period would be meaningless.

There was an attempt to resolve the melon rate problems. For sack crews the Union proposed a Monday through Saturday, 5 hours per day work week, with time-and-a-half after 6 hours per day. For machine crews, the proposal was time-and-a-half after 8 with a Monday through Saturday work week. Sunday would be at time-and-a-half for all hours worked.

For Sack Crews, Respondent proposed time-and-a-half after "hours a day Monday through Friday, after 6 hours on Saturday and for all Sunday work. On machines Respondent agreed to time-and-a-half

after 8 and for all Sunday work.

The UFW responded by sticking with 6 hours as the work Jay for the Imperial Valley sack crews, Monday through Saturday and time-and-a-half after 6. In Bakersfield they proposed a 7 hour day, Monday through Saturday with time-and-a-half after 7 and on Sunday. The union resubmitted its proposal for time-and-a-half for the first day back. Richard Chavez said the sack rate was going to be $6.75 everywhere or the melons would be struck everywhere. He said that some places were paying as high as $7 a foot.

June 25, 1979

Chavez presented the Workers Security, Discipline and Discharge and Union Labor Sections to be signed off.

He then wanted once more to talk about supervisors doing unit work. The Master Agreement prevents supervisors from doing unit work even if it had previously been done except for specific things such as construction, training and emergencies. There was some discussion about what the UFW considered to be an emergency. The issue was not resolved. Nassif wanted to discuss the subject matter further with Don Andrews.

The frequency with which Respondent would be required to report and transfer dues and the fund contributions required by the Agreement was discussed. Respondent wanted, for ease of administration, to do it monthly off of the trust fund reports submitted by the UFW. Master Agreement language was agreed upon and signed off.

Chavez rejected Respondent's February 12 proposed No-Strike/No-Lockout clause and resubmitted the old Master Agreement

language.

Following a caucus Nassif presented a proposal on No-Strike/No-Lockout which rewrote some of the language of the Master Agreement provision. He also submitted a proposal on supervisors, which would permit supervisors to perform unit work so long as it wasn't done for the purpose of displacing unit employees or for the purpose of causing a layoff or a delay in the recall of unit employees.

The Union modified its position on subcontracting to permit Respondent to subcontract where its employees lacked the skills to do the work or the employer did not have the machinery to do the work. As viewed by Chavez the difference between the parties was that Respondent sought to maintain its past practices.

The Union still opposed utilization of labor contractors to do thin and hoe work. Nassif said the problem really related to hiring. If there were a hiring hall, use of a labor contractor would be proscribed. If there were no hiring hall, Respondent would do the hiring except for people hired by a labor contractor. Don Andrews explained that if labor contractors were prohibited, the Company would probably hire a foreman, have the foreman hire the crew and pay him a salary rather than a commission. Nassif reiterated that the use of labor contractors had nothing to do with the subcontracting clause because they are not subcontractors.

There followed a conversation regarding the No-Strike clause and language in the agreement permitting Andrews to seek an injunction without first having exhausted the grievance procedures. Chavez argued that an employer had a right to do this under Boys

Market; [13] therefore, it wasn't necessary to have such language in the contract. Nassif said he understood Respondent's Boy's Market rights; but absent language in the contract excusing exhaustion of contractual remedies, each instance would have to be litigated, and the judge would have to determine the existence of the right. Avoidance of litigation was Respondent's reason for seeking the injunction language in the No-Strike/No-Lockout clause.

Subcontracting was discussed again. Respondent reiterated the functions performed by subcontractors and labor contractors. Regarding the UFW position that the clause applys only to machine operators, Respondent stated there were instances where the subcontractor insisted on using his own ground crew in conjunction with his machines.

There was, once more, extended discussion regarding supervisors doing bargaining unit work. Numerous examples were given by each side to illlustrate their respective positions. Chavez described the manner in which the UFW would administer its proposed provision. He stated the Union wouldn't grieve every little situation in which a supervisor was observed doing bargaining unit work. Nassif expressed doubts such would be the case, noting a substantial number of grievances on this issue involving other employers with whom the UFW had contracts.

Chavez returned to a position prohibiting supervisors from doing any bargaining unit work. Starting from that position, it was his view that common sense would govern. He sought to assure

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13. Boys Markets, Inc. v. Retail Clerks Local 770 398 U.S. 235.

Respondent that if a supervisor took 5 minutes to throw some pipe on the back of a pickup, that the union wasn't going to go to arbitration. He conceded that someone might grieve, but he said that someone might grieve under the language Respondent was proposing. Nassif said he thought it unlikely. Chavez reiterated that he wanted to go back to his initial language totally prohibiting supervisors from performing bargaining unit work. Then if little things pop up that Respondent wanted to take care of, he doubted the UFW would file grievances unless it kept happening time and time again or unless it was done for an extended period of time.

Nassif asserted that Respondent had a right to have it's supervisors do all the bargaining unit work it wanted them to do; that was no law or rule which said they couldn't do that. Therefore, Respondent was relinquishing a right in agreeing to limit the right of supervisors to do some bargaining unit work.

After a caucus, Chavez said he wanted to meet further with absent committee members regarding supervisors.

July 30, 1979

Chavez presented proposals on Health and Safety, Successorship and No-Strike/No-Lockout.

The discussion turned to subcontracting and essentially both parties restated their earlier positions. Chavez again brought up labor contractors in connection with subcontracting; once again Nassif said the use of labor contractors really related to hiring and not to subcontracting.

Chavez agreed to have a side letter covering the use of customer harvester employees in garlic, onion, carrot and tomato

operations stating that past practices would govern with respect to those particular crops and stating that employees involved in harvesting operations wouldn't be covered by the contract so long as they were employees of the subcontractor. For those crops in which only a machine operator is involved; the equipment language in the old Master Agreement would cover the situation. Nassif agreed to draft language expressing the parties agreement so that the article could be signed off.

Chavez suggested they talk again about supervisors. The Union's position was that supervisors could do no bargaining unit work except for emergencies, training and supervision. Chavez said that whether grievances would be filed about insignificant amounts of work performed by supervisors would be a function of how well the parties were getting along. If they were at loggerheads, it would happen. Nassif sought to avoid the problem by permitting supervisors to work so long as the work didn't have the effect or result of displacing bargaining unit employees or wasn't done for the purpose of causing the layoff or delaying the recall of unit employees. Nassif "s stated goal was to avoid harassment by the UFW. Chavez responded that Nassif’s language was no guarantee against harassment.

Regarding the No-Strike clause, there was again discussion of language permitting Respondent to seek injunctive relief without having to go through the grievance procedure. Chavez said the company had a right to do so anyway; therefore he could see no reason for the language in the contract. Nassif's response was that even though the UFW’s lawyers knew it was the law, growers had been

put to the expense of litigating the issue. It was his view that the non-exhaustion language should be in the contract because it would forestall the need to litigate.

The parties next discussed the UFW's Health and Safety proposal in detail. Respondent found may paragraphs acceptable but expressed a preference for its own language on other paragraphs.

The discussion then moved to the Successor's clause and the No-Strike clause. Respondent had no change in its position on either of those proposals.

With respect to the successorship proposal, Respondent had some concern about giving the union 30 days advance notice of a sale. Nassif was concerned about union harassment of the purported successor and that such conduct might queer the deal. Chavez modified his position regarding the need for prior notice of a sale and suggested that the union be notified when the sale occurs. Nassif suggested language requiring Andrews to notify any successor of the existence of the collective bargaining agreement as well as notifying the Union of the sale and the transfer of the business.

The July 30 meeting was the last bargaining session in which Paul Chavez functioned as the UFW's negotiator.

July 30 - October 16, 1979

There was an hiatus in negotiations between July 30 and October 16. On October 2, 1979, Ann Smith, a UFW representative, received a call from Nassif seeking to talk to someone at the UFW about increasing wages in Andrews' thin and hoe operations in the Imperial Valley because the season was about to begin. Smith was aware of the UFW policy not to agree to unilateral wage increases

for a single job classification in the absence of total agreement and told Nassif the Union objected to such an increase.

(2) Nassif-Smith Period October 1979 - October 1980

On October 9, Smith contacted Nassif and told him she would be handling the Andrews negotiations.[14/] A meeting was set for October 16. Smith said she would not have sufficient time to prepare a complete economic proposal to submit on the 16th, and if Nassif were interested in an economic proposal, they should meet on a later date. Nassif said Andrews wanted to submit a wage proposal and would like to meet on the 16th. Smith knew Massif wanted early agreement on economics.[15/]

October 16, 1979

Ann Smith, Jerry Cohen and Marshall Ganz, were present with a rank-and-file committee of 15 people at the October 16th meeting[16/]

Nassif submitted a wage proposal covering all contract classifications except shop maintenance employees.[17/] The Proposed

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14. Paul Chavez left his Andrews files for Smith together with a memorandum which summarized the main issues. Smith reviewed the files but did not speak with Chavez.

15. By early October 1979 the UFW reached agreement with Sun Harvest and several other vegetable growers: West Coast Farms, Green Valley Produce Cooperative, Salinas Marketing Cooperative, Hard in Farms, Senimi, Hubbard Company and Sakata Brothers. The Sun Harvest agreement became the new Master Agreement.

16. Cohen and Ganz were UFW attorneys.

17. Nassif did not make a wage proposal covering mechanics because he doubted they were agricultural employees. He suggested the parties seek a unit clarification. Without conceding such employees were properly in the unit, Respondent submitted a wage proposal covering mechanics classifications on November 20, 1980.

wages for vegetable crops were identical to those previously effected by Andrews. Except for a flat crop differential and the absence of a COLA provision, the proposal rates were those in the Sun Harvest agreement. In some classifications an increase of 40% was proposed.

Nassif explained that Andrews had not participated in industry negotiations because of its extensive flat crop operations, including cotton. He said the company was proposing and needed to have a "meaningful" wage differential for flat crop operations both in Bakersfield and Holtville;[18/] and if a meaningful flat crop differential could be obtained, resolution of other issues would probably be less difficult.

Smith manifested understanding of the company's concern about a cotton differential; she said it was an important issue for the workers as well.[19/]

Cohen said there were a number of issues of crucial importance to the union: union security, hiring hall, and the paid representative system. Either Smith or Cohen asked Respondent its position in light of the settlements reached with Sun Harvest and seventeen other companies.

Nassif replied that Andrews made its wage proposal in light of the Sun Harvest wage rates but had not reviewed the Sun Harvest

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18. At that point in time Sun Harvest was the only grower raising cotton with whom the UFW had an agreement.

19. The differential in Andrews earlier Teamster contract was never more than 20C below the vegetable rate for a certain job. Andrews proposed difference of 85¢ to $1.25 an hour depending upon the job classification.

contract to determine whether it was acceptable in its entirety. He said Respondent would do so during the period between meetings.

During this period Smith and Nassif were negotiating several other contracts. There was discussion of rearranging other meetings to permit Smith time to prepare to UFW's economic proposal, Respondent suggested that it would be wiser to put a meeting off for two or three weeks because Nassif had a hearing. In the meantime, the union could prepare a complete economic proposal.

After a caucus the Respondent suggested a meeting in early November. Nassif asked if any of the wages in Respondent's proposal were acceptable. The Union said it was unable to take a position because it didn't have a complete economic proposal as a context for evaluating the proposed wage rates; i.e., no proposals had been submitted on fringe benefits or COLA.

There was no agreement regarding when the UFW would submit a complete proposal. The understanding was that the parties would talk sometime after November 1 and that the UFW would prepare a proposal to submit to Nassif in advance of the meeting. On November 5, 1979, Smith presented a contract proposal to Nassif.

November 1, 1979

At the outset of the meeting, Nassif expressed confusion regarding the UFW's November 5 package proposal because it did not reflect all the agreements reached with Paul Chavez. Smith responded that some articles on which there was agreement had been altered to reflect industry language. The object was to facilitate contract administration. She appreciated Nassif's concern and told him that if he had a compelling reason for keeping the language as

agreed to, he should let her know.

Thereafter Andrews presented a package proposal. Retroactivity was proposed "for the first time. Respondent's package contained the Martin Luther King Fund, the Robert F. Kennedy Fund and the Juan de la Cruz Fund as found in Sun Harvest and also proposed identical contribution rates. When testifying, Smith characterized the UFW as accepting Respondent's proposals on the three funds, however, she admitted the proposals were identical to the provisions found in Sun Harvest.

Respondent's union security proposal was that good standing be defined in terms of payment of the dues and initiation fees uniformly required of members, the area of difference being the Union's requirement of membership in good standing as defined in the UFW Constitution.

Respondent modified its position on hiring. Foremen would no longer do the hiring; hiring would be centralized and done by one designated management person. The UFW had agreed to a similar hiring procedure with another grower.

Following Respondent's counterproposal, the Union caucused for several hours after which Smith made an oral response. She listed the Articles upon which agreement had been reached as well as provisions in Respondent's proposal the UFW was prepared to accept. These were the following: Article 5, Grievance Procedure; Article 6, No-Strike Clause; Article 9, Discrimination; Article 10, Worker Security; Article 12, Maintenance of Standards; Article 14, Health and Safety; Article 18, New or Changed Operations; Article 21, Pest Periods; Article 25, Jury Duty and Witness Pay; Article 23, Income

Tax Withholding; Article 29, Credit Union 'Withholding. The union accepted Andrews' proposals on the Robert F. Kennedy Fund, the Juan de la Cruz Fund and the Martin Luther King Fund; Article 35, Bulletin Boards; Article 38, Location of Company Operations; Article 39, Modification; Article 40, Savings Clause. It withdrew its proposal on Article 46, Apprenticeship Fund.[20/] The Union's response contained no wage differential for flat crops.

During the course of the meeting, Smith requested the current or past seasons's wages for a number of job classifications and crops, stating she needed this information in order to submit a wage proposal.[21/] She noted there was no wage proposal covering shop and maintenance classifications. She also requested information regarding the flat crop operations.[22/] She received a response to her requests at the November 15th meeting.

November 15, 1979

Cohen, Dalzell and Smith were present together with a rank-and-file committee.

Nassif presented written proposals on Article 15, Mechanization; Article 16, Travel Allowance, and a proposal entitled Injury on the Job. Respondent's initial position on mechanization

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20. During the period Smith was negotiator, the practice of initializing or signing off agreed upon articles was not followed.

21. Mechanic, Assistant Mechanic, Welder and Helper, Carpenter and Helper, Gardener and Helper, Car Washer, Camp Maintenance, Cooks, Watermelon Cutters, Watermelon Pitchers, Melon Packers.

22. For cotton, wheat, sudan, alfalfa and mila maze, the UFW requested by year for 1976-79, the acres grown and harvested, units produced, costs of production and sales.

was that it could do as it pleased; that of the Union was total prohibition against mechanization, Andrew's position of November 15th differed from the Sun Harvest language in three respects: "new to the industry" versus "new to the company" the notice period; and whether submission of disputes to arbitration would prevent implementation of new equipment. Nassif explained the reasons for the Andrews proposal.

Smith replied that while Respondent's mechanization proposal contained the basic language of the Sun Harvest article it differed in two vital aspects which were part of the compromise made in reaching agreement on the article, i.e., limiting application of the article to mechanical equipment new to the industry, and giving the union reasonable notice of the new equipment rather than the six- month notice provided in the Sun Harvest agreement.

There was discussion regarding when new equipment could be utilized, i.e., before or after an arbitrator's decision on all issues related to the mechanization. Respondent's position was that it would be entitled to utilize new equipment once an arbitration hearing had been conducted, irrespective of whether the award had issued. The UFW wanted Sun Harvest language, i.e., no implementation until an arbitrator's decision issued.

The UFW's response to Andrews' Travel Allowance article related to a paragraph not included in Sun Harvest or in Respondent's prior proposal which the UFW regarded as more restrictive.

The Andrews Injury on the Job proposal was accepted as modified by the Union's proposal of November 5. The Andrews

proposal was identical to the Sun Harvest language.

Respondent's Bereavement Pay and Family Housing proposals of November 7th were accepted.

Nassif asked whether Sun Harvest was the model agreement for the vegetable industry and whether the UFW wanted Andrews to sign Sun Harvest.[23/] He said if Sun Harvest is what you want why don't you propose it. Cohen expressed doubt about the acceptability of Sun Harvest wage rates because the Union had obtained a higher wage scale at Bud Antle.

There was an off-the-record meeting among Cohen, Smith, Andrews and Nassif at which Nassif again asked whether the UFW wanted Andrews to sign Sun Harvest. Cohen responded that if Andrews were interested in settling on that basis, such a settlement was acceptable to the Union. He added that the UFW was prepared to negotiate a cotton differential for Bakersfield.

Following the off-the-record discussion, Respondent modified its wage proposal by limiting the flat crop differential to cotton as opposed to all flat crops and by restricting the differential to the Bakersfield area. The company also proposed a favored nations clause with regard to other flat crops in the Imperial Valley. The UFW did not respond.

Nassif expressed some doubt regarding whether Andrews would agree to the Sun Harvest Management Rights language, stating

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23. Smith denied Nassif made any remarks regarding the fairness of asking Respondent to sign the Sun Harvest agreement on the ground that it was the result of a long and bitter strike. There was no strike at Andrews at the time. However, there had earlier been work stoppages in lettuce.

Respondent had some philosophical problems with the provision. He also voiced Respondent's concerns about the Sun Harvest Hiring Hall, Subcontracting and Grower-Shipper language. He asked how the hiring hall provision was applied in Bakersfield where the UFW had no hiring hall. Smith explained the paid representative was responsible for hiring and dispatching new hires. In effect, the representative was the hiring hall.

Nassif expressed additional difficulties with accepting the Sun Harvest agreement because it had not been proposed, and the amount of the cotton differential the UFW was considering was not known. Cohen responded that if Andrews had so many difficulties with Sun Harvest, it would be more fruitful to proceed with discussions of the mutual proposals on the table. Nassif said the Andrews partners would have to review and discuss the Sun Harvest agreement more thoroughly before taking a position on its acceptability.

Nassif expressed Respondent's concern regarding the transference of power from the company to the union required by the UFW's union security and hiring hall proposals. Cohen replied that the bargaining process necessarily would result in some readjustment of power.

The following issues were discussed by Nassif: supervisors doing unit work, transportation of irrigators and tractor drivers to and from Calexico, the use of labor contractors, weekly transportation of workers from Bakersfield to Calexico, subcontracting, cost of living and paid representatives.

Respondent asked whether the UFW was interested in the Sun

Harvest type of seniority system. There were also questions about the effect of the UFW's union security provision on existing Andrews employees. The UFW expressed its interest in the general principals of the Sun Harvest seniority system.

During the course of the nee ting Nassif provided the UFW with the requested rates on shop classifications and with some acreage information on flat crops. Don Andrews said he thought it unnecessary to provide cost information on flat crops because Andrews was not claiming an inability to pay. He thought Andrews was paying a high enough wage in cotton and did not want to pay more. Nassif added that the cost information was obtainable from market news service reports. The requested information regarding cotton production costs was never supplied.

Smith testified she wanted the information to justify to the workers the increased differential the company proposed. She wanted data that would support the company's position that the greater differential was warranted.

November 20, 1979

At the outset of the meeting, Nassif stated Respondent found the Sun Harvest contract unacceptable for two reasons: (1) it hadn't been offered; (2) there were a number of unresolved basic issues such as union security, the hiring hall, cost of living adjustment, the paid representative system, supervisors working and travel pay.

The UFW submitted a wage and classification schedule for shop and maintenance employees. Nassif responded with a counterproposal. However, he still questioned whether shop and

maintenance people were appropriately within the bargaining unit.

During the course of discussions about subcontracting Nassif referred to a list covering the kinds of work performed by subcontractors which had been given to Paul Chavez sometime during February 1979. Smith had this information, though she was unaware such was the case.

There was no change in the UFW's position as proposed on November 5 with respect to the following subjects: Union Security, Hiring, Seniority, Supervisors, Mechanization, Hours of Work and Overtime, Holidays, Reporting and Standby Pay, Travel Allowance, Subcontracting, Agricultural Agreements and Retroactivity. The parties also remained at odds with respect to COLA, Paid Representatives and the amount of the cotton differential. The UFW had not modified its position on these subjects.

November 20, 1979 - January 15, 1980

Nassif was due to go on vacation; it was agreed there would be no meetings in his absence. The parties were to ponder their respective positions and communicate upon his return. There was no discussion on November 20 regarding signing the Sun Harvest agreement.

On December 7th, Smith and Nassif met for a series of one-half hour meetings relating to other contracts which they were negotiating. They also met on December 11 for Admiral Packing negotiations. On the 7th, Smith asked Nassif how he wanted to proceed on Andrews; Nassif ^as unsure. He knew Don Andrews wanted to meet; however, no meeting was scheduled at that time because Nassif was unfamiliar with Andrews' schedule.

Smith was out of the area from December 22nd until January 5 or 6, 1980.

December 11, 1979 - January 15, 1980

Between December 11 and 22, Smith made no attempt to contact Nassif to set a meeting or to discuss the relative positions of the parties.

In a mailgram to Smith dated December 28, Massif asserted the parties had reached impasse. He stated Respondent intended to effect its wage proposal of October 16 as amended on November 15, 1979, and that Respondent was prepared to discuss implementation of the wage increases any time prior to the end of 1979. Nassif stated his awareness of the UFW's policy against negotiating implementation of wage increases prior to signing a contract and, absent word to the contrary would assume the policy was still operative. Marshall Gantz responded by mailgram of December 29th denying the parties were at impasse.[24/]

January 15, 1980

The union submitted a proposal on paid holidays which modified its previous position by deleting two holidays, a move which left it proposing one more holiday than is found in the Sun Harvest agreement. Respondent's then current position was one less holiday than in Sun Harvest.

The UFW modified its Travel Time proposal by deleting a provision not found in Sun Harvest. The UFW also modified its

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24. Nassif reiterated his "impasse" contention and notice of implementation of wage increases in a letter to Smith dated December 29th.

Company Housing proposal by deleting a provision not found in Sun Harvest. While written proposals covering holidays and company housing had previously been exchanged, neither topic had been discussed during negotiations. Admittedly neither of these subject matters was of first line importance to Andrews.

Respondent stated it wasn't interested in changes or proposals based on the UFW's November 5, 1979, proposal and it wasn't interested in the Sun Harvest contract; therefore, it wanted the union to propose something more favorable than Sun Harvest. Smith said the UFW was prepared to settle on the basis of Sun Harvest coupled with a cotton differential; but since Respondent had said it wasn't interested, the UFW thought bargaining should be on the basis of the respective proposals which the parties had on the table with the object of narrowing the issues and reaching agreement. Massif responded that Andrews didn't want to waste time dealing with proposals more onerous that Sun Harvest since they'd already said Sun Harvest wasn't acceptable. He expressed frustration at the UFW's failure to respond to what were recognized as the crucial issues. He suggested that Smith should know that the UFW's January 15 proposals would not expedite negotiations.[25/]

Don Andrews said other unions present a master agreement and say sign it. He wanted to know why the UFW didn't do this. Smith replied that the UFW had offered to settle on the basis of the master industry agreement, but Respondent wasn't interested. She

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25. At some point during the meeting, Smith told Nassif that Sun Harvest was a negotiated agreement and that UFW would not put it on the table as a proposal; i.e. the union would not bargain down from a negotiated agreement.

asked why Andrews treated the UFW different from other unions and refused the UFW's master agreement if they signed master agreements with other unions.

Nassif said he had an unfair labor practice hearing beginning on January 19, and another one the following week and asked whether it would be mutually advantageous to continue the Sam Andrews unfair labor practice hearing and spend the time bargaining. Smith responded that she saw nothing in Respondent's bargaining position which led her to believe that around-the-clock bargaining sessions would be productive. If she were convinced otherwise, she was prepared to meet on that basis. Until then, the parties should find time to negotiate as well as proceed with the unfair labor practice hearing.[26/]

Smith and Nassif agreed to talk the following day to set a date to discuss "substantive issues" or "crucial issues".

January 21, 1980

Nassif directed a letter to Smith suggesting a meeting on the 28th. A list of the job classifications and wage rates for shop employees was enclosed. Nassif did not concede such individuals were properly in the bargaining unit.

January 24, 1980

The meeting on the 24th was an off-the-record meeting between Andrews, Nassif, Cohen and Smith. Cohen said that the UFW told Respondent in November it was prepared to settle on the basis

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26. The hearing in Sam Andrews' Sons (1983) 9 ALRB No. 24 commenced February 19, 1980, and ran until August 7, 1980. There were approximately 70 days of hearing.

of Sun Harvest and give them a cotton differential. The amount of the differential was an important issue about which the parties would have to bargain. Cohen said the UFW position didn't seem acceptable so he posed the following question: if the UFW were prepared to settle on Sun Harvest with a cotton differential to be negotiated for the Bakersfield area as well as a hiring procedure instead of a hiring hall in Bakersfield, would that be a satisfactory basis for settlement; if not, what else did Respondent want?

The rationale of Cohen's proposal was as follows: Respondent's Bakersfield acreage was substantial, and they had previously enjoyed a differential. Such was not the case in Imperial Valley. Since the UFW had no hiring hall in Bakersfield, and Respondent was opposed to the paid representative system, the Union was prepared to yield on the hiring hall issue in Bakersfield. The exception was not warranted in Imperial Valley because the UFW operated a hiring hall in the area. Cohen said if we're going to get something done, we need to know what you want. You tell us that you have problems with Sun Harvest; we try to deal with you on the basis of our bargaining proposal; but you don't want to do that, so why don't you just tell us what it is you do want, and we'll tell you whether it will' fly.

Respondent did not indicate when it would be able to respond to Cohen's statement.

January 24, 1980 - April 15, 1980

There was an exchange of correspondence but no meetings during the period between January 24th and April 15th. By letter

dated February 25th, Nassif first notified Smith of Respondent's tentative decision not to grow or harvest cantaloupe in 1^80 in the Imperial Valley. He invited a response if the UFW desired to bargain about the decision or its effects.

By letter of February .29th, Smith requested the following cantaloupe information: acreage and crops grown over the past four years in Bakersfield and Holtville; the impact of the decision upon various classifications of employees; whether Respondent would operate its shed facilities; whether Andrews was going to sell cantaloupe on behalf of other growers; whether the Andrews labels would be used by others; what disposition was to be made of equipment used to harvest cantaloupe; whether the decision not to grow was temporary or permanent; what factors led Respondent to make its "tentative" decision not to have a cantaloupe crop; and earnings information for those who had worked in cantaloupe. Smith's letter requested a meeting during the week of March 10. No meeting resulted. Nassif responded to this request by letter of March 26th. His letter also stated that Respondent would have some cantaloupe acreage in the Bakersfield area. He updated the information in a letter of May 20th.

In a letter dated March 21 Nassif listed the various contract articles before the parties and Andrews position with respect to each. Nassif's recap showed tentative agreement on eighteen articles.[27/] There were an additional thirteen articles

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27. Utilizing the Sun Harvest numbering system, Massif showed agreement on Article 1, Recognition; Article 4, Seniority;

(Footnote continued----)

regarding which Nassif listed Respondent's position as the Sun Harvest language.[28/] With regard to unresolved issues, Respondent had no change in its November 5, 1979/ position on the following articles: No. 2 Union Security, No. 3 Hiring, No. 5 Grievance and Arbitration, No. 6 No Strike, No. 13 Supervisors, No. 14 Health and Safety, No. 15 Mechanization, No. 13 Hours of Work and Overtime, No. 24 -Holidays, No. 26 Travel Allowance, No. 37 Subcontracting, No. 3B Agricultural Agreement and No. 48 Duration.

Respondent modified its position on Article 20, Reporting and Standby Time and moved closer to the Union's position. Respondent's proposal on Delinquencies (Article 44); Cost of Living Allowance (Article 45), Union Representative (Article 46) and Injury on the Job (Article 47) represented a change in position; the

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(Footnote 27 continued ----)

Article 7, Right of Access to Company Property; Article 8, Discipline and Discharge; Article 9, Discrimination; Article 10, Workers Security; Article 11, Leaves of Absence; Article 12, Maintenance of Standards; Article 16, Management Rights; Article 17, Union Label; Article 18, New or Changed Operations; Article 28, Income Tax Withholding; Article 29, Credit Union Withholding; Article 35, Bulletin Boards; Article 36, Family Housing; Article 39, Location of Company Property; Article 40, Modification; and Article 47, Injury on the Job.

28. Article 22, Vacations; Article 23, Bereavement Pay; Article 25, Jury Duty and Witness Pay; Article 30, Robert F. Kennedy Medical Plan; Article 31, Juan de la Cruz Pension Plan; Article 32, Martin Luther King Fund; Article 33, Reporting on Payroll Deductions; Article 34, Camp Housing; Article 42, Successor Clause; Article 44, Delinquencies; Article 45, Cost of Living Allowance; Article 46, Union Representative and Article 47, Injury on the Job. With respect to Articles 44, 45 and 46, Andrews acceptance of Sun Harvest was a change in its position.

language proposed was Sun Harvest language.[29/]

Nassifs letter also set forth examples of bargaining unit work done by foremen from time to time in response' to the UFW s request for information regarding the type of work which supervisors had done and which Respondent was requesting that they continue to be able to do.[30/] By letter dated March 25, 1980, Smith acknowledged movement in Respondent's bargaining position, particularly noting Articles 45 and 46.[31/]

There had been no discussion of meeting dates by either party since January 24, 1980. During the period between January 24th and April 15th, Nassif and Smith confronted each other as lead negotiators in negotiations involving Vessey, Colace, Maggio, Martori and California Coastal Farms. Additionally Smith, as lead negotiator, met with J.R. Norton Company in February and March. She also testified in three unfair labor practice proceedings in February. The negotiations covering Vessey, Colace and Maggio were all negotiations looking toward renewal and modification of expired agreements.

April 15, 1980

Smith began by reviewing the status of negotiations with

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29. Respondent subsequently advised the union that Nassif's letter incorrectly stated its position with regard to Article 44, 45 and 46.

30. Smith did not recall the Paul Chavez file contained any list of unit functions performed by supervisors. It was her testimony that Nassif's letter of March 21, 1980, was the first Andrews response on this issue. This is incorrect.

31. Smith's letter makes no mention of Respondent's decision to not plant Imperial Valley cantaloupe.

regard to all proposals of the parties. In discussing the Union Security provision, she noted the main issue was the "good standing" provision.

With respect to hiring, Smith said the Union would agree to the Sun Harvest probationary period if Andrews agreed to a hiring hall.[32/] She stated this trade off was the compromise reached with Sun Harvest on that issue. She said that the UFW's Discipline and Discharge proposal was identical to Sun Harvest but for the probationary period. The UFW would accept the probationary period if Andrews would agree to a hiring hall. Respondent did not reply.

On Mechanization and on Holidays the UFW had no change in its November position. Smith said there were a number of issues which needed to be discussed regarding Family Housing.

She thought Subcontracting and Agricultural Agreements could be resolved with more discussion. The Union was not prepared to accept Respondent's proposals because their language was too broad and presented too serious a ramification for the Union bargaining unit; she said the Sun Harvest language would adequately protect both Andrews and the Union.

With respect to Hours of Work and Overtime, Smith outlined the areas of agreement and disagreement in the various subparagraphs.

On Reporting and Standby Time, Smith said paragraph A of Sun Harvest was agreed upon and that there was no change in the UFW

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32. In Sun Harvest an employee is regarded as a probationary employee and not covered by the discharge for just, cause requirement in the Discipline and Discharge Article during a five-day probationary period following his date of hire.

position with respect to the remaining paragraph of the article.[33/]

The UFW proposed a 10* per hour differential for cotton.

Smith said Seniority and Supervisors doing unit work were tonics worthy of more discussion and suggested setting a meeting specifically to deal with those issues. Nassif agreed her suggestion had merit.

She said that the company's job description proposal was incomplete; that there were differences as to how to classify or at what rate to pay Grader Operators and the Water Truck Drivers and there were still problems regarding the rate for a 24-hour irrigator shift, as well as various other differences with respect to particular classifications.

Smith wanted to discuss Respondent's decision not to grow or harvest cantaloupe.

Following the meeting on April IS, Smith received a phone call from Nassif in which he disclosed that the company made an error in its proposal as the result of improper transcription of the tape of an earlier meeting. Respondent had not agreed upon Articles 44, 45 and 46 and was withdrawing those articles from its proposal.[34/]

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33. The referenced paragraph provides a four hour minimum for workers called to work but not put to work. This language had been proposed by Andrews.

34. The circumstances of this incident were the subject matter of 8 ALRB Mo. 64 (1982) in which the Board held: "[T]he record in this case establishes that the miscommunication between Respondent and its negotiator caused a genuine mistake, and was not as the UFW contends, an effort to intentionally mislead the Union. We therefore find in the isolated context of Respondent's March 21

(Footnote continued----)

April 21, 1980

Company housing was discussed. Neither party submitted a new proposal. Nassif stated that Kern County reported that all Andrews family housing facilities were to be red tagged and that such an action might result in the eviction of workers living in those facilities. Smith asked several questions regarding the report. Nassif was unsure of the answers; he said he would try to reach Andrews that day for answers to her questions.

The discussion turned to the topics of Transportation and Travel allowances. Smith asked why Andrews did not want to continue using its current pickup points. Respondent's reason was strike violence attributable to the UFW.

The discussion then moved to the subject of providing transportation for tractor drivers and irrigators and payment for the time spent traveling from Calexico to Holtville and on to the job site. The tractor driver representative proposed paying the tractor drivers from the time they reached the Holtville shoo rather than from the Calexico pickup point. This position was -different from and less onerous than that presented by Smith. Nassif said the committee man didn't know what was in his own proposal; Smith told

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(Footnote 34 continued----)

proposal, that Respondent had good cause for withdrawing its proposal and did not renege on a tentative agreement. We are not persuaded, however, that Respondent's mistaken proposal of March 21, 1980, was consistent with the duty to bargain, in good faith." Id. 7-8.

Because this was an isolated incident in a long course of conducting, the Board found it insufficient to support a finding an"? "bargaining in bad faith overall."

him to shut his fucking mouth. With this Nassif picked up his papers, put them in his brief case, stood up, walked around the bargaining table and said, "When you learn to talk like a young lady, then I will come back and negotiate with you" and departed.[35/]

April 23, 1980

Following the meeting on the 21st, there was a exchange of correspondence between Smith and Nassif in which each complains of the other's conduct at the meeting of the 21st. In an April 23rd letter, Smith requested information regarding the company's camp and family housing and stated the union did not agree with Andrews' decision not to make the housing repairs required by the County.

She requested dates for another meeting, particularly to discuss the cantaloupe problem. She also requested an update on the company's response to her request for cantaloupe information, saying the company's March 28 response contained many unknowns regarding the company's plans.

Nassif responded in a letter dated April 29, 1980, stating his version of what transpired at the April 21st meeting. He noted he was available to meet with a reasonable short time.

Smith responded by letter of May 8, 1980, in which she reiterated the UFW's non-acquiescence to Andrews' withdrawal of proposals previously presented. She reviewed her request for a prompt response to her request for family housing information as well as an update on the company's cantaloupe plans.

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35. In a letter to Smith recounting the event, Nassif denies referring to Smith as a young lady. His letter states his language to her as: "When you can learn to talk like a human being, etc."

In a May 20, 1981 letter, Nassif provided the requested melon information[36/] and stated a willingness to discuss any of the matters set forth in the letter.

In response to Smith's letter of May 8th, Nassif's secretary, on May 23rd, sent Smith a letter setting out four dates on which Nassif would be available for meetings.

On June 5, 1980, Nassif responded to the information request regarding company and camp housing. He enclosed a copy of an April 15 letter from the Kern County Health Department setting out the Code violations observed in the Department's inspection of Andrew's "Employee Housing."[37/] Also included were figures purporting to show an operating net loss for its barracks and kitchen operations of $55,900^. Additionally, Massif asserted Respondent had lost approximately $116,000, in 1979 on its family housing operations. The letter concludes by saying that it must be obvious why the company can no longer continue to provide housing.

On June 5, Nassif directed a letter to Smith at the UFW's Calexico office setting out the 1980 melon rates Respondent proposed to implement. Smith was in Salinas. It is UFW practice not to open mail addressed to someone not present; so Smith testified she did not receive the letter until June 10th when she returned to Calexico.

A confirmation copy of a phone-delivered telegram was

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36. The letter set out the contemplated melon acreage in Bakersfield, and noted it would be approximately one-half its 1979 acreage and that sack crews would be used.

37. California Administrative Code, Ch. 1, Subch. 3.

directed to Smith at Calexico on June 8; it dealt with the watermelon rates and increases in those rates which Respondent proposed to implement and asked to be advised whether the Union wished to meet to discuss the rate implementation.

On June 10, Nassif called Smith in Salinas to advise her of his June 5 letter and June 8 mailgram, saying he was aware she had not received these communications.

Nassif said Andrews wanted to increase wages for cutting and pitching watermelons. Absent a resolution of all bargaining issues, the UFW would not agree to a unilateral wage increase. Nassif said the company intended to implement the increase immediately since the harvest had already begun. On June 11, Nassif wrote Smith confirming their June 10 telephone conversation. The letter stated that Andrews was implementing prevailing watermelon harvest rates and asked whether the UFW wanted to meet regarding the rate or its implementation.

In a letter of June 20 Smith stated that camp housing was a mandatory subject of bargaining and, therefore, no unilateral changes could be made. She reiterated the UFW's desire to negotiate regarding the issue. She wanted an opportunity to verify the cost figures Andrews had supplied.

Her letter also stated the UFW regarded Andrews' unilateral implementation of watermelon harvesting rates to be an unfair labor practice. Finally, The letter accuses Nassif of proposing only meeting dates on which he was aware Smith was unavailable because of other negotiations. She proposed a meeting during the week of July 14.

Nassif's office responded by letter of June 26 suggesting June 30, July 1 and July 3 as meeting dates.

Smith's response to Nassif's letter of June 26 is dated July 1 and in essence says that she can't understand why he is proposing those dates and further notes that he didn't respond to her suggestion to meet the week of July 14; a suggestion which she renewed. She received no response to this letter.

Under date of July 16, she sent another letter in which she requests being advised of an available day or lays for meetings during the week of August 18 and/or the week of August 24. Nassif responded by letter of August 13 stating that he and Don Andrews have been unable to work on negotiations because of their involvement in unfair labor practice hearings. Nassif noted he vas leaving on vacation and suggested a meeting upon his return on September 2. When he returned from, vacation in the first week of September, Smith telephoned Nassif regarding scheduling negotiations for California Coastal Farms; there was no discussion about scheduling an Andrews meeting. During June, July and August, Smith and Nassif had several meetings regarding California Coastal Farms and Colace Brothers.

On September 3, Nassif wrote Smith asking whether September 23 and 24 were available for Andrews negotiations; Smith did not respond. On September 11, at California Coastal Farms negotiations, they set a California Coastal meeting for September 24. When they met on September 24, they agreed on October 7, "the next available date we had," for an Andrews meeting.

October 7, 1980

At the outset of the meeting, Nassif gave Smith a copy of a letter directed to Don Andrews in which he listed each article, its name and its status as of that point in time. Smith agreed the letter was accurate.

Following this discussion, Nassif announced that the company desired to effect the wage rates it last proposed in November 1979 and wanted the union's agreement to do so. Smith reiterated the union's opposition to implementation of wage increases at that point in time; she said the parties had made no progress for some period of time; they should work at resolving pending issues rather than get into another confrontation over a unilateral wage increase. She said a unilateral wage increase would undermine the UFW position at the bargaining table. Nassif didn't understand the rationale of her position. Smith explained that a unilateral increase diminished in workers eyes the UFW as a force in the securing of improvements in wages and benefits for its members and also made it more difficult for the union to compromise issues when the increases were implemented outside the context of the give-and-take bargaining of things in which the workers were interested. Nassif said Andrews was willing to find a method by which they could make the increase without undermining the position of the union.

Andrews wanted to implement the lettuce rate increases forthwith in Bakersfield because the season was about to start. While the company preferred to increase the rates with the union's

approval, the action would be taken without such approval.[38/]

Following a caucus, Smith said the rank and file committee opposed implementation of the increase. The union also opposed Respondent telling workers the union had not agreed to the increase, and that it was not a final resolution of all issues. She said such statements would not alleviate the real problem, i.e., payment of an increase absent a total collective bargaining agreement.

Smith asked Don Andrews about past practice with respect to the recall of lettuce crews at the start of the season, and about its practice during the season if there weren't enough work for all crews. Respondent agreed to the UFW proposal that recall at the start of a season be done by seniority rather than by crew as had been done in the past. Andrews said that if there were lulls during the harvest which were of short duration, the company rotated the work amongst the crews on the payroll; if they needed two crews today and two crews tomorrow, different crews were called in order to distribute the work as equally as possible. Nassif asked Smith to provide a seniority article which incorporated what the union wanted in the contract.

The company modified its position on Delinquencies and proposed the Sun Harvest language with two modifications: the notice period to the company before the union could invoke the protections provided in the article be ten days instead of five, and deletion of reference to contributions owing to the union for Citizenship Participation Day because Andrews had not yet agreed

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38. Respondent stipulated it increased wage rates for fall Bakersfield. lettuce harvest.

inclusion of that holiday in the agreement. Smith did not respond.

There was discussion of the related topics of Subcontracting, the company's proposal on Agricultural Agreements and the UFW's proposal on Grower-Shipper Contracts. Smith viewed the company proposals as too broad and therefore, unacceptable.

Nassif stated Andrews' concern about being able to use labor contractors for cantaloupe and lettuce work. With respect to cantaloupes, the perishable nature of the crop was the explanation for needing freedom to utilize a labor contractor. With regard to lettuce thin and hoe work, he said Andrews had a past practice of using labor contractor crews on a fairly steady basis.

Regarding tractor work, Nassif said the company needed the option of bringing in extra equipment and drivers if it got behind in the planting schedule.

Smith said Respondent's Agricultural Agreements proposal insulated growers with whom Andrews did business and was too broad from the union's point of view and unnecessary to protect Andrews' interest. Nassif said he would consider their objections and with a more detailed discussion, resolution of the issue might be possible.

Smith then directed the discussion to the issue of supervisors doing bargaining unit work. She referred to the list of 'functions submitted with Respondent's March 21 proposal and said the union did not object to supervisors or foremen continuing to perform them. However, there were five or six objectionable items on the list. These were discussed.

On the subject of Health and Safety, Nassif wanted a list of the tools and equipment the union proposed the company

for employees.

October 17, 1980

The union submitted a written proposal on seniority which was followed by a 4-hour employer caucus. When they returned, Nassif stated Don Andrews was confused regarding why seniority was being discussed because the company had accepted a proposal submitted in July 1979 by Paul Chavez and felt the issue was closed at that point. Despite that, Respondent was willing to discuss the current proposal. Nassif and Andrews wanted to discuss the proposal with Imperial Valley management personnel; they stated, however, they reserved the right to advise Smith at the next meeting whether they would adopt any of the UFW's new language or would stand on the previously accepted UFW proposal.

Smith provided the list of tools and equipment the UFW expected Respondent to provide, and she responded on the question of supervisors doing unit work. After a company caucus on the UFW's equipment list, Nassif proposed that the article be left as the union proposed and that no list be incorporated into the agreement. He said Respondent would provide all tools and equipment necessary to the job; and disputes about whether a piece of equipment was necessary could be resolved through arbitration. Smith made no response.

Smith then went through the list of supervisors duties and summed up the union's position. A general discussion of supervisor duties followed.

October 17, 1980 - October 28, 1980

During the interval between the October 17 meeting and the

October 28 meetings there were a series of communciations between Smith and Nassif.

On the 21st Nassif called Smith to tell her the company desired to implement a wage increase. She reiterated the lira's opposition to such an action and confirmed her position in a mailgram to Nassif on October 22.

Nassif responded to the mailgram by letter of October 23 denying the charge that the company was unavailable for negotaitions from May through September of 1980, asserting that the company was available on numerous dates, but that Smith refused to meet on those dates. Nassif's letter stated he was unable to understand why the union refused to make the same concessions to Andrews it made to the grape industry on many of the outstanding issues, and that they could not understand why, having made a significant variation from the Sun Harvest contract in its Souza-Boster agreement, the union adamantly refused to make reasonable concessions for Andrews. He referred again the UFW's failure or refusal to recognize differences between a predominantly lettuce shipping company and Andrews which is heavily involved in growing and shipping of non-vegetable crops such as cotton. The letter goes on to state that wage increases have never been demonstrated to under-cut the union's bargaining position; but rather it is the union's intransigence and bad faith conduct including illegal strikes in the melons and unlawful work stoppages in lettuce which have been detrimental to the UFW. He stated that most of the issues which were unresolved a year ago are-still unresolved; and the union had done nothing more than insult Andrews by making predictably unacceptable proposals. He noted that

while the company is required to notify and bargain with the Union before implementing a wage increase, when it attempts to do so, the UFW refuses to discuss the issues and gives their "pat" response, i.e., it will not agree to an increase without an entire agreement. Nassif states that such an attitude leaves nothing to be negotiated; he noted that the company offered to notify the workers that the wage increases were a result of the union's efforts on their behalf; and that Smith neither responded to this proposal nor offered any alternative. Nassif suggested that every company with whom the UFW seeks an agreement will not sign the Sun Harvest contract just because the UFW deems it to be the master agreement. Some companies will persist in wanting to negotiate their own agreement. Me said Andrews is not a conglomerate and is not able to offset financial losses in agriculture by registering profits in other divisions.

October 28, 1980

The meeting began with a discussion of Smith's mailgram and a statement by Nassif to the effect that she set negotiations back a hundred years by sending it. Smith responded that the mailgram was a response to the company's proposed action which was more of a setback to negotiations than her response. Smith said if Andrews hadn't decided to effect another unilateral wage increase, there would have been no need for the mailgram and nobody would have been upset.

After more bickering regarding each others behavior, there was bickering about whether Respondent had any new proposals. Nassif's response was perhaps we do and perhaps we don't and asked whether the union had any new proposals.

Smith asked whether Nassif had additional information about persons whom Smith had suggested might not be supervisors. He did not.

Smith asked whether Respondent had its final bargaining postion on the table, the response was no. Nassif asked whether the UFW had its final position on the table, the response was no. The union requested a caucus.

After the caucus Smith returned with a proposal which she said was being submitted in the hope that the company would be encouraged to review its position and make some substantial movement.

By way of preface, Smith said that UFW realized that a cotton differential was of critical importance to Respondent; she noted that historically company's cotton differential had been no more than 12-20C per hour depending upon the job classification. She said the UFW realized the company wanted a more substantial differential; therefore, the union was proposing a differential of 35¢ an hour in the tractor driver, irrigation and thin and hoe job classifications in Bakersfield for cotton work.

Respondent caucussed an reported back that the UFW's movement was appreciated. Nassif said Respondent wanted to adjourn, cost out the proposal and reevaluate its total position. Nassif acknowledged there were some difficult unresolved issues which Respondent knew were important to the union. He said he would communicate with Smith after Respondent re-evaluated the Union's proposal.

Smith said she would draft language on the supervisor issue.

and submit to the company as soon as possible. No date was set for the next meeting. The October 23 meeting was the last attended by Smith.

October 28, 1980 - April 1981

Following the meeting of October 28, there were no bargaining sessions until April 3, 1981 at which time both parties had new negotiators. Nassif had gone to Washington as Deputy Chief of Protocol; Josiah Neeper of the law firm in which Nassif was a partner became the Andrews negotiator and David Villarino. assumed responsibility as the UFW negotiator.

On October 31, 1980, Smith hand-delivered a proposal on Article 13, Supervisors, to Nassifs office. It was submitted without discussion.

On January 15, 1981, while meeting with Nassif in El Centro on the California Coastal Farms contract, Smith asked whatever happened to Andrews. Nassif replied he didn't know what Andrews wanted to do.

In March 1981 during the final stages of the California Coastal Farms negotiations, Smith again asked Nassif whether he'd heard from Andrews since the meeting on October 28 or even since her inquiry of January 15. She asked whether they were ever going to get a response from Andrews and also whether there was a chance they could settle a contract with Andrews on the basis of the contract with California Coastal Farms. Nassif replied that he really didn't know what to tell her. He wasn't sure there was anything the union could do regarding its contract proposal that would prompt any reaction or movement from Andrews. Smith said she was sorry to hear

that. She said if he heard anything from Andrews to let her know because she was interested in concluding an agreement on the same basis as Cal Coastal.

On March 10, 1981, Smith directed a letter to Nassif with essentially summarized the matter as it was left on October 23 and followed up by her conversation with Nassif on January 15.

Nassif responded by letter of March 31 in which he stated that he had not got back to her because, as he had said in the October 23 meeting, he would do so when the company had room for movement; but as of that date it had no room for movement with the following exceptions: On Records and Pay Periods; and a possible accommodation on Seniority, although the seniority discussions would be supplemental to and not amend the agreement already reached on seniority. The Union's Supervisor proposal was still unacceptable because it would prevent supervisors from doing some of the unit work they had traditionally done. Nassif disputed Smith's statement that the 35¢ cotton differential was a substantial adjustment of the union's bargaining postion because the proposal was 35¢ less then whatever was the rate agreed to on the vegetables, and the UFW's proposed vegetable rate was 40¢ an hour higher than the basic wage rate at Sun Harvest. This would mean that the 35¢ differential would leave Andrews paying 5¢ more for cotton than anyone else paid for vegetables. He asked whether the 35¢ differential was being proposed based on the Sun Harvest vegetable rate.

Nassif's letter also stated that Respondent would be harvesting mixed melons in Bakersfield and cantaloupe and watermelon in both Holtville and Bakersfield. Nassif advised that wage rates

would not be less than paid the previous year, and that it might be necessary to pay more to meet the competition for labor. He suggested a face-to-face meeting as soon as possible.

(3) Neeper-Villarino Period (March 1981-October 1981)

On March 25, 1981, David Villarino, the newly assigned negotiator for the UFW directed a letter to the Gray, Gary, Ames and Frye office in El Centro memorializing a conversation he had that day with the office regarding his unavailability for a meeting on March 27 and his availability the first of the following week. His letter stated he hadn't heard from the of Lice thereafter. The date of the document is March 26. Deeper responded by letter of April 3 setting out his understanding of the interaction between March 26 and April 1 suggesting a meeting on April 8, 1931 in Bakersfield.

April 8, 1981

This was the initial meeting for the new negotiators, Josiah Neeper for Andrews and David Villarino for the UFW. After introductions, there was some talk about scheduling and the ground rules for the conduct on future meetings. It was agreed that articles would be initialed to show tentative agreement and that each side would tape the meetings.

Neeper had not come with a proposal; he said the union's proposal as viewed by the company was very tough. He suggested that the UFW look at Respondent's proposal to see whether there were areas in which compromises could be reached. When asked whether Andrews was willing to make compromises, Neeper responded that unless there were compromises in areas critical to both parties there would be no agreement. The company needed to make money to

exist and that currently it existed because of a cotton differential. He said that the Union's position on the differential was unreasonable. Villarino did not respond.

Don Andrews said Respondent had modified its position by proposing to pay the higher rate for everything except cotton, and that the proposal was made to show substantial movement on economics by the company. Villarino stated Andrews owed the Union an economic proposal in response to the UFW's 35v movement in the amount of the cotton differential. Neeper responded that Respondent did not view the UFW's proposal as movement.

Villarino asked about the differences between the UFW's proposed Grower-Shipper article and Respondent's Agricultural Agreement article. He also asked for an explanation of the differences in the respective union security positions. Neeper responded he would have to talk to Nassif to make sure what had transpired at the bargaining table.

Villarino then moved to a discussion of tractor driver grievances, i.e., the number of tractor drivers used in March; the unwillingness of the company to pay double time for work on Sunday; transferring drivers from the higher paying vegetable tractor work to lower paying tractor work in cotton and replacing them with drivers having less seniority; and threats against the UFW's tractor driver negotiator, by his foreman. Villarino voiced the fear that Andrews had expanded its practice of subcontracting tractor work. Neeper responded to each of the problem areas raised by Villarino.

April 8, 1981 - May 5, 1981

During this period, Neeper and Villarino exchanged

correspondence; Villarino also had two telephone conversations with Andrews' representatives regarding post certification access. He was not told about the impending Salinas lettuce harvest.

On April 10, Neeper wrote Villarino regarding the double time issue, stating that Andrews had never paid double time for Sunday work and did not propose to do so. Neeper's letter also stated that workers would be disciplined for failing to work when required, and he protested undisclosed recordings by workers of conversations with foremen or other representatives of the Company.

By mailgram of April 29, 1981, Neeper notified Villarino of Andrews decision to harvest lettuce in the Salinas area commencing the following week. The Union was also notified that Bakersfield lettuce crews had been offered the work and were expected to provide sufficient, workers. The Bakersfield rate would be paid. The mailgram said Neeper was available to meet and confer on the matter if the Union wished. When Villarino received the mailgram on May 1, he called Neeper who provided certain requested information. Neeper stated that Repsondent did not own the property it would be harvesting; a list of growers for whom Andrews was harvesting would be provided as soon as possible;[39/] that two crews would be used at the outset with the likelihood of additional crews; that the names, addresses, and social security numbers of those working in the harvest would be provided as well as information regarding how the workers were obtained.

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39. Despite this representation, the list of growers never provided. In a letter of December 9, 1981, 'Respondent stated it regarding the identity of the owners as irrelevant, out manifested a willingness to meet on the relevancy issue.

May 4, 1981

Present were Villarino, Neeper, Don Andrews and members of the union bargaining committee.[40/]

Neeper provided requested pay rates for such classifications as welders, carpenters, and mechanics. There was discussion regarding the omission of rates for certain requested classifications. Neeper responded that Andrews employed no people in those classifications, e.g. carpenters and welders.

Neeper provided the following information regarding the Salinas harvest: acreage harvested, number of parcels, location of parcels harvested and the number of crews. There were two crews working, and there was some anticipation of a third crew. Bakersfield crews were solicited prior to the completion of the Bakers field harvest to work in Salinas. The product will bear Andrews labels and Andrews is the marketing entity for the harvested lettuce.

There was discussion of Villarino having taken access, the cooperation given him; and whether he was under surveillance when he took access to talk-to workers during the lunch hour. Villarino related the foremen refused to leave the area while he was seeking to speak with the workers. There was some discussion regarding whether post certification access was covered by the Regulations.

Problems previously raised with respect to the utilization of undisclosed recording devices in conversations with supervisors

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40. Commencing with the meeting held on this date the parties recorded and transcribed each bargaining session. Agreed upon transcripts of those meetings were introduced as General Counsel exhibits.

were again discussed. Similarly the problems Villarino had previously raised regarding a transfer of tractor drivers from high paying vegetable jobs into cotton work were again discussed.

Don Andrews responded to the information request contained in a UFW letter of March 31, 1981, relating to cantaloupes and melons. Acreage information for both Bakersfield and Imperial Valley for watermelons and various other melons was provided and the anticipated starting date in each area was given. Andrews said that the manner in which work would be offered was the sane as in the past.

Neeper recited the list of articles which had been signed off; articles where one party claimed agreement but which had not been signed off; and the areas of disagreement. Villarino indicated that Neeper's recitation was consistent with his understanding of what had been accomplished.

Villarino asked what was holding up agreement from Andrews point of view. Neeper replied that the most significant problem was the total cost of the contract. He conceded that no cost analysis had been made of either the UFW or company proposal and that Respondent did not intend to make one.

Neeper listed the following as the most important non-economic items: Union Security, Hiring, Supervisors and Mechanization. In the economic area he listed the following: Wage Rates, COLA, Paid Union Representatives and Subcontracting.

Villarino listed the major union concerns: Economics and the effects upon the prevailing standards in the Imperial Valley area, protecting bargaining unit work and hiring hall.

May 5, 1981

Respondent submitted a proposal on Record and Pay Periods, Article 27. The proposal reflected a modification of its previous position and adopted the union's requested language regarding accumulation of wages. There was further discussion regarding the right of the union to check the monthly and quarterly reports made by Andrews to the pension and health and welfare trust funds.

When the discussion turned to seniority; Neeper stated the Union had previously made a proposal which the company accepted. Therefore, the company had no further proposals on seniority. However, Respondent was willing to consider any supplements to the seniority provision which the union desired to propose.

Neeper stated that Respondent's proposals with respect to wages reflected its historical wage practices in both the Bakersfield and Holtville areas. He restated Respondent's view that it was a different operation from other growers with whom the UFW has contracts. Neeper said Andrews had made what it regarded as a realistic wage proposal and had agreed to assume the cost of contributions to the UFW funds. Moreover, the company had narrowed its proposal on differential to cotton which meant it would incur a substantial cost increase for other flat crops such as alfalfa and wheat.

Following the formal meeting, there was an off-the-record meeting at which Villarino said the UFW would accept a wage differential of one dollar on Bakersfield area cotton; Respondent's mechanization and union security proposals; however, Villarino wanted to know what Andrews would agree to regarding other parts of

the contract. Don Andrews asked about hiring, and Villarino responded the UFW would let the company do the hiring hat not under the terms of the company proposal then on the table. Villarino said the union needed more protections. Respondent's response was that its hiring proposal was the one with which it felt most comfortable. Villarino said it didn't provide enough protection in terns of notice, of non-discriminatory hiring, and other problems.

Respondent asked why paid representatives had to be in the agreement. Villarino said he wanted to make sure the contract ran smoothly. Neeper said Villarino's statement was a significant development, and the company would need some time to consider it. 'He asked where he could get in touch with Villarino later that day; however, he did not contact Villarino during the remainder of the day.

May 6, 1981 - May 14, 1981

Villarino called Neeper on May 6. Neeper said he hadn't had time to talk with his principals and suggested that Villarino call him on May 8 or May 11. Villarino called on both the 8th and the 11th and was unable to reach Neeper. On the 11th, Villarino sent Neeper a mailgram confirming his inability to reach him.

By letter to Neeper of May 11, 1981, Villarino requested the following information: the form of the employer's organization; a list of all tools, equipment and protective garments provided workers over the last three years; the total cost for the last three years for wages, holidays, vacation, overtime premiums, bereavement pay, and jury duty pay; the total hours worked by bargaining jni[1]: employees for each of the last three years; the total hours worked

and total wages paid for the last three years for work in connection with 11 listed commodities; the total number of. bargaining unit jobs on a month-to-month basis for the last three years; a list of crops currently grown or harvested by Andrews; a list of the crops scheduled for 1981 and the predicted crop schedules for 1982; the total number of acres included or anticipated to be included in each operation; whether the company contracts itself out to grow and/or harvest crops; if so, which crops, for whom and for how long has the practice been in existence; whether the company subcontracts work to other entities to be done on a custom basis, and if so, when during the year this is done and in what crops, together with the name of each contractor associated with the operation and the greatest number of workers used in any one time by a subcontractor; the frequency of subcontracting land preparation or pesticide application; the criteria used to determine the need for such subcontracting; a list of the subcontractors utilized for these functions, and for what period Respondent has followed such a practice.

On May 12th Villarino reached Neeper by phone and asked for Andrews' response to the UFW proposal of May 5.

Neeper reiterated Respondent's position on union security, i.e., the good standing problem. He said the company wants to do the hiring but is willing to explore providing the UFW more protections. Neeper said seniority was a confused situation because of the prior agreement; however, the company's position was not fixed or firm. There was no change in Respondent's position regarding supervisors doing the unit work they'd done in the past.

Regarding mechanization, Neeper said it vas extremely important for the company to be a modern farmer. He said Respondent was firm on its present position regarding Hours of Work and Overtime. On Holidays, the company can go up a little on money. Neeper said the company did not foresee a new proposal on Travel Pay (Article 26) or Company Housing (Article 34).

Neeper said Subcontracting was extremely important and was tied to its Agricultural Agreements proposal. He foresaw no cost of living allowance provision in a contract. On Paid Respresentatives, Respondent's present position was "no" but opposition would lessen in the face of agreement. Neeper said there was no change in Andrews' wage position at that time; but there was a little room for movement.

May 14, 1981

At the start of the meeting Neeper asked why the UFW's information request dated Apirl 27 had not been presented to him at the earlier meetings in May. Villarino said he forgot to do so. There was further discussion about an inability to contact Villarino to explain why Andrews was unable to gather certain information as initially promised.

Neeper provided certain previously requested information relating to melons: The estimated number of crews to be used; the system for hiring in the watermelon harvest; he advised that the extent to which melon harvesting machines would be used and not been decided, noting that use of more machines in the Holtville area was contemplated. Villarino stated that UFW was opposed to any change in the terms of working conditions related to melon harvesting

machines, labor contractors or custom harvesters absent a new contract.

Neeper also provided certain requested information with respect to the Salinas lettuce harvest, i.e., the location of the fields to be harvested, the number of crews to be utilized, the number of fields harvested per crew per day, and the method used for obtaining the crews.[41/]

Villarino argued that Salinas harvest work was not offered the Bakersfield workers and that in failing to do so Andrews deviated from its past practice.

After a lunch break, seniority was discussed. Villarino said the proposal made by Ann Smith and accepted by Nassif did not include an area seniority concept. Thus, an Imperial Valley lettuce harvester who had not historically gone to Bakersfield would lose his seniority if he departed from the Imperial Valley harvest prior to the end of the season; but such was not the case with workers who had a past practice of going to Bakersfield harvest. These workers were permitted to leave prior to the end of the Imperial Valley harvest.

Villarino made a new seniority demand: workers should be able, on a seniority basis, to move in and out of various crews in order to be able to work with faster trios. There was a discussion regarding application of the seniority principle during periods when work was slow. Villarino raised the further problem of retention of

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41. Neeper said that the Salinas work had been offered to Bakersfield crews by their foremen while they were working the Bakersfield harvest.

seniority by workers promoted out of the bargaining unit who were unable to perform the higher rated work. He proposed that ones seniority be retained for a period of time in his former unit classification. Neeper asked whether Villarino had language which he wanted the company to consider.

The discussion turned to hiring. Neeper gave an extended explanation of the problems Andrews perceived in connection with the operation of a hiring hall. He stated the company felt it should have discretion to refuse a worker so long as it does not discriminate against him for an unlawful reason. He said if there was a prevailing structure in the Imperial Valley regarding hiring, Andrews would be willing to consider incorporating in a supplement some "technique" for hiring.[42/]

In response Villarino recited agricultural labors historical hiring problems as viewed by the UFW, emphasizing the problems of favoritism and discrimination by labor contractors and growers, sexual abuse of women and racial disharmony. Villarino noted that the UFW fought long and hard for the hiring hall and that they approached negotiations as if it were theirs. The hiring hall was and is meant to be a radical change to eliminate the huge abuses in previous hiring processes. He noted that where the UFW had foregone a hiring hall, the previous abuses continued. He also noted that when a grower does the hiring, it becomes a techinque for attacking the union through the decertification process.

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42. Neeper's manner of speaking, as set out in the transcription of the bargaining session, is sometimes oblique. Presumably, his reference to a "prevailing structure" was to the UFW's hiring hall.

There was also a discussion regarding supervisors doing unit work, and the possibility of grandfathering some of the supervisors.

May 15, 1981

Neeper opened a discussion on the hiring issue by referring to Villarino's remarks of the previous day. He said he recognized the remarks were expressions of: the UFW's concerns regarding hiring, and he wanted to reflect Andrew's concerns on the issue. He said Andrews was seeking to approach each of the union's concerns from the point of view of whether it could meet them successfully, and whether it was creating a potential liability for itself.

Neeper stated the company acknowledged a need to change its present hiring practices and had proposed changes in these practices. He said the company needed to investigate how to channel its hiring needs to a central point and communicate then to the UFW in a useful fashion. However, the company could not agree to a specific procedure that would create liability if it failed to follow the procedure. He also noted that under the contract much of the hiring would be a function of the seniority and recall provisions of the contract.

Neeper spoke extensively of problems related to "hiring the best worker". He said the company wanted to avoid grievances being filed by individuals who were not hired. He said Andrews had no intention to stock the work force with the object of decertifying the UFW.

Respondent had no change in its position on Travel Pay. Villarino responded that the parties were far apart.

With regard to supervisors performing unit work, Weeper stated Andrews was considering the union's proposal for a dues equivalent approach. Regarding the matter of Supervisors pulling or moving pipe with their trucks, it was a past practice which Andrews felt strongly that it was necessary to continue. Villarino responded the Union was unconvinced of the necessity to continue the practice.

The union then wished to talk about Mechanization, Camp Housing, Health and Safety, and Reporting and Standby. With respect to Camp Housing, the union proposed adoption of the Sun Harvest language. Neeper said the parties were in potential agreement.

There was discussion regarding the Health and Safety article resulting in tentative agreement. The article was to be signed off after being reduced to writing.

The parties reviewed their respective positions on Mechanization. The UFW was prepared to agree to the Andrews mechanization proposal of November 15, 1980, with the modification that the notice requriement for effecting changes be six months as opposed to a "reasonable" time period. Six months notice was unacceptable to Respondent.

Neeper said the company had some movement on Reporting and Standby, but it might not be sufficient to result in total agreement. There was a discussion of show up pay and pay for working less than four hours. There was also discussion and disagreement with respect to the method of paying piece rate workers show up pay.

situation.

Turning to information requests, Neeper said detailed information regarding subcontractors was provided the union on February 2, 1979. He said the company did not grow onions or garlic. With respect to carrots, lettuce, melons, cotton and wheat, Neeper spelled out what functions were performed by Andrews' employees, custom contractor employees or persons supplied by a labor ocntractor.[43/]

Villarino argued that use of contractors has resulted in reduced hours and days worekd by Andrews employees, citing April and May 1980 as a time when a labor contractor was used for weeding and thinning, thereby reducing the work week for Andrews employees from six to two or three days a week.

June 2, 1981

Neeper provided language for the Health and Safety and Camp Housing articles which reflected the parties agreement in those areas.

Villarino stated the Union has not received some items of information requested on May 13.[44/] Neeper said Respondent was still attempting to gather it. He did provide information regarding Andrews' organizational structure in the Bakersfield area, naming the persons occupying various jobs.[45/] He also described a crop

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43. This information had been requested in Villarino's May 12 letter.

44. The request was dated April 27th, mailed May 11 and received May 13.

45. The names of additional melon harvest Foremen were also provided.

growing cycle, beginning with the disposition of the prior crop and continuing through the cycle to harvesting. He named the phases performed by subcontractors and those performed by Andrews' employees and the names of Andrews' subcontractors.

Neeper then began discussing seniority, listing the following concepts: company seniority, crop seniority, crew seniority and classification seniority. With respect to year round jobs, he listed the following concepts: company seniority, area seniority, and classification seniority.

Crews are hired in order of seniority. Crew 1 is the first crew hired. Persons are hired in Crew 1 on the basis of their seniority in that crew, irrespective of whether there nay be non-members of Crew 1 who have more service with Andrews. The members of each crew are hired by the crew foreman. The foreman goes to Calexico and contacts former crew members giving them the date workers will be hired and the number to be hired. These individuals pass the word along to their follow workers. Persons with crew recall rights are first hired. When all such persons have been hired, the foreman has discretion to hire whom he chooses.

Seniority is lost through discharge, quitting before ones crew is laid off or failing to report when recalled.

On the subject of hiring, the company was not opposed to using applications having a limited effective period as the basis for hiring new workers; nor did Neeper see a problem in the Calexico area for obtaining new workers through the UFW hiring hall. There was discussion regarding new hires being on a first come first served basis as opposed to foremen selecting those whom they

regarded as the best workers. Villarino's opposition to the latter system was grounded on the contention that when there were more applicants than jobs, favoritism controlled unless the first come, first hired principle applied; moreover, Villarino argued that a foreman is unable to determine as between two individuals who is better qualified. Neeper responded that foremen do investigate; that they find out for whom a person has worked, knowing which growers require good work; and that applicants may also have worked for the foreman at another grower. Respondent asserted there was a cost advantage in hiring the most qualified individuals. Villarino asserted that favoritism determines who gets hired. The hiring hall would eliminate this problem. Villarino noted the proposal contains a probationary period during which Andrews can reject persons dispatched from the hall, and he also argued there were no appreciable skill differentials among persons in the general labor category.

There was extended discussion regarding putting the UFW on notice of the date on which major operations were to commence. Respondent was prepared to give notice, provided it incurred no liability in the event of failure to begin on the noticed date.

Villarino asked whether the company had problems with a requirement that terminations be accompanied by a written notice setting out the reason for discharge. Neeper responded that any written notice requirement would be covered in the grievance procedure language.

There was once again discussion regarding supervisors performing unit work.

June 9, 1981

At the outset of the meeting, Villarino raised the question of Respondent's opposition to an unemployment insurance claim of Guadalupe Castillano; however, he knew nothing of the facts in the case beyond knowing she was seeking a job in the melon harvest.

Villarino stated the Camp Housing and Health and Safety drafts were okay. He then wanted to discuss the UFW's information request of May 12th. Neeper stated that Respondent had provided requested information as time permitted within its need to conduct a farming operation and within its obligation to meet with the Union; further that Respondent would continue to do so unless the union desired to delay further meetings until all requested information was completed.

Turning to the supervisor issue, Neeper said Respondent was standing on its proposal of Novmeber 7, 1979. He pointed out that information requested regarding the Bakersfield supervisorial structure had been supplied as well as a list of duties performed by supervisors in the irrigation and tractor departments. Noting that the UFW had suggested grandfathering job duties performed by supervisors, Neeper said Respondent opposed this suggestion because jobs and duties are subject to change. Respondent was also opposed to a dues equivalency approach because the supervisor would get nothing for his dues.

Requested information regarding subcontractors, "custom contractors" and labor contractors, including names, was provided. Neeper asserted that Respondent had attempted to provide information related to those areas about which the 'JF?I wished to talk and which

appeared to be most critical at a particular negotiating session.

Turning to the UFW's May 11th request, Neeper stated Andrews had already provided much of the requested information in written form, Villarino said he was unable to locate it. When Neeper began his response, Villarino asked whether the information would be provided in writing; Neeper responded that Andrews would put in writing such information as the union demonstrated it needed in written form. However, since the union wanted the information as soon as possible, he was providing it orally.

Responding to the request for a list of tools, equipment and protective clothing supplied workers, Neeper said bargaining issues relating to the request had been resolved.

Respondent asserted it did not have the following information for 1978 through 1980: wage and fringe benefit costs, total bargaining unit hours worked, wage and production records by commodity, the size of work force on a monthly basis, nor wage and related information for each of the bargaining unit members. Neeper opined the information could become available by late summer; he stated Respondent was in a busy season and its limited office staff was already overworked. Moreover, he contended the information was unrelated to issues currently being discussed. He said the information would be forwarded as it was developed; Villarino replied that all the information was necessary before the union could present an economic proposal.

Responding to other questions in the May 11 request, Neeper stated: Respondent had no projected crop schedule; it had harvested for other growers; and it had substantially provided information

regarding use of subcontractors for land preparation or pesticide application.

The discussion then turned to the relative time difficulties in responding to unanswered requests. Neeper divided material into categories according to his estimate of how long it could be expected to take to supply the information. he said Respondent had no seniority lists covering the Salinas lettuce harvest; however, it had lists for the tractor, irrigation, harvesting and thin and hoe departments. He did not know whether Respondent had a list of current employees working in the melon and lettuce crops which contained the addresses and social security numbers of the employees and promised to investigate the matter.[46/]

Villarino said he had heard that shop employees received a wage increase in January 1981, and he wanted to know the amount of the increase.[47/]

Villarino clarified the flat crop rate the UFW was proposing and stated the UFW position was 35C per hour less than the Sun Harvest rate. He also set forth specific rates now being proposed for contract classifications working in cotton in the Bakersfield area:

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46. From the transcript it appears that both Don Andrews and Bob Garcia were present at the meeting. Neither responded to Villarino's question regarding a list of current employees; nor does the record indicate that Neeper checked with either during the course of the meeting to ascertain whether lists with names and addresses were available.

47. Neeper made no effort to get the information from Andrews or Garcia, both of whom were present and should have known the amount of any increase granted.

Tractor 1	$6.37 per hour
Tractor 2	$6.25 per hour
Heavy Equipment	$6.47 per hour
Listing	$6.37 per hour
Irrigator	$5.40 per hour
Sub-foremen	$5.60 per hour
General Labor	$5.30 per hour

The proposed rates for all other crops were 35 cents per hour higher. Villarino also proposed rates for the above classifications effective July 1981. He said the proposal was not made on a take-it-or-leave-it basis; Neeper said Respondent's response would also not be a final position. He asked Villarino why the UFW entered into an agreement with Edgar Ghio providing lower wage rates than Sun Harvest. Villarino said he would delay a response until he received Neeper's written request.

Neeper and Villarino agreed to postpone the meeting scheduled for the following day to permit Respondent to prepare a response to the UFW's wage proposal. Villarino restated his need for the balance of the requested information within the following two or three weeks.

June 23, 1981

Respondent submitted the following wage proposal: no retroactivity; no COLA, non-vegetable rates to be applicable to all crops and not limited to cotton. An interim wage increase effective July 16th was proposed in the event the parties reached agreement before that date.

Following discussion of the wage proposal, Neeper provided the following previously requested information: the total number of hours worked in the bargaining unit during 1980; total wages paid agricultural field workers for 1978, 1979 and 1980; an approximation

of the total number of hours worked by bargaining unit employees during 1973 and 1979; the dollar amount of health and welfare contributions for 1978, 1979 and 1980; and various seniority lists.

Respondent's estimate of the maount of time it would take to provide remaining information requested by the union had not changed. Cesar Chavez, who was present at this meeting, stated that the outstanding information was necessary to permit the union to bargain intelligently with the Respondent. He noted that the information just provided did not permit the union to calculate actual costs for each classification of worker. Neeper told Chavez it would take three to four months to make the information available. He said the information would be provided as it was developed; that Respondent did not have the information in the form in which it had been requested. Chavez said the union would take it in whatever form Respondent had it. Neeper said that the union was free to send a representative to Respondent's office to examine the raw records.

Chavez expressed the view that perhaps the parties had been bargaining too long to be able to get themselves out of the mess they were in. He suggested it was a problem of making some movement; hopefully Respondent would make movement to correspond with the union's movement.

Chavez and Neeper agreed that there were still big items outstanding other than wages. Neeper said the company felt strongly about those outstanding items, and if Chavez was asking whether Respondent was going to come to the union's position on those matters, the answer was no.

With respect to the hiring hall, Chavez said that the employer hadn't negotiated on that issue and perhaps the union hadn't either. Neeper responded that there had been discussion of the hiring hall as well as seniority issues. Neeper noted taht there was substantial disagreement with the company's new proposal regarding involvement of foremen in the hiring process. He explained that hiring was now almost entirely done through foremen; Respondent had modified that position but had not proposed eliminating foremen completely from the hiring process. He said he understood that the union viewed the hiring hall as essential.

Chavez said it was difficult to respond to Andrews' wage proposal in the absence of information upon which to base the Union's proposal. It would be easier for the union to modify its proposal with respect to various wages if it had the requested information.

When Chavez suggested shifting the discussion to job descriptions, neither Neeper nor Don Andrews could recall the UFW having ever made any proposals with respect to job descriptions; that it had not been a big issue as yet.

Chavez noted that inclusion of shop workers in the unit was still at issue. Andrews said that this issue was the subject of an unfair labor practice, and their inclusion of exclusion would be ruled on in that proceeding.

Turning to the union security issue, Chavez asked why the company had a problem with the "good standing" provision. Neeper responded the company may "potentially" have employees who would prefer not to belong to the union; agreement to the union security

provision would compel such employees to join. Moreover, he said it was the company's position that it preferred not to have the work force subject to disruption because the UFW decided that a person is not in good standing for matters unrelated to work. The company did not propose to hire workers in any situation in which it would have to fire them because they did something with respect to the union other than failing to pay dues. Chavez asked about the company's position if a referendum were held among the workers to decide whether the good standing language should be part of the union security clause. Neeper's response was no. He stated the problem doesn't arise until some individual is threatened with firing and doesn't want to quit. He wants to keep working and the company has to fire him. Respondent was opposed to accepting this posture. He said the company did not desire to be in the position of having to fire an employee because the employee had engaged in an act, in the union's opinion, against the interest of the union.

Chavez moved the discussion to the hiring hall. Neeper said the company proposed a system which it thought would satisfy the union's concerns as well as satisfy Respondent's desire to continue to do the hiring. Neeper explained that most hiring is based on seniority or on the basis of previous work performed for Andrews. For totally new employees, Respondent wanted to hire the best qualified person. Neeper then recited the differences arising out of the parties' discussion of the use of employment applications in connection with Respondent's system. Neeper also pointed out that Respondent did not wish to have the grievance procedrue apply to person who were not hired.

Chavez said the UFW's experience in situations where foremen do the hiring was that the foremen were more prejudiced than the grower towards the UFW and that UFW workers were systematically and fairly consistently weeded out. The situation was exacerbated by the use of a labor contractor. He said labor contractors almost without exception discriminated against union members and sympathizers. A hiring hall is the way the union can combat this kind of discrimination. Chavez said it was not the UFW's position that the hiring hall was the only way to solve the hiring problem, but hiring was a problem which needed to be dealt with.

Neeper replied that Respondent's proposal dealt with Chavez' fears regarding foremen hiring family members or discriminating against union sympathizers. Neeper's opposition to the UFW proposal to cover refusals to hire under the grievance procedure was that it gave the grievant two bites at the apple. Since the UFW could not waive the individual's right to file an unfair labor practice against Respondent, Respondent would have to win in two forums in order to establish its right to refuse to hire a particular individual.

Chavez moved the discussion to the topic of seniority. Neeper reviewed what had transpired, noting Respondent's acceptance of a union proposal during the period when Ann Smith was the negotiator, and the UFW's subsequent posture that the Smith proposal omitted an area of seniority. Neeper said Respondent recognized that there had to be four kinds of seniority: company, area, classification and crew. He said the company did not want to change its present seniority system, noting the parties disagreed with

respect to application of the crew seniority concept in that Respondent did not permit a person in a low seniority crew having more individual seniority than persons in a higher seniority crew to bump into the seniority crew when the low seniority crew was laid off.

Chavez shifted to the supervisor question. Neeper said the remaining difference related to supervisors hauling pipe, work which they had historically performed. No one else does this work. Chavez said he understood that occasionally supervisors did other unit work on an emergency basis.

Neeper provided the seniority list for the 1980-81 lettuce harvest in the Holtville area for loaders and closers and the seniority list for harvest crews #1, #2, #3 and #4. He also provided seniority lists for the first quarter of 1981 for Holtville irrigators and tractor drivers. A list of persons working in the current cantaloupe harvest was provided.

At Chavez' request, Neeper proceeded to explain at length the areas of difference between the parties on the following subjects: Article 3, Hiring; Article 4, Seniority; Article 14, Health and Safety; Article 15, Mechanization; Article 19, Hours of Work and Overtime; Article 24, Holidays; Article 26, Travel Allowance; Article 37, Subcontracting; Article 38, Agricultural Agreements (Chavez was told this was Respondent's counterpart of the UFW's Grower-Shipper proposal); Article 44, Delinquencies; Article 45, Cost of Living Allowance; and Article 46, Union Representative; and whether shop employees were to be covered by the agreement.

July 1, 1981

Chavez and Villarino were present for the UFW; Neeper and Don Andrews were present for Respondent. Neeper presented additional seniority lists for Bakersfield tractor drivers, irrigators, and Alvarado's weeding-thinning crew as well as a list of the Salinas lettuce harvest workers together with their addresses and social security numbers.

Chavez sought clarification of Respondent's proposals on irrigators, retroactivity and subcontracting. Neeper explained that any subcontracting which the company was permitted to do would be limited to activities which were not to the detriment of the union or bargaining unit members. Chavez said the union was prepared to permit that subcontracting which had been done in the past; he said he was aware that Respondent needed subcontractors, custom harvesters and in some cases custom applicators; however, he was opposed to the use of the labor contractors, stating their use "flies in the face of the bargaining unit."

Neeper acknowledged that Respondent's proposal would not include employees of a labor contractor; that Respondent's proposal would treat a labor contractor as a contractor and persons he supplied would be treated as his employees.[48/] Neeper also acknowledged that labor contractors were used with some' frequency. He said they were used in most, if not all, vegetable crops. He stated that Andrews wanted to use labor contractors even if

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48. G.C. Ex. 44, p. 4.

bargaining unit workers were out of a job. He stated:

> You can certainly be in the situation where you have the immediately available bargaining unit thinning and weeding working and we need more thinning and weeding people, even though you may have harvest people who aren't working, pickers who aren't working.49/

Neeper said that while it was generally true that additional people would not be brought in until all bargaining unit people were working; it was not true in particular instances because of the unavailability of an Andrews foreman. A labor contractor is used in such a situation because of his foremen's availability.

Chavez had difficulty accepting that Neeper was serious about this proposal. Neeper contended that no work was being taken away from the bargaining unit because the Respondent had used labor contractors in the past for this purpose. It was his position that Andrews was simply seeking to do what it had always done.

Chavez said the union could not say that Respondent could not bring in labor contractor people for surge periods and for short periods of time; but the UFW was contending that such people should not be used until all the UFW people were working. Neeper's response was that if such had been Respondent's past practice, it would be required to continue to do as Chavez suggested, but if it were not past practice, Respondent wasn't required to do it. Chavez contended that Respondent was making a proposal which it knew could not be accepted.

Neeper stated the essence of Respondent's position: the proposal provides that if the company has engaged in certain

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49. Ibid, p. 5.

contracting or subcontracting activities in the past, a resort to those activities would not under Respondent's proposal constitute a use detrimental to the union or bargaining unit workers prohibited by the proposal.

Chavez said the company changed its practices in October 1979 because of strike action, and since then there was considerably more utilization of subcontractors and labor contractors. Chavez suggested the LJFW could agree to Neeper's proposal if the provision spoke to practices prior to October 1979.

Neeper summarized what he saw as the respective position of the parties. Andrews wanted to continue its practices regarding utilization of subcontractors and labor contractors. The UFW wanted Andrews to change its method of operating because it wanted Respondent to provide more work for the people. Neeper said that was understandable. However, Respondent has resisted that proposal because it wants to continue to operate in what it views as the efficient way it has operated in the past.

As Chavez saw the problem, it related to whether or not the company had in fact changed its practices in October 1979. If the company had not changed its practices after that time, Chavez said it would be very easy with some minor modifications to accept the subcontracting clause proposed by Respondent; however, if the practices had changed in 1979, there were serious obstacles to overcome.

He recited his understanding of what work had been contracted out prior to October 1979, and he pointed out that without information from the company relating to the dates and

numbers of people engaged in subcontracting, the union was unable to modify its position.

Neeper replied that the information was being supplied as fast as Respondent could get it. He noted that Respondent had made the alternative suggestion to have the union come to the office to develop the information itself.

Neeper ran through the history of negotiations with respect to the subcontracting clause. On February 5, 1979, the union proposed no subcontracting; the Respondent proposed unlimited subcontracting on February 12. On April 23rd, the union proposed some subcontracting; the company proposed some subcontracting on April 30, and proposed an additional side letter on July 30. On November 5 the union proposed to no subcontracting; on November 7 Respondent proposed some subcontracting as in its April 30 letter plus the side letter of July 30. The employer's current proposal was the November 7, 1979 proposal plus the July 30 side letter.

Following this discussion, Chavez stated the UFW was prepared to submit a total package proposal for settlement. He said if the company refuses to accept the proposal in its entirety, the proposal was withdrawn, and the UF.V had gone as far as it could go.

On Article 2, Union Security, the UFW would accept the company proposal, provided two minor items were taken care of, i.e., the date on monthly reports and Respondent's cooperation in signing up new hires.

With respect to Article 3, Hiring, Chavez said the union would accept Respondent's proposal with three minor changes: hiring would be on a non-discriminatory basis; a requirement that

Respondent notify the UFW when additional workers were needed so that the Union could refer people for hiring; since the union was not going to know who gets hired at all times, it needed company held to sign up new members.

Article 4 - Seniority, the UFW position was its proposal of October 17, 1980.

Article 13 - Supervisors, the UFW would accept the Respondent's proposal provided the past practices spoken of for supervisors meant moving the loaded trailers with pipe.[50/]

Article 15 - Mechanization, the union was prepared to accept the company's proposal subject to expedited arbitration.

Article 19 - Hours of Work and Overtime, the UFW wanted to add four points to the company's proposel:

1) A 24-hour irrigator shift for Imperial Valley irrigators;

2) For machine operators time-and-one-half after eight on Saturday;

3) For melon piece rate harvesters time-and-one-half after four hours on Saturday; and

4) Pay at a higher rate for temporary transfers.

Article 20 - Reporting and Standby, the UFW accepted Repsondent's proposal of March 21, 1980.

Article 24 - Holidays, the UFW accepted the company's proposal on holidays with two additions - February 10 and the first

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50. It is unclear from the transcript whether Chavez was proposing to include or exclude moving loaded pipe trailers from the past practice exception.

Sunday in June - Citizens Participation Day.

Article 26 - Travel, the UFW accepted Respondent's proposal but wished to include the past practice described by the company in the meeting of May 14, 1981.

Article 37 - Subcontracting, the UFW would accept the company's proposal of April 30, 1979, if paragraph (d), the past practice paragraph, were deleted.[51/] The company's proposed Article 38, Agricultural Agreements was acceptable with the following addition: the company would not enter into any legal arrangements with a party involved in prior economic action with the UFW.

Article 42 - Delinquency, the UFW stood on its proposal.

Article 43 - Cost of Living Adjustments, the union withdrew its proposal.

Article 44 - Union Representative, the union proposed a full time representative at Metler[52/] and an additional one during 50 percent of the lettuce harvesting season.

The union proposed that wages be retroactive to July 16, 1980. With respect to medical insurance, the union proposed that the contributions be made for hours worked in June 1980 so that workers would be eligible for benefits as of August 1. The union proposed that vacation be prorated to the end of 1980 and that thereafter workers would accrue vacation on a calendar year cycle. Respondent's job descriptions with the addition of descriptions covering shop work would be acceptable.

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51. Chavez was also to provide some additional language for inclusion in the proposal.

52. A location in the Bakersfield area.

Neeper proposed that the parties skip the meeting in which they had scheduled for the following day in order to give Respondent time to evaluate the union proposal. Agreement was made to meet on July 7, 1981.

July 7, 1981

Neeper announced that Respondent rejected the UFW's package proposal and was submitting its own package proposal in writing under the same conditions as it had received the union proposal. Me stated Respondent's package proposal did not represent its final position. He added that Respondent was prepared to talk about a multi-year contract if its package proposal accepted.

After reviewing Respondent's written- counterproposal, Chavez said the union negotiators were disappointed, that they saw no concessions; Respondent seemed more inflexible in its bargaining stance than it had appeared to be at the two earlier meetings. Cesar stated it had become clear that the company did not intend to reach agreement with the UFW and that Respondent was engaging in bad faith bargaining, particularly in view of the major concessions made by the UFW with the object of obtaining movement from the company.

Neeper replied that Respondent had told the union some months ago that it had very little room for movement. He said the wage rates in the union proposal were artificially and unnecesarily high and in excess of what the UFW had agreed to with other growers in the vegetable business and in view of those rates Respondent did not view the UFW's concessions as major. He noted that it was the UFW who suggested using the package proposal approach although Respondent regarded it as unduly rigid.

With respect to comments about Respondent's failure to provide information, Neeper reiterated that Respondent had offered the UFW an alternative way of getting the information, which the union had chosen not to utilize; he stated that Respondent was in the process of developing further information and would continue to do so.

July 7, 1981 - October 9, 1981

During the period between July 7th and early October 1931, there were no bargaining sessions. During August there was an exchange of mailgrams regarding access. Respondent contended that the UFW had not complied with principles regarding post-certification access spelled out in Board and Court of Appeal decisions.[53/] Additionally, as the UFW was striking Respondent during this time frame; it was Respondent's announced position that no right to take access existed. However, Respondent communicated its willingness to negotiate terms for such access.

By mailgram of September 1, 1981, Respondent notified the UFW that its Salinas lettuce season would begin between the 4th and 8th of September and that it wished to effect a per carton price increase which would reflect the industry rate, i.e., 82¢ per carton. Respondent stated it would effect the new rate on the 7th, with the concurrence of the UFW; and if no response were received within three days, Respondent would assume there was no opposition to the increase or that the union did not wish to discuss the

53. The Board decision referenced was O. P. Murphy Co. (1973) 4 ALRB No. 106. The Court of Appeal decision appears to be one superceded by Agricultural Labor Relations Board v. California Coastal Farming Inc. (1980) 31 Cal.3d 469.

matter.

Villarino responded by Mailgram of September 3rd in which he stated that Respondent was aware of the UFW's position regarding the implementation of wage increase in the absence of total agreement. Villarino stated this policy applied to any unilateral wage increases which Respondent might effect. If Respondent wished to resume negotiations, Villarino advised that the contact should be made directly with Cesar Chavez.

Respondent sent Chavez a mailgram on September 4th noting its availability for negotiations and Villarino's failure to request a meeting.

(4) Herman-Villarino Period (October 9, 1981 -January 1982)

Meetings resumed on October 9th. During the hiatus, Respondent changed bargaining representatives. Joe Herman a partner in the law firm of Seyfarth, Shaw, Fairweather & Geraldson now served as Respondent's spokesman. The meeting was triggered by Herman's call to Villarino of October 5th or 6th advising him of the change in representation and suggesting the parties meet as soon as possible. Cesar Chavez was present at the October 9 meeting. No proposals were exchanged. Respondent suggested the State Conciliation service be asked to sit in the meetings as a means of getting negotiations off dead center. Herman also asked the union to advise him of any requested information it felt it had not received. He said he was unclear on this point following his review of the history of negotiations. Finally, he asked that the UFW set out its present position.

Chavez agreed to join in a request to the State for the

assignment of a conciliator. He then listed those articles to which union notes showed the parties had agreed.

Herman said it would be difficult to reach agreement absent the union's understanding of the differences between Respondent's operations and those of other companies with whom the UFW has contracts.

October 13, 1981

Pursuant to Respondent's request, Villarino forwarded Herman a list of the information which the UFW contended it had not received; the list set forth the dates upon which the respective pieces of information had been requested. Villarino's letter noted that information regarding subcontractors and Respondent's supervisory structure had been supplied orally and that Respondent had declined to make a written response. Additional information was requested relating to Respondent's Bakersfield and Imperial Valley cotton production; its intentions regarding land sales or other land transactions; and copies of any collective bargaining agreements covering Respondent's cooler and packing shed operations and its truck drivers.

By letter of October 23rd, Andrews advised Villarino it had not engaged in any land transactions which would adversely affect unit employees.

October 23, 1981

Villarino wrote Herman protesting a unilateral change in hiring practices to a "more discriminatory form;" alleging that Respondent was refusing to. rehire workers engaged in protected concerted activity in October 1979. Villarino enclosed a list of

union activists who had advised Respondent of their availability as long ago as the spring of 1980. A meeting scheduled for October 25 was not held.

November 2, 1981

State Conciliator David Ruiz was present at this meeting. He placed the negotiating teams in separate rooms and went from one group to the other.

When Ruiz met with the union, Chavez said the UFW has room to move if the company had movement. Thereafter, Ruiz met with the employer for about an hour, and when he returned, he stated the company said there was no more movement. Thereafter there was no meeting until January 1982.

November 19, 1981

Don Andrews directed a letter to Villarino in which he requested information regarding the income, expenditures, employees and rate of compensation and tax returns for each of the trust funds into which Respondent had agreed to make contributions. Additional information was sought with respect to the RFK Medical Plan and the UFW's pension fund.

Respondent also requested information regarding the operation of the UFW's hiring hall, specifically asking for evidence of compliance with the registration requirement of the Farm Labor Contractor Registration Act, 7 U.S.C.A. 2041, et seq.

In responding to Andrews' letter, Villarino expressed puzzlement regarding the information request relating to the RFK, MLX and pension funds, stating that Respondent had accepted the UFW's proposal regarding these funds, and that Respondent's

attorneys already had the information in their possession by virtue of their representation of other growers. Andrews was referred to the respective plan administrators. Villarino referred Respondent's request for hiring hall information to the UFW legal staff for response.

December 9, 1981

Andrews wrote Villarino stating that Respondent had already supplied much of the information requested in his October 13, 1981, letter; despite that Respondent was prepared to resubmit the information. His letter also set out Respondent's willingness to meet to resume negotiations.

December 22, 1981 - January 18, 1982

During this period there was an exchange of self-serving correspondence between the parties. Villarino wrote Herman on the 22nd that Respondent had been inflexible in that it had not responded to UFW proposals of March 1981, June 9, 1981, and July 1, 1981; and that in October and November 1981, the company had indicated the company's position was "no more movement", a position which it had maintained since 1979.

By letter of January 14, 1982, UFW attorney Eggers advised Herman the union was not obligated to supply information regarding the Citizen's Participation Day Fund, citing Admiral Packing Company, et al. (1981) 7 ALRB No. 43. She also stated that the UFW did not retain referral lists with respect to its hiring hall; workers were dispatched on a first-come, first-served basis. No lists are maintained since no attempt is made to contact workers as work becomes available. With respect to requested information

regarding the funds, Eggers directed Herman to contact Villarino.

January 18, 1982

Villarino wrote Don Andrews setting out approximately fifty pieces of infomration relating to subcontracting which he contended the UFW had not received. Villarino stated that answers were needed "on or before 19th of January 1982."[53/]

The January 13th request reiterated a demand for information not supplied on December 9, 1981, i.e., lettuce harvest seniority lists for various areas for 1979, 1980 and 1981, the addresses for approximately 130 employees. Arrangements were made for Villarino to view documents at the company premises; he also received another packet of information.

January 20, 1982

The meeting was not taped. State Conciliator Ruiz was present and spelled out the format for the meeting. He told Herman to make a presentation. Herman stated that Andrews had compiled a chart of all wages in the Imperial and San Joaquin Valleys. Cesar Chavez responded that if wages were the problem, well negotiate. Ruiz then suggested a subcommittee meeting. Villarino and Chavez met with Andrews and Hermann. Ruiz was also present. Chavez told Andrews the UFW would be willing to take care of their economic problems on the condition that Andrews took care of four UFW language problems: the standard UFW union security and hiring hall language; on seniority the UFW was willing to work with the company to arrive at a good fair seniority system; and on subcontracting

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53. G.C. Ex.. 161

Chavez said Respondent could do what they'd done in the past, hut he wanted the labor contractor's employees included in the bargaining unit. He said there was still had a problem with subcontracting because information which had been requested since the beginning of negotiations had not been provided. There was no response from Respondents. Chavez said if you take care of these four things, the union would accept Andrews' money package provided it can take lie off the de la Cruz Pension Fund, leaving the contribution at 10 cents. Chavez also wanted to take 5¢ from the Martin Luther King Workers Fund and leave it at 1¢ and move the 16¢ from the benefits and apply it to the cotton differential in Bakersfield.

Hermann responded that the union had obviously made significant movement, Andrews wanted to break to study the proposal and proposed meeting the week of January 28. This was agreeable.

January 28, 1982

The parties met in Bakersfield. Present were Chavez, Villarino, Ruiz, Don Andrews and Hermann. Respondent presented a counterproposal which Chavez said contained no movements as compared to the UFW's significant movement. He said there was no point to any further meetings.

The January 28, 1982 meeting was the last with respect to which testimony was taken in the present proceeding.

(c) Analysis and Conclusions

When called upon to determine whether a party has engaged in surface bargaining, i.e., whether its course of conduct during negotiations evidences an absence of intent to reach agreement on a collective bargaining contract or, as it is sometimes stated, whether its course of conduct evidences an intent to frustrate the union in its attempt to obtain an agreement, the answer must rest upon the totality of the party's conduct over the entire period of the "bargaining" process.[54/] Conduct at and away from the bargaining table is appropriately considered.[55/] Additionally, a respondent's conduct must be evaluated against the backdrop of the charging party's conduct during the bargaining process, i.e. particular actions of an employer seeming to suggest bad faith may be viewed otherwise in the face of union conduct violative of Labor Code section 1154(c) or, when juxtaposed with union conduct excusing an obligation to bargain.[56/] In short, "[one] must determine by examining the totality of its conduct whether Respondent acted with 'a bona fide intent to reach an agreement if agreement is possible.'"[57/]

Ascertaining whether there has been surface bargaining violations also requires viewing a respondent's conduct

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54. J.R. Norton Company (1982) 8 ALRB No. 89.

55. Id. at p. 25.

56. O. P. Murphy Produce Co., Inc., dba O. P. Murphy & Sons (1981) 7 ALRB No. 37. UFW found to have waived its right to bargain over effects of employer's decision to mechanize its tomato harvest.

57. As-H-Ne Farms, Inc. (1980) 6 ALRB No. 9, 2.

retrospectively as well as prospectively, particularly when attempting to ascertain when a respondent can be held to have begun surface bargaining. An action at one point in time may not, viewing all preceding and contemporaneous circumstances, be regarded as evidencing the requisite absence of intent to reach agreement; however, subsequent actions may support an inference the earlier action was not so innocent as it seemed at the time of occurrence. It is for this reason the NLRB has held the 10(b) period does not begin to run until the point in time when a charging party has reasonable cause to believe a respondent was not bargaining in good faith.[58/]

Thus, as the courts, the NLRB and the ALRB have recognized and often stated, surface bargaining cases are difficult to decide and require close scrutiny of the facts.[59/]

Certain types of respondent conduct have been held over the years to evidence an intent to frustrate bargaining and an intent not to reach agreement, e.g. making proposals which the proponent has no reasonable ground for believing to be acceptable, rejecting proposals without explanation,[60/] failing to have persons with authority to bargain present at the bargaining table, failing

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58. Section 10 (b) provides in part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ." Section 1160.2 is the ALRA counterpart.

59. Montebello Rose Co., Inc. (1979) 5 ALRB No. 64, p. 7.

60. As-H-Ne Farms, supra.

to make proposals or counter-proposals,[61/] being unavailable for meetings,[62/] delay or failure to respond to requests for information necessary for effective and intelligent bargaining,[63/] and effectuating unilateral changes in wages, hours or other conditions of employment,[64/] to name but a few. Certain of the examples listed may also violate section 1153(e) and section 1155. 2(a) in that they may constitute refusals to bargain as well as indicia of a failure to bargain in good faith, the so-called per se violations of 1153(e).[65/]

The complaint alleges that Respondent commencing November 9, 1979, engaged in surface bargaining. The charge upon which this allegation appears to rest is 30-CE-143-EC, filed March 12, 1980; however, section 1160.2 does not preclude resting a violation upon conduct occurring more than six months prior to March 12, 1980. The 1160.2 period does not begin to run until the charging party has actual or constructive notice of a respondent's unlawful conduct.[66/]

The complaint specifically pleads certain conduct as manifesting bad faith. It is appropriate to examine these

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61. Montebello Rose Co., Inc., supra.

62. Hemet Wholesale Company (1978) 4 ALRB No. 75.

63. Holtville Farms (1981) 7 ALRB No. 15.

64. Montebello Rose Co., Inc., supra, 10.

65. E.g. unilateral changes in working conditions during the course of negotiations, O. P. Murphy Produce Co., Inc., dba O. P. Murphy & Sons (1979) 5 ALRB No. 63, p. 12 and cases cited; failure to provide information from which the union could intelligently bargain about wages, Id., p. 14 and cases cited.

66. Ibid., p. 13, 14.

allegations with an eye to whether the conduct provides circumstantial evidence of bad faith and also with an eye to whether the conduct constituted a refusal to bargain.

The following conduct is alleged as evidencing bad faith bargaining: (1) the failure and refusal to provide requested information since February 1980; (2) the failure and refusal to decision bargain or effects bargain regarding a decision not to grow cantaloupe during the 1980 Imperial Valley season; (3) the unilateral implementation of wage increases; (4) effecting unilateral changes in the method of hiring employees; (5) refusal to respond to UFW proposals on the issues of supervisors performing bargaining unit work and on wages; and (6) the failure since November 1979 to make concessions while rejecting UFW proposals without explanation.

(1) Failure to Provide Requested Information

In an apparent division of labor as between General Counsel and Charging Party, the latter makes the argument that Respondent failed to provide certain requested information and that this failure manifests a failure to bargain in good faith. Charging Party focuses on the UFW request of May 1, 1981, which was triggered by learning that Respondent was to begin harvesting lettuce in the Salinas-King City area.[67/]

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67. The complaint does not allege the failure to provide information was a refusal to bargain, i.e. a per se violation of section 1153(e); however, the matter has been fully litigated and a consideration of whether Respondent's conduct was a refusal to bargain is appropriate. (Prohoroff Poultry Farms (1977) 3 ALRB Mo. 87.) The same observation is appropriate with respect to the other conduct specifically alleged to be evidence of surface bargaining.

An employer violates the Act when it fails or refuses to furnish information requested by the union which is' relevant to the performance of its duty to negotiate a collective bargaining agreement covering the wages, hours and conditions of employment of the workers it represents.[68/]

Satisfaction of Respondent's obligation requires not only that the information be furnished but that it be supplied with reasonable promptness.[69/] As will be seen below, Respondent failed, in certain respects, to meet both obligations. Moreover, an employer may not defend its failure to supply relevant information on the ground that the information is otherwise available.[70/]

May 1, 1981 Request

Immediately upon learning that Respondent intended to harvest lettuce in the Salinas area, Villarino telephoned Neeper and requested information regarding the proposed composition of the work force, the location and ownership of the fields to be harvested, and the names, Social Security numbers and addresses of those in the work force. Much of the information was provided either during the course of the call or at the bargaining session of May 4, 1981. However, workers' names, addresses and Social Security numbers were not provided until December 9, 1981.

Villarino testified credibly that he never received the

68. Kawano, Inc. (1981) 7 ALRB No. 16; As-H-Ne Farms, supra; Adams Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24; Autoprod, Inc. (1976) 223 NLRB No. 773.

69. B. F. Diamond Construction Company (1967) 163 VLRB 161, 175.

70. Autoprod, Inc., supra.

list of growers for whom Andrews harvested. In a communciation of December 9, Andrews advised that it felt the grower list was irrelevant but expressed a willingness to meet with the UFW to discuss the matter of relevancy.

It is well established that Respondent had an obligation to supply the names, addresses and Social Security numbers of unit work force members. The failure to provide the information until seven months after it was requested evidences bad faith as well as a refusal to bargain.[71/]

With regard to the list of growers for whom Andrews would be harvesting, the information does not seem presumptively relevant in that it does not relate to wages or other conditions of employment. Since the UFW made no effort to establish the actual relevancy of the information, Respondent's failure to provide it does not evidence bad faith or establish an independent refusal to bargain.

May 11, 1981 Request

Consistent with its usual practice, the union, in August 1978, submitted its standard Request for Information together with its request for the start of negotiations. As of February 5, 1979, UFW negotiator Paul Chavez conceded that all requested information had been supplied. Much of the information sought by UFW negotiator Villarino in his May 11, 1981 request is the same sort of information supplied Paul Chavez, e.g. hours worked, wages paid and

71. As-H-Ne Farms, Inc., supra (3 months); International Union of Operating Engineers, Local 12 (1978) 237 NLRB No. 204 (6 weeks); The Colonial Press, Inc. (1973) 204 NLRB 852 (2 months); and Ellsworth Sheet Metal, Inc. (1977) 232 NLRB 109 (3 months).

units produced by commodity; a schedule of crop operations; the tools, equipment and protective garments utilized in crop production; fringe benefit costs. However, the May 11 request can be regarded as duplicative only in so far as information is requested for 1978. Any explanation for failing to update the information supplied in early 1979 cannot rest on a contention that the information had previously been supplied. Having once recognized the appropriateness of the information requested, Respondent's failure to respond to the UFW's update request supports an inference that delays or refusals related to that request were illicitly motivated.

Some information sought in the May 11 request was supplied at the June 2 meeting, e.g. the growing cycle and the work performed during various phases of the cycle by Andrews employees, by labor contractors and by sub-contractors. Such information was supplied in a sufficiently timely fashion to negate an inference of bad faith.

At the bargaining session of June 9th, Respondent declined to provide requested information regarding tools, equipment and safety clothing provided workers, asserting the issue had already been resolved. The fact the union was able to negotiate and reach agreement on this issue does not establish clear waiver of its right to the information.[72/] However, reason suggests that once agreement has been reached, a showing of actual relevance of further requests for information with respect to that particular subject matter

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72. Sun Oil Company of Pennsylvania (1977) 232 NLRB 7.

should be required. The record reveals no attempt to establish actual relevance; Respondent's failure to provide this information will not be considered as manifesting bad faith; nor will it be regarded as a separate incident of a refusal to bargain. This conclusion seems particularly appropriate in the instant case where Respondent at least until May 1981 was generally responsive to repetitive and detailed information requests.

Respondent explains its failure to produce obviously relevant information sought in the May 11 request by saying it vas in a "busy season" and its limited office staff was already overworked; it further contended the information was unrelated to issues currently under discussion. The latter argument is clearly without merit. The information sought, i.e. wage and production records, hours worked by unit employees and fringe benefit costs, was necessary to the preparation of an intelligent economic proposal and presumptively relevant. The right to the information prior to discussion of such subject matters is well established under the National Labor Relations Act.[73/]

At the June 2 meeting, Neeper, described a typical growing cycle from ground preparation through harvest, pointing out which operations were performed by sub-contractors and which were performed by Andrews employees. Villarino requested the names of sub-contractors used by Andrews; they were supplied at the June 9th meeting. In the context of negotiations as they were proceeding during the May-June 1981 period, the three week time lapse in

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73. Safeway Stores; Inc. (1980) 252 NLRB 582.

providing the subcontractor information is not sufficiently long to evidence bad faith or a refusal to bargain.

At the June 9 meeting, Respondent supplied additional information requested on May 11th; stated it would continue to do so as time permitted; and offered the UFW the option of suspending meetings until all information was provided. Neeper contended accurately that much of the information had previously been supplied; Villarino said he had been unable to locate it.

Respondent, purportedly in the interests of expedition, was going to supply information orally, absent a demonstration that the union needed the information in written form. The unwillingness or refusal to supply information in written form is an indicia of bad faith; Respondent cannot escape the duty to supply written information by seeking to impose upon the union the burden of proving need to have the information in written form.[74/]

At the June 23rd meeting, Respondent further answered the May 11th information request, again noting it would provide information as it became available and again noting that three to four months was the estimated time for producing all the requested information. Neeper invited UFW representatives to examine the Andrews records containing the information sought by the union.

The foot dragging posture evident during this phase of the negotiations when juxtaposed to the reasonable promptness with which Respondent's earlier negotiator, Nassif, had been able to provide information suggests an absence of good faith with respect to

74. See Stamco Division (1977) 227 NLRB 1265; Safeway Stores, Inc., supra.

meeting Respondent's obligation to supply requested relevant information. Some of the information which Neeper contended would take three to four months to provide would have necessitated only an update of similar information provided the union in early 1979 and thereafter; the record contains no explanation regarding why updating such information would require substantially greater time and energy than the original production of information in 1979. By offering UFW representatives the opportunity to examine at Respondent's offices the raw data from which the union could obtain information covered in its May 11 request, Respondent can be regarded as having complied with its obligation to provide the information.[75/] Respondent had no obligation to provide information in any particular form. "It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the progress of bargaining."[76/] Good faith bargaining requires only that (relevant) information be made available at a reasonable time and in a reasonable place with an opportunity for the Union to make a copy of such information if it is deires."[77/] The failure of the UFW to act upon Respondent's invitation suggests that its May 11 request was intended to harass Respondent rather than express a bona fide need for the information sought,[78/] the

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75. The UFW never accepted Respondent's offer.

76. The Cincinnati Steel Castings Company (1949) 86 NLRB 592. 593.

77. Lasko Metal Products, Inc. (1964) 148 NLRB 976, 979.

78. Dynamic Machine Co. (1975) 221 NLRB 1140; in Kawano, Inc. (1981) 7 ALRB No. 16, the Board affirmed a similar finding by the ALJ.

UFW's failure (for approximately two weeks) to pick up at the post office a packet of information ultimately provided by Respondent also supports this conclusion. In view of the opportunity afforded the UFW on June 23rd, Respondent's delay thereafter in providing requested information was neither a refusal to bargain nor a manifestation of bad faith bargaining.[79/] However, Respondent offered no explanation for failing to make its June 23rd offer at an earlier date, its delay in making this offer is itself a circumstance which evidences bad faith.

To summarize: The evidence supports an inference that Respondent's failure to provide presumptively relevant information in written form during the period from May 11 through June 23 was conduct evidencing bad faith. However, having offered the UFW an opportunity to review the raw data as of June 23rd, its delay or failure thereafter to provide additional information requested on May 11 does not support such an inference. While one may suspect Neeper's offer was not bona fide, speculation doesn't suffice to support an inference it was not; nor does the record suggest Respondent could have expected its offer would not be acted upon.

Although argued by neither General Counsel nor Charging Party, two other interactions with respect to furnishing requested information merit discussion.

At the bargaining session of November 15, 1979, Respondent refused to provide cost information relating to its flat crops,

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79. General Counsel made no attempt to prove Respondent's offer did not meet the reasonable time and place requirment of Lasko Metal Products, supra.

arguing that it was not claiming an inability to pay and that the information was available to the union through market service news reports.

Availability of information from a source other than the employer is not a defense to a refusal to provide that information.[80/] Throughout the course of negotiations Respondent maintained the position that it needed a substantial differential between rates paid for vegetable crops and for flat crops. In this context, assuming the validity of Respondent's contention, its claim is in the nature of a claim of inability to pay higher rates; therefore the requested cost information was actually relevant and ought to have been provided.

Assuming the contrary, Respondent's statement that its cotton wage position rested upon its "feeling" that it should not pay more is not the kind of response to a wage proposal required of good faith bargaining. It is tantamount to rejecting the union's proposal without explanation; conduct which manifests bad faith bargaining.[81/]

At the meeting of April 21, 1980, Respondent alerted the UFW to the possibility it might close its camp housing because Kern County had advised all that facilities were to be red tagged. Respondent was unable at the meeting to provide answers to questions raised by the UFW regarding the County's report; the Andrews spokesman said he would attempt to obtain answers that day. When

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80. Designcraft Jewel Industries, Inc. (1981) 254 NLRB 791.

81. As-H-Ne Farms, supra.

the information had not been supplied by May 8th, Smith, the UFW negotiator, renewed her request. Nassif responded by letter of June 5th.

No explanation was offered for failing to respond at an earlier date. A delay of six weeks in responding to the union's request is borderline with respect to whether it is sufficient to support a finding the Act was violated. However, when no explanation for delay is offered and the information was readily available to Respondent, the failure to produce it at an earlier date is evidence of failure to bargain in good faith.

(2) Respondent's Decision not to Grow Cantaloupes

(a) The Evidence

Prior to February 1980 Respondent had grown, harvested and packed cantaloupe in the Bakersfield and Holtville areas since the late 1950's or early 1960"s. Historically, Respondent has packed and shipped its cantaloupe in a 95 pound "jumbo" crate. The melons were field packed, transported immediately to a shipping point and loaded into railcars or trucks. The melons were then cooled by crushing large blocks of ice and smothering the load with crushed ice which cooled the melons as it melted.

By 1980 supermarket buyers resisted purchasing melons so packaged. For six or seven years the industry had been moving to palletized loading, and the jumbo container was not compatible with such an operation. There were also complaints from retail store outlets about having to deal with 95 pound crates; chain store buyers wanted lighter cartons. In general, the industry had, by 1980, shifted to a half-crate or carton and to new methods for

cooling the melons which utilize cold storage facilities. Building such a facility is a multi-million dollar investment. Commercial could storage facilities were not available to Respondent in the Imperial Valley in 1980 and had not yet become available as of the time of hearing.

Respondent sold melons packed in jumbo crates through the 1979 season. Fred Andrews testified Respondent had made no move to the new system because Imperial Valley is the hottest area in which melons are grown, and Respondent felt there was insufficient data to establish the quality of the new cooling method under such conditions.

Respondent admittedly was aware well in advance of February 1980 that cooling facilities would not be available in the Holtville area. By way of explaining Respondent's delay until February in making a final determination not to plant cantaloupe, Fred Andrews testified:

> Well, because we were ... in engineering and trying to solve our problems as to being able to build a plant completed engineering and had a parcel of land adjacent to our packing plant promised to us by Chevron Land Company, and they couldn't deliver the property.
>
> Q [Moss]: . . . [W]hy then did you make the decision as late as February not to grow cantaloupe?
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> A: Because we didn't have the -- the right kind of container.[82/]

Andrews had an alternative to the jumbo pack, the TVK container; but, according to Andrews, it wasn't what the market wanted. Despite that conclusion and despite assigning that

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82. TR XVIII:86. That answer is incredible coming from a partner in an agricultural operation the size of Sam Andrews' Sons.

conclusion as a basis for not growing cantaloupe in Imperial Valley in 1980, Respondent grew cantaloupe in the Bakersfield area in 1980, using the TVK container. Fred Andrews testified that Respondent, despite the container problem, anticipated it could do all right because of a substantial reduction in melon acreage in the Bakersfield area. It erred; it failed to make a profit.

Respondent again planted melons in Imperial Valley in 1981. Fred Andrews testified "We thought we saw an opportunity." Respondent planted approximately 60% of its former acreage and used the TKV container.

> Q: [Moss] [D]id you have any reason to believe that it would be more successful this time?
>
> A: Well, it was the only thing left for us to use, even having come through a bruising deal with it, the small Bakersfield deal the year before.
>
> Again, we saw opportunity and we bowed our necks, and we planted, and we used the TKV. We do not want to not plant cantaloupes 83/

Economically speaking, Fred Andrews described the result as a disaster.84/ The same containers were used in 1981 in Bakersfield, again without economic success.

So far as Imperial Valley is concered, late February is the latest one can make a decision not to plant cantaloupe. A weeks lead time prior to planting is required for ground preparation of those fields where cantaloupe follows lettuce. A substantially longer period is required for ground preparation when melons follow

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83. TR XVIII:89-90.

84. On cross, Andrews conceded that Andrews main customer loss in Imperial Valley was in 1981.

cotton or alfalfa. The last ten days of January are the earliest the crop can be planted.

Respondent will have no melon crop in Imperial Valley in 1982. Although it now has the requisite property and engineering designs for construction of a cooler, Andrews testified that interest rates are too high, money costs make construction prohibitive.[85/] No commercial cooler facilities are available to Respondent in the El Centro area. Andrews plans a melon crop in Bakersfield where a commercial cooler is available.

In 1977 and 1978 Respondent made plans for limited cantaloupe acreage about two months ahead of planting time. Thereafter, plantings and weather are evaluated and alterations, might be made in the acreage planted.

In 1979 and in 1981 Andrews began planting Imperial Valley cantaloupe on January 15th and finished in the last week of February. Andrews could not testify from memory as to the cost per box of growing Imperial Valley cantaloupes.

The Union's first notice that Respondent was not going to plant a 1980 cantaloupe crop was Nassif's letter of February 25th. The letter invited a response if the UFW wished to bargain about the decision or its effects. The Union's response wa a request for information coupled with a request for a meeting.[86/]

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85. The decision not to grow cantaloupe in Imperial Valley in 1982 was made in late 1981.

86. The UFW also sought to discuss the cantaloupe decision at the bargaining session of April 15, 1980.

Respondent provided an initial and partial response to the information request on March 25th. Given the context, a delay of approximately a month was inordinate and is a circumstance supporting a conclusion Respondent was not bargaining in good faith.[87/]

While Nassif's letter characterizes the decision as tentative, there is evidence permitting the conclusion that the decision was final prior to the date of notification. There were no negotiations regarding the decision or its effects upon the bargaining unit.

87. In view of Cardinal Distributing Company, Inc. (1983) 9 ALRB No. 36, the delay in responding to the UFW request evidences bad faith only with respect to Resondent's obligation to bargain about the effects of its cantaloupe decision.

(b) Analysis and Conclusion

Labor Code Section 1155.2(a) defines the mutual obligation of employer and union to bargain collectively in good faith. The parties must:

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

While the parties may agree to bargain about subjects other than "wages, hours and other terms and conditions of employment," section 1153(e) is not violated if a party declines to do so. Thus, unless Respondent's decision to eliminate its 1980 Imperial Valley melon crop be a mandatory subject of bargaining, i.e., a subject dealing with wages, hours or other conditions of employment, any failure or refusal to bargain regarding its decision is unreachable under section 1153(e).[88/]

> Generally, a decision by management regarding what crop to grow or discontinue is not subject to the collective bargaining process. Although such managerial decisions may substantially affect conditions of employment, we do not impose a mandatory duty to bargain about such decisions. An agricultural employer must retain the freedom to make such decisions because they are a basic right that lies at the core of entrepreneural control.[89/]

Cardinal Distributing is dispositive of the issue regarding Respondent's decision to forego a melon crop, making such a decision is not a mandatory subject of bargaining. Thus, the motivation for

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88. Whether the decision was motivated by reasons violative of section 1153(c) is a separate question.

89. Cardinal Distributing Company, Inc., supra at 5 and 6.

the decision becomes irrelevant in terms of section 1153(e).

Respondent, however, had a duty to bargain regarding the effects of that decision. In requiring such bargaining, the union's interest in protecting jobs, wages and conditions is satisfied.[90/] Furthermore, if Respondent's decision were motivated by a desire to weaken the UFW or to discriminate against melon harvest employees for reasons violative of section 1153(c), the protections of that section are available.

At the bargaining meeting of April 15, 1980, Smith told Nassif the UFW "wanted to discuss the company's tentative decision not to grow or harvest cantaloupes;" however, the subject matter was not discussed at that meeting. In a letter to Nassif dated April 23, Smith requested an update of the company's response to the UFW s request for information regarding the cantaloupe decision. Her request was repeated in a letter of May 8th. Nassif responded in a letter of May 20, 1980, setting out certain information regarding the Bakersfield cantaloupe operation as well as projected honeydew and watermelon operations. His letter closed by asking Smith to advise him if she wished to discuss any of the matters mentioned. There does not appear to have been further interaction on this subject matter. There is not sufficient evidence upon which to base a finding that Respondent, aside from the delay in providing relevant requested information which evidences bad faith, refused to bargain regarding the effects of its decision.

While the complaint does not alleged the cantaloupe

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90. Ibid.,7.

decision as violative of section 1153(c), Respondent's reasons for the decision were fully explicated and it is appropriate to consider whether the decision was economically motivated or was motivated by reasons violative of section 1153(c). The evidence convinces me that Respondent's business reasons for not planting a 1980 cantaloupe crop in Holtville were pretextual.

A primary reason for this conclusion is the proximity of its communciation of the decision to the deadline for crop planting in light of its long standing awareness of the industry conditions upon which it purports to have based its decision.

While it asserts market unacceptability of its packaging method as the main reason it decided against a 1980 cantaloupe crop, no explanation was given for the timing of its decision vis-a-vis the planting deadline. Respondent was aware well before communication of its tentative decision that the new carton box method for packaging melons would not be available during the 1980 Holtville season; moreover, the new cartons and accompanying cooling methods had been in use in the industry for some seven years prior to the 1980 season, yet it was only during a cantaloupe season which followed a season in which its harvest was subjected to work stoppages, that Respondent decided not to plant cantaloupe. The greater customer acceptability of the non-iced cartons must have been apparent to Respondent for some time; it was also aware of resistance to the jumbo crates it had continued to use.

The unavailability of a commercial cooler in the Holtville area is also cited as a reason for Respondent's decision. If the absence of cooling facilities were other than a pretextual reason,

it was incumbent upon Respondent to explain why its recognition of the need for such a facility came so late in the game; i.e., at a point well inside the lead times necessary for it or a commerical operator to build a facility for use in the 1980 season.

The pretextual nature of Respondent's business reasons is further exposed by its utilization of other than the new cartons for its 1980 Bakersfield melon harvest as well as in the 1981 Imperial Valley melon harvest and by the fact that in neither harvest was a commercial cooler facility available to Respondent.

In apparent recognition of an inconsistency in its position, Respondent's witness Fred Andrews testified Respondent thought it saw a favorable opportunity to both instances. No detailed testimony was adduced; Respondent's failure to do so leaves standing the contradictions cited above and their support for the conclusion that Respondent's business reasons for its decision are spurious.

A thusfar unmentioned factor supporting this conclusion is the totality of Respondent's conduct during the bargaining process as well as conduct related to this particular issue. While Nassif's telegram of February 25th invited bargaining regarding the tentative decision, Respondent's failure promptly to reply to the UFW's request for information essential to intelligent bargaining, which served to prevent the possibility of effective bargaining by the UFW, lends support to the conclusion that the stated reason for its decision was pretextual, as does the telegram itself with its reference to the unreliability of the 1979 melon crew. While Respondent did not violate section 1153(e) with respect to its

cantaloupe decision, because the decision was motivated by animus toward the Union and its 1979 Holtville melon harvest crew, it violated section 1153(c).

Stated in more detail, the General Counsel's evidence established a prima facie case which was unrebutted by Respondent's failure to raise a genuine question of fact that it would have made the same decision absent the melon strike the previous year.[91/]

(3) Unilateral Wage Increases

Paragraph 7(c) alleges that commencing in June 1980 Respondent implemented unilateral wage increases for watermelon and lettuce harvest workers without giving the UFW adequate notice and without bargaining with the Union regarding the increases.

In Sam Andrews' Sons (1983) 9 ALRB No. 24, the Board found that Respondent violated the Act by effecting a unilateral increase in January 1980. In so doing, the Board rejected Respondent's contention the parties were at impasse when the action was taken, noting there were twenty-five unresolved issues, including all economic proposals, most of which had not been discussed when impasse was declared and stating there can be no bona fide impasse when substantial issues have not been explored.[92/] The Board recognized that "Impasse may be reached as to certain crucial issues, while agreement is still possible in other areas."[93/]

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91. Martori Brothers Distributors (1982) 8 ALRB No. 15, infra.

92. Ibid. See also: Admiral Packing Co. (1981) 7 ALRB No. 43; Montebello Rose Co. (1979) 5 ALRB No. 64.

93. Ibid., page 6.

However, the Board found the ALJ's reliance on Taft Broadcasting Co. in finding impasse to be misplaced,[94/] distinguishing Taft on the ground that Taft involved impasse centered on a matter of principal while the purported impasse in Andrews was a question of the economic cost of the contract.

FACTUAL BACKGROUND

It was approximately ten-and-one-half months following commencement of negotiations and not until the UFW had reached agreement with Sun Harvest before either party submitted a written wage proposal. The UFW responded with its first economic proposal on November 5, 1979. At the November 20 meeting, Respondent modified its wage proposal by limiting the applicability of its previously proposed flat crop differential to cotton. On December 28, 1979, Respondent declared impasse and thereafter effected the wage increase found violative of section 1153(e) in Sam Andrews Sons, supra.

Respondent stipulated that it increased wage rates for its watermelon harvest employees at the outset of the 1980 harvest season in Holtville and Bakersfield. The resulting rates did not exceed rates previously proposed during negotiations.

Union negotiator Smith received notice on June 10 of Respondent's desire to increase wages. The union would not agree to the increase absent settlement of all unresolved issues. On the 11th, Respondent sent Smith a letter saying its proposed rates were being implemented.

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94. Taft Broadcasting Co. (1967) 163 NLRB 475.

There were two bargaining sessions in January 1980; two in April, and no further meetings until October. During the period between February 19 and August 7, Respondent spent 70 days litigating the charges covered in 9 ALRB No. 24. At the October 7, 1-980 meeting, Respondent announced its desire to implement its wage proposal of November 1979 and sought the union's agreement to do so. The UFW reiterated its opposition to such implementation absent agreement on all outstanding differences. Respondent said it would effect the increase without the union's agreement and did so. Respondent also implemented a unilateral wage increase in September 1981.

Respondent raises four defenses to the allegations of 7(c): the UFW's bad faith; impasse had been reached when the increases were implemented; the UFW waived its right to bargain regarding the increases; and the wage increases were necessary to maintain a dynamic status quo.

The UFW's Bad Faith: The Board has recognized that bad faith bargaining on the part of the union may provide an affirmative defense to section 1153(e) allegations.[95/] In urging this defense Respondent argues the UFW failed to meet at reasonable times and places, refused to make counterproposals, used negotiators who lacked authority, refused to bargain until Master Agreement negotiations were completed, delayed the start of negotiations, failed to assign a negotiator during the period between July 20 and October 1979, withdrew agreed-upon proposals, avoided discussion of

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95. Montebello Rose/Mount Arbor Nurseries (1979) 5 ALRB No. 64; O.P. Murphy Company (1979) 5 ALRB No. 63.

bargaining issues by raising non-bargaining issues and by using information requests as a harassment tactic, used Boulwarism tactics and engaged in unlawful work stoppages. To provide defense for its June and October increases the alleged misconduct must either have occurred prior to the wage increase or the union must thereafter have behaved in such a matter that contemporaneous conduct, not otherwise evidencing bad faith, may by perceived as part of a pattern of bad faith bargaining.

During the first (Paul Chavez) phase of negotiation, Chavez was admittedly not authorized to deviate from positions already taken by UFW negotiators in industry negotiations; it is also apparent from his seeming inability, despite repeated explanations, to comprehend that labor contractor's employees are, as a matter of law, employees of the grower that he was not a particularity knowledgeable negotiator. However, any lack of skill evidenced by Chavez is not necessarily indicative of bad faith on the part of the union; an inference as easily made is that he was the most proficient person available at the time. Absent unusual circumstances a union may be presumed to have greater interest in securing a collective bargaining agreement than does an employer; therefore, conduct manifesting bad faith when engaged in by an employer may not warrant a like inference when engaged in by a union. Thus, I find that as of June and October 1980 the union's use of Paul Chavez as its negotiator was not conduct sufficient to excuse Respondent's implementation of unilateral wage increases; nor are Respondent's other assignments of union bad faith persuasive. Viewing the situation as of June and October 1980, the UFW's conduct

neither at or away from the table supports a finding of bad faith on the part of the UFW. The same is true when that conduct is viewed in the context of the entire period of negotiations. Nothing in the UFW's later conduct supports the conclusion that its conduct prior to either the June or October wage increase was designed to frustrate negotiations or the consumation of a collective bargaining agreement.

Impasse:

The Board found no impasse as of January 1980. Therefore, if impasse existed in June, it resulted from events between January and June. There were four meetings during this period. The January 24th meeting was devoted primarily to the UFW's attempts to find a method for expediting negotiations. There was no wage discussion during the interval between January and June before Respondent's notification that it was raising rates for the watermelon harvest. The period was one in which neither party was actively seeking to negotiate; both Smith and Nassif were involved in other negotiations which they appear to have tacitly agreed had priority over Andrews negotiations and both were involved in litigating an unfair labor practice case against Andrews.[96/] Thus, the fact situation as of June 1980 is substantially identical to that of December 1979 upon which the Board rested its conclusion that the parties were not at impasse on wages. The same conclusion is appropriate with respect to the claimed impasse on wages as of June 10, 1980. Also, as was

96. Since Smith and Nassif met as lead negotiators on these other agreements and since neither pressed for Andrews meetings during the period, the inference regarding a tacit agreement is appropriate.

the case in 9 ALR8 No. 24, Respondent's pro forma June 10 notice to the union of the impending increase did not satisfy its duty to bargain in good faith before granting the increase.[97/]

At an October 7, 1980 meeting, the first after an hiatus of approximately four months, Respondent notified the union it wanted to effect the wage rates proposed in November 1979. The union would not agree. There is no basis for Respondent to assert the parties had reached impasse as of October 1980. The scant attention given the bargaining process during 1980 resulted primarily from Respondent's unavailability to meet. One can hardly urge a bona fide impasse has been reached when one is unavailable to meet or refuses to meet, thus denying itself the opportunity to ascertain whether further agreement on outstanding issues is possible. "As a general rule, contract negotiations are not at impasse if the parties still have room for movement on major contract items, even if the parties are deadlocked in some areas."[98/]

There was no genuine impasse in the fall of 1980 when Respondent implemented the lettuce harvest rate increases. AS was the case with its earlier unilateral wage increases, Respondent's pro forma notification of the UFW regarding its plan did not satisfy its duty to bargain in good faith.[99/]

Union's Waiver of its Right to Bargain: Respondent argues that the UFW had no desire to bargain about or to permit the

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97. Sam Andrews Sons, supra, p. 8.

98. Pacific Mushroom Farm (1981) 7 ALRB no. 28, p. 3-4.

99. The same conclusion is appropriate with regard to the unilateral wage increase in the fall of 1981.

employer to implement any type of an interim wage increase; therefore, any effort at negotiations would have been futile and Respondent was free to proceed unilaterally. This argument presumes that the union had an obligation to bargain piecemeal, i.e., that it-had a duty to bargain solely about watermelon harvest rates in one instance and lettuce harvest rates in another, and that Respondent had a right to demand it do so. Such is not the law.

When faced with a demand that it bargain solely about a wage increase, a union does not waive its right to bargain about that increase by demanding that the employer negotiate a comprehensive agreement.[100/] The union is entitled to insist on. bargaining on all issues until agreement is reached.

> Both the NLRB and this Board [ALR3] have rejected a piecemeal approach to negotiations because of the interdependence of bargaining issues, and the fact that a proposal on one issue may serve as leverage for a position on some other issue. "[101/]

Finally, the Board has repeatedly held that waiver of bargaining rights must be clear and unequivocal.[102/] Such was not the case here.

Dynamic Status Quo: Both the ALRB and the NLRB have long recognized that an employer is not chargeable with a refusal to bargain, nor may his action be regarded as evidence of bad faith bargaining when a wage increase is implemented which is consistent with the employer's past practice, provided that such effectuation

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100. Mario Saikhon, Inc. (1982) B ALRB Mo. 88.

101. J.R. Norton Company (1982) 3 ALRB No. 89, 28-29.

102. See: Mario Saikhon, Inc., supra; Kaplan's Fruit and Produce (1980) 6 ALRB Mo. 36.

is non-discretionary as to timing and amount.[103/] Under such circumstances, the employer's action is not regarded as a unilateral change in wages, but rather as an action taken to maintain wages or other conditions of employment, i.e., the maintenance of a dynamic status quo.[104/]

Respondent defends its increase in the watermelon and lettuce harvest rates as being required in order to maintain the status quo and argues that had not such increases been effected, the UFW would have filed unfair labor practices on the theory that its failure to grant such increases constituted change in wages.

The wage increases granted did not exceed in amount increases proposed to and rejected by the UFW; however, any argument that this fact supports the validity of the increases is disingenuous, for any rate increase which exceeded that proposed to the union would have patently constituted both a refusal to bargain and evidence of bad faith bargaining.

To provide a defense to the allegation that its 1980 watermelon and lettuce wage increases violated the Act, Respondent must provide persuasive evidence the increases were mandatory, nondiscretionary and effected pursuant to a well-established past practice.[105/]

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103. See German, Labor Law Basic Text; the basic rule is that a unilateral change in wages on working conditions amounts to a per se violation of section 1153(e); N.A. Pricola Produce (1981) 7 ALRB No. 49.

104. Pacific Mushroom Farm, supra; Kaplan's Fruit and Produce Co. (1980) 6 ALRB No. 36.

105. N.L.R.B. v. Allis-Chalmers Corp. (5th Cir. 1979) 102 LRRM 2194, 2198.

Testimony regarding Respondent's practice was elicited largely from Eddie Rodriguez, Respondent's harvest supervisor. Andrews policy is to pay the going rate in a given area. Rodriguez checks wage rates in the area and discusses them with Don Andrews and Bob Garcia. Increases are generally granted around July 16th for crops being harvested at that time. Lettuce harvest rates are changed at the start of the harvest, i.e., the end of October in Bakersfield and the first of December in Imperial Valley.

As his information source for watermelon rates, Rodrigaez telephones other shippers in the area to determine their rates and sometimes gets information from Andrews' harvest workers regarding rates being paid by other growers. In 1980 Rodriguez, according to his testimony, checked with the Imperial Valley Growers. Rodriguez[1]s telephone calls are customarily made at or near the start of the watermelon harvest. He does not inform Andrews of the results of his calls unless he intends to recommend a wage increase. He did recommend an increase in 1980 harvest rates for both Bakersfield and Holtville. With respect to lettuce harvest rates, Rodriguez had made no survey since 1979.

Rodriguez testified that rates are raised when they have to be raised, but not to any particular level. The going rate is used as a guideline.[106/] In N.A. Pricola Produce (1980) 7 ALRB No. 49,

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106. See: Kaplan's Fruit and Produce Company (1980) 6 ALRB NO. 36.

a case substantially similar on its facts, the Board stated:

> Respondent had absolute discretion regarding the amount and timing of the wage increase, and indeed whether to grant any increase at all. Although the increase was based in part on objective factors, such as the wages other employers were paying, Respondent's owner decided what he was willing and able to pay; his determination of how much he was "able" to pay was necessarily a subjective determination within his total discretion. He had not made any prior commitment to grant automatically an increase of an objectively-fixed amount .... Thus we find that the wage increase here does not fall into the category of "automatic" increases to which an employer has already committed itself, and over which there is no duty to bargain. Rather, the increase, although in line with the company's long-standing practice of granting [an annual review of wages, was] in no sense automatic, but [was] informed by a large measure of discretion, and was thus a proper subject of bargaining. (Sic) 107/

To Summarize: Respondent's 1980 and 1981 unilateral increases in watermelon and in lettuce harvest rates were per se violative of section 1153(e) as well as manifesting bad faith bargaining.

(4) Refusals to Respond to UFW Proposals or to Make Concessions

Paragraph 7(d) alleges that Respondent has failed and refused to respond to the UFW's proposals on wages and supervisors since October 1980; Paragraph 7(e) alleges that since November 1979 Respondent has failed and refused to make any concessions on UFW proposals, rejecting them without explanation.

(a) Summary of the Evidence

As of October 1980, the parties had met seventeen times.

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107. The Board distinguished N.L.R.B. v. Southern Coach and Body Co. (5th Cir. 1964) 336 F.2d 214, on the ground that the Pricola increase was not made pursuant to any prior commitment automatically to grant an increase of an objectively fixed amount. The same distinction is appropriate in the instant case.

The issue of how much, if any, unit work could be performed by supervisors was discussed at six of those meetings. During this period the UFW moved from an initial position that supervisors perform no unit work to a position that they might perform unit work in emergencies, for training and supervision. Respondent's position was essentially that supervisors by permitted to perform the same unit work they had performed prior to the UFW's certification. Respondent's explanation for its position was that it sought to avoid featherbedding, i.e., having to hire an additional employee to do five minutes work. The core issue seems to have been the right of foremen to continue to transport irrigation pipe when it needed to be moved. It was this work which was mentioned in conjunction with the featherbedding example.

By October Respondent's position was that supervisors be permitted to perform unit work so long as such performance did not result in the layoff of a full time employee or prevent the recall of such an employee from layoff.[108/] The UFW still maintained the position that supervisors perform no unit work, basing this position on the contention that work performed by supervisors was work taken away from unit employees.

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108. While not explicit in the record, the concern regarding supervisors working seems to center on their performing work within the province of irrigators.

On October 31, 1980, Smith hand delivered to Nassif's office a new proposal on Supervisors:

ARTICLE 13: SUPERVISORS

> Supervisors and other employees not included in this bargaining unit shall not perform any work covered by this Agreement, except for instruction, training, emergencies, and those types of miscellaneous job duties which supervisors have performed in the past which do not displace bargaining unit workers from work they would normally perform nor prevent the recall of bargaining unit workers for work they would normally perform. Supervisors will not be added for the purpose of displacing or avoiding the recall of bargaining unit workers. However, the permissible "miscellaneous job duties" as used in this paragraph shall not include the moving of pipe trailers, loading of pipe or moving of equipment which work shall be performed by bargaining unit workers except in an emergency.109/

There was no response to the October 31 proposal until Nassif's letter of March 31, 1981, in which he stated the UFW's proposal was still not acceptable because the union was "... trying to restrict the supervisors from doing some of the bargaining unit work they have traditionally done in the past. As you know, our position has steadfastly been that we continue our past practices and that we have no intentions whatsoever of attempting to displace bargaining unit workers."110/ As previously noted, the

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109. G.C. Ex. No. 97. The UFW's November 5, 1979, proposal read as follows:

ARTICLE 13: SUPERVISORS

> Supervisors and other employees not included in this bargaining unit shall not perform any work covered by this Agreement, except for instruction, training and emergencies. This paragraph shall not be used as a basis for the purpose of avoiding the recall of bargaining unit workers from work they would normally perform. [G.C. Ex. No. 50.]

110. G.C. Ex. No. 99.

parties did not meet between the end of October 1980 and mid-April 1981.

The subject was discussed during the meeting of May 14, 1981, in the context of grandfathering some of the supervisors and the work which they had historically done. There was additional discussion on May 15th without any modification of position by either party. When Respondent stated it had no change in position on the issue during a May 27th meeting, the UFW requested information regarding the work performed by supervisors.[111/]

At the June 7th meeting, Neeper announced that Respondent was standing on its proposal of November 7, 1979, with respect to supervisors doing unit work, stating that it was opposed to any language grandfathering certain duties because their jobs and duties are subject to change. He noted that Respondent was also opposed to what he termed a "dues equivalency" approach because the supervisor got nothing for his dues.

As part of its package proposal of July 1, 1981, the UFW modified its position to permit supervisors to do historically performed pipe moving and hauling.

The package proposal was rejected without comment regarding the supervisor issue. Respondent counterproposed its own package, characterized by Cesar Chavez as without concessions to match those made by the UFW. Thereafter there were no discussions of the supervisor question.

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111. Such information has been provided in detail to the two previous UFW negotiators. Villarino was apparently unaware the union already possessed this information.

(b) Analysis and Conclusions

Bargaining in good faith does not require, that one agree to any particular proposition put forth by the other side. Nor is one required to concede any position reasonably held. What is required is that there be a rational explanation put forth for any position which is taken, including rational reasons for rejecting proposals by the other party.

Respondent did not fail to respond to the UFW's proposals with respect to supervisors. Having once set forth its position and the rationale for that position, its response was no change in position. Respondent's contention that prohibiting supervisor's from moving irrigation pipe would require the hiring of an additional worker for whom there would be little or no other work was not controverted. Nor was Respondent's contention that the amount of time devoted to this work was minimal.

During the course of negotiations, the parties moved closer together on the issue and Repsondent's position on pipe moving was part of the UFW's package of July 1, 1981. The package was rejected; there was no discussion of the supervisory issue. While agreement was not reached regarding the supervisor issue, it cannot be said that Respondent failed or refused to respond to UFW proposals on the subject' matter.

Similarly with respect to wages, the record does not support the allegation that Respondent failed or refused to respond

to UFW proposals on wages.[112/]

I recommend that the allegations of paragraph 7(d) be dismissed.

Turning to paragraph 7(e): the initial observation is that Respondent in order to meet its obligation to bargain in good faith is not required to make concessions so long as its failure to do so is explained to the union. It is rejection of the union proposals without explanation which is indicative of bad faith bargaining.

Reviewing the course of negotiations, I do not find a general pattern on the part of Respondent of rejecting proposals without explanation. In some instances there were repeated explanations of position. It is true that explanations of positions given during later stages of negotiations may have been more cursory or even not restated when there was a reiteration of positions previously proposed; but the failure to restate reasons already articulated and known to the other party cannot be a basis for inferring bad faith bargaining in the context of rejecting a proposal which does not overcome or deal with Respondent's previously voiced objections.

I shall recommend that the allegations of paragraph 7(e) be dismissed.

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112. This allegation is considered independently of the unilateral wage increases heretofore found to be violative of the Act. The dismissal of paragraph 7(d) is recommended because the General Counsel has not established the conduct alleged as independent circumstantial evidence upon which to rest a conclusion. Respondent was engaged in surface bargaining or a conclusion that Respondent was refusing to bargain.

(5) The 1981 King City/Salinas Lettuce Harvest

Paragraph 7(f) alleges that Respondent unilaterally changed its method of hiring harvest employees for the 1981 Salinas lettuce harvest without giving the UF^7 adequate notice or the opportunity to bargain about the change.

1981 was the first year Respondent harvested lettuce in the Salinas-King City area.[113/] General Counsel contends that harvest workers were hired for Respondent's Salinas operation in a manner different from that used to obtain harvest workers in Bakersfield or Imperial Valley. Respondent's defense rests on the proposition that it had never before harvested lettuce in the Salinas area; therefore, the method used to obtain workers for that area cannot be characterized as a change. The argument is frivolous; as was stated by General Counsel during the course of the proceedings, the change alleged is the method of hiring harvest workers, not harvest workers in Salinas.

Generally speaking, Respondent's hiring policy with respect to lettuce harvest workers has been to hire from the previous season's seniority list for the particular geographic area. Separate seniority lists have been maintained for Bakersfield and Imperial Valley.[114/] A lettuce harvest worker having seniority in Imperial Valley would not necessarily have seniority in Bakersfield. However, such a worker "may" get consideration in Bakersfield if there are openings and would "probably" be considered over an

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113. Hereafter called the Salinas area.

114. In May 1981 there was no Andrews seniority list for the Salinas area.

individual not having previously worked for the company.[115/]

Patently, Respondent could not give effect to its policy of initially hiring seniority workers in Salinas absent a Salinas seniority list. We turn to see whether there was adherence to the secondary stage of its policy.

Shortly before the end of the Bakersfield lettuce harvest, workers were advised Respondent was going to harvest in the Salinas area, and workers were solicited for Salinas work. At least one worker declined to go upon being told that Andrews would not have a labor camp. Andrews did not have its own camp in Salinas, but it did make arrangements for its workers to stay at the camp operate-! by labor contractors. The arrangement was apparently make the day before the harvest was to begin. Employees from Bakersfield harvest crews 3 and 5 worked in the Salinas harvest.

When Respondent notified the UFW of its forthcoming Salinas operations be mailgram of April 29, 1981, it stated the work had been offered to Bakersfield harvest crews. General Counsel failed to present evidence to controvert this statement.

General Counsel complains that the UFW received inadequate notice of Respondent's decision to harvest in the Salinas area. However, the absence of adequate notice is significant only if there were a unilateral change in hiring practices. The proof does not support the allegation. I shall recommend dismissal of the allegations of paragraph 7(f).

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115. Testimony of Respondent witness E. Rodriguez which was uncontroverted.

(6) Unilateral Change in Working Conditions

Paragraph 7(g) alleges a unilateral change in working conditions of lettuce weeding and thinning workers on or about September 1981.

Respondent's Holtville weed and thin crews were laid off for the season during the seek of December 10, 1981. Thereafter, a labor contractor's employees were used for weed and thin work intermittently for six days during late December and early January.

Respondent has utilized a labor contractor in conjunction with its weed and thin operations for the past fifteen years. At least during the five years preceding the 1981-82 harvest season, Andrews' crews finished work and were laid off during the month of December, following which labor contractor crews were intermittently used.

Thus, it appears that Andrews' treatment of its week and thin crews during the 1981-82 Holtville lettuce season was consistent with its past practice.

I shall recommend dismissal of the allegations of Paragraph 7(g).

(7) Non-Specific Manifestations of Surface Bargaining

Despite reaching the conclusion that General Counsel failed to prove the specific allegations of paragraphs 7(b), (d), (e), (f) and (g), an overview of the entire period of negotiations discloses a course of conduct manifesting surface bargaining.

Viewed retrospectively, an argument can be made that Respondent from receipt of the UFW's request for information and commencement of negotiations in 1973 manifested no intention of

entering into an agreement with the union. However, the UFW's conduct during the period preceding the entrance of Ann Smith as its negotiator was such that doubt is cast upon the premise that Respondent's conduct was illicit from the outset.

During the period Peter Chavez bargained on behalf of the UFW, the union was clearly in a holding pattern. Chavez admitted he could not break new ground, that is, he could not advance beyond positions taken by the UFW in their negotiations with Sun Harvest looking toward a new Master Agreement. In an atmosphere in which the union set the pace of the negotiations; when Respondent accepted many of the less central provisions of the Master Agreement; and when detailed and reasonable explanations were put forth for its proposals, it would be speculative to find Respondent's course of conduct manifested bad faith.

Once agreement was reached with Sun Harvest and Smith took over negotiations, the situation changed.

Following a hiatus in negotiations, Respondent at the October 16, 1979 meeting proposed the Sun Harvest wage rates for all crops except its flat crops, stating that a meaningful flat crop differential would make resolution of other issues easier.[116/]

At the next meeting Respondent agreed to the trust fund proposals cutstomarily found in UFW contracts and proposed a union security clause making employment contingent upon payment of the periodic dues and initiation fees required by the UFW, as well as a

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116. The differential proposed by Respondent ranged from 85 cents to $1.25 per hour as against 12 to 20 cents per hour under its contract with the Teamsters.

nondiscriminatory hiring provision (in lieu of a hiring hall) found in a UFW agreement with grape growers in the San Joaquin Valley. These were significant modifications of position and, viewed objectively, evidence an interest in reaching agreement. It would be inappropriate to characterize the proposals as ones which Respondent knew would be unacceptable.

In Sam Andrews' Sons, supra, 9 ALRB No. 24, the Board held Respondent's unilateral wage increase of January 1980 violative of the Act. That per se violation of 1153(e) coupled with Respondent's demand at the meeting of January 15th that the UFW propose something more favorable than the Sun Harvest agreement marks the outset of Respondent's surface bargaining.[117/]

Once begun, there is a presumption of no change in posture until that point in time when the parties reach a bona fide impasse or an agreement.[118/] Subsequent events manifesting no change in posture are now detailed.

Respondent's failure to respond with the promptness required under the circumstances of the UFW's request for information regarding the melon crop decision evidences surface bargaining. Although Respondent had no duty to decision bargain on the issue, it had a duty to bargain regarding the effects of the decision, and the information sought by the UFW was relevant to that issue. Also indicative of surface bargaining is Respondent's

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117 The break in negotiations between November 20 and January 15 is not relied on to support the bad faith bargaining conclusion.

118. Eto v. Agricultural Labor Relations Bd. (1981) 122 Cal.App.3d 41.

failure to respond to the UFW's request to bargain about the effects of its melon crop decision.

Respondent's withdrawal in April 1980 of proposals marking a significant change in position due to an erroneous transcription of the tape of the March 21st meeting was the subject matter of an earlier Andrews case. The Board found that Respondent had good cause to withdraw its proposal and did not renege on a tentative agreement in violation of section 1153(e). Although declining, because of the paucity of the record to find bad faith bargaining, the Board stated:

> We find that Respondent's inattention to its own communications with the Union evidences a lack of good faith and sheds doubt on the seriousness of Respondent's desire to reach agreement.119/

This evidence of bad faith stands together with other such evidence in supporting the conclusion Respondent engaged in bad faith course of conduct bargaining.

Respondent's unilateral increase of watermelon harvest rates in June 1980, and its unilateral increase in lettuce harvest rates in October of that year are further manifestations of its ongoing failure to bargain in good faith.120/

The surface bargaining posture of Respondent becomes more apparent in 1981 with the substitution of Josiah Neeper as lead bargainer. On several occasions Neeper attended bargaining sessions without necessary materials and information; there were also

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119. Sam Andrews' Sons, Inc. (1982) 8 ALRB No. 64, p. 8.

120. Respondent's unilateral increase in lettuce harvest rates in September 1981 is further evidence of surface bargaining.

occasions when not knowing the answers to questions put to him by the UFW negotiator, Neeper failed to obtain the answers from other Andrews representatives present and who were presumptively able to respond; nor did they respond, independently of having Neeper refer the matter to them.

In May 1981 after stating that cost was a major consideration, Neeper stated that Respondent had not calculated the cost of either the union's package or that proposed by Andrews and had no intention of doing so. Such an attitude manifests a lack of seriousness and even contempt for the bargaining process. Certainly the verbalization of such an attitude manifests a lack of desire to reach agreement and no serious intent to do so.

Following a formal meeting on May 5th, UFW negotiators made an off-the-record proposal which contained a substantial modification of its previous position on the cotton differential and acceptance of Respondent's union security and mechanization proposals. Neeper stated he recognized the significance of the UFW's movement; that Respondent would need time to study the proposals and intimated he would call villarino later that day. Villarino was unable to reach him until May 12th when Neeper's response was essentially a reiteration of previously held positions. Having previously asserted the importance of an adequate cotton differential, Respondent's absence of movement in the face of a proposed differential four to five times' greater than the differential enjoyed under its earlier agreement with the Teamsters can reasonably be regarded as evidence it vas not bargaining in good faith.

Additional evidence of this posture is found in Respondent's proposal of July 1st on the subject of subcontracting wherein Neeper conceded that Andrews proposal would exclude from contractual coverage workers supplied by a labor contractor; Cesar Chavez who attended the meeting understandably had difficulty comprehending that Neeper was serious about the proposal. As if to emphasize his seriousness, Neeper asserted that such a proposal would not deprive unit employees of work, since the work had historically been performed by labor contractor employees.[121/]

Further supporting the surface bargaining conclusion is Respondent's conduct away from the table during the time frame in which negotiations were conducted.[122/]

In summary: I find that the evidence and the reasonable inferences to be drawn therefrom, when juxtaposed to applicable legal principles, establish that from December 28, 1979, forward Respondent failed to bargain in good faith. Once an employer has been found to have engaged in surface bargaining, there is a rebuttable presumption that this posture continues until that point

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121. One of a mind for tenuous inferences might infer that Nassif's oft reiterated explanations of Peter Chavez in 1979 that labor contractor employees were required by statute to be considered employees of Respondent, though accurate, was not made in good faith; thus setting the spring and summer of 1979 as the outset of Respondent's surface bargaining. Such an inference is not drawn here.

122. Respondent unlawfully denied UFW organizers access to its Lakeview Labor Camp on October 28 and 29, 1981. (Sam Andrews' Sons (1982) 3 ALRB No. 87. During July 1981 Respondent violated section 1153(c) by refusing to rehire Francisco Larios and also commited numerous violations of section 1153(a). Sam Andrews' Sons (1982) 8 ALRB No. 69.

in time when the parties reach agreement or genuine impasse.[123/] it is apparent from the evidence reviewed regarding Respondent's conduct at the bargaining table, its per se violations of 1153(e) and its conduct away from the table, that the Eto presumption has not been rebutted; and that Respondent by the close of the hearing in the instant case had not begun to bargain in good faith.[124/]

V. THE ALLEGED DISCRIMINATORY LAYOFFS AND REFUSALS TO HIRE

A. Summary of the Evidence

(1) Jose Marcos Jimenez

Paragraph 8 of the Complaint alleges that Jimenez was discriminatorily laid off on or about October 3, 1981.[125/]

(a) Employment History

Marcos Jimenez first worked for Respondent in July 1977 in the Bakersfield area. He was hired to pick melons and worked two-and-one-half to three weeks in this capacity. In October and November 1977, Marcos worked for Respondent in Imperial Valley for approximately two-and-a-half to three weeks moving sprinklers for

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123. Eto v. Agricultural Labor Relations Bd. (1981) 122 Cal.App.3d 41.

124. In reaching the foregoing conclusion no reliance was placed upon arguments that Respondent manifested bad faith by not being available for negotiations, pointing to the several time gaps in bargaining sessions. It is true that good faith bargaining requires a party to give the bargaining process the same attention it would give other business matters; however, that requirement must be taken in context. To hold that Respondent's failure to meet during the period in which Nassif was involved in trying Sam Andrews' Sons, supra, 9 ALRB No. 24 evidences a failure to bargain in good faith would place Respondent in a dilemma. Additionally, it is not clear that Smith, who testified in the ULP hearing was freely available for negotiations during the period.

125. The year is misstated in the Complaint. It is apparent from the testimony that 1980 is the correct year.

irrigators and spent one to three days thinning lettuce during this period.

During 1978 Jimenez worked in Bakersfield and Imperial Valley during May and June and worked moving sprinklers in Imperial Valley during the first half of September. When this work was completed, Jimenez was transferred to a lettuce thinning crew and worked in that crew continuously until the first week of December.[126/]

In 1979, Marcos Jimenez began work for Respondent about the middle of October in a sprinkler crew; he was assigned to moving irrigation pipes. He worked until November 12th when he was laid off. The reason given for his layoff was "no more work." During this period he worked six or seven days per week. Marcos worked twenty-five days in sprinklers in 1979; his brother Jose worked thirty-five. Rea denied being aware of the number of days Marcos had worked as of the date of his layoff.

In 1979, while working in a sprinkler crew, Marcos together with others participated in three work stoppages.[127/] As part of his "participation" he spoke to fellow workers regarding their

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126. Sprinkler crew foreman Jose Rea testified that Marcos worked primarily in the thinning crews in 1978. On occasions when additional people were needed for sprinkler work, Rea would get people from the thinning crews and use them as long as necessary; the workers would then be returned to the thinning crew. Marcos was among those in the thinning crew who worked in this fashion.

127. Marcos testified the stoppages were triggered by information he received from the crew representative regarding problems Andrews employees were having in the Bakersfield area. The representative suggested an Imperial Valley work stoppage and Marcos relayed the suggestion and the information to his fellow crew members.

mutual problems and about discrimination against some of the workers. The conversations occurred before and after work as well as during the lunch break. No foremen were present at any of the lunch time discussions. Jimenez was unsure whether he was observed by a foreman while engaging in his before work discussions.[128/] The record is silent regarding supervisorial presence at any after work discussion.

As the work stoppages occurred, Marcos Jimenez and others visited Repsondent's fields to urge the thinning crews to participate.[129/] There were Andrews foremen present on these occasions.[130/] Marcos urged workers to wear buttons, hats or bandanas bearing the UFW insignia.[131/]

Rea testified the members of the sprinkler crew all left the fields at the same time. He had no knowledge Marcos Jimenez was more active than other workers in connection with the work stoppage.

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128. Rea admitted seeing Marcos talking with other workers, but denied he overheard any talk about Union matters. His denial is credited.

129. Marcos listed Francisco Sauros and his brother and Gabriel Jiminez as persons he remembers having engaged in the same activity. His brother Jose testified that approximately 20 sprinkler crew members visited the thinning crews.

130. Jose Jimenez named Rea, Ortiz and Rendon as the supervisors present and looking in the direction of the sprinkler crew members.

131. Marcos Jimenez is unclear regarding whether he wore a hat bearing UFW insignia while at work. On direct he testified he wore such a hat and was observed by a foreman doing so. On cross-examination he could not remember whether he wore such a hat to work. When examined by counsel for the UFW, he testified in -tore detail: He was sure Rea had seen him wearing a hat; he was sure Amador Rendon had seen him wearing a bandana bearing the UFW insignia.

ost of the members of the crew wore UFW buttons or other insignia during the work stoppages. Rea admits seeking Marcos wearing a UFW cap as well as UFW buttons. Jose Jimenez wore similar UFW insignia. In 1980 Marcos did not work in melons either in Bakersfield or Imperial valley because "there was no way to find out when the work would begin and there was no one to let me know if there was any work or not."[132/] in prior years Marcos' father, an Andrews employee, solicited work on his behalf from the foreman who would tell Marcos' father the date on which Marcos was to report. The father (Guadalupe Jiminez) did not work for Andrews in 1980.

In 1980, Marcos' brother Jose was hired by Rea sometime between September 10 and September 20 by way of a telephone call from Rea. When Rea called, the brother, Jose G. Jimenez, was not at home. Rea told Marcos that Jose could come to work. When Marcos asked why Rea was offering a job only to Jose, Rea told him "[T]here was only a job for him, and there wasn't one for me yet."[133/] Rea places this conversation in September 1979 as opposed to September 1980. The testimony of Rea and Marcos regarding the substance of the conversation is consistent. Rea admitted telephoning the Jiminez residence in 1980 to call Jose to work but could not remember whether he spoke to Marcos as well as Jose.

Marcos had begun seeking sprinkler work prior to his

132. TR. I:41; II:4-5.

133. TR I:46; I9-20.

brother's employment[134/] he was not hired until Sunday, September 20. He worked one day. The next day he was told by foreman Josa Rea there was no more work for him. He repeatedly sought work by going to Respondent's shop prior to the start of the work day. [135/]

Following September 20, Marcos worked in the sprinklers for about 10 days beginning October 1. He and 10 to 15 others were hired by Rea at the same time. Marcos and 9 or 10 other were laid off on or about the October 7th; Rea said there was no more work for them. At the time of the layoff, Rea gave each worker a layoff slip and told each he was laid off for lack of work and to check back to see if they could be called back. Rea testified credibly the people selected for layoff were those with less seniority.

The sprinkler crew, including Marcos' brother, continued to work. At the time of his layoff Marcos asked Rea why he was being laid off when there were others in the crew with less seniority. Rea responded, "There was only work for the good ones."[136/] There

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134. Rea denied that Marcos checked at the shop every day or every other day asking for work; he denied having a conversation with Marcos in which he asked Marcos for his telephone number; Rea already knew the number and that it was in the telephone book. Rea also denied Amador Rendon told him that Marcos had been checking about work.

135. Jimenez testified he spoke either to Rea or Amador Rendon on these occasions. Rea had no recollection of Marcos having worked on the 20th or of any conversation with him the following day.

136. TR 1:51, 18-19. Rea denied having made this statement. At best the statement is ambiguous. It is as easy to read the statement to mean competent workers as it is to read it as meaning not being a UFW supporter. In the face of Rea's direct denial of the statement, the General Counsel has failed to prove by a preponderance of the evidence Rea made the statement. See S. Kuramura, Inc. (1977) 3 ALRB No. 49.

were about ten others laid off at the same time as Marcos; they had completed the work required for a particular field the day of the layoff. During the balance of the 1980 sprinkler season Marcos apparently did not seek additional sprinkler work, nor did Jose seek work on his behalf.

Following Marco's layoff in 1980, Respondent needed some additional sprinkler workers and hired a group of six or seven persons living in Holtville near the Andrews shop. By way of explanation, Rea said those persons were readily available for short hours and on short notice. None had previously worked for Andrews. If needed on a particular morning, Rea would go knock on their door and tell them to come to work. Rea made no effort to recall Marcos although he was aware Marcos could be reached by phone. He was also aware that Marcos lived with his brother, but he denied knowing Marcos could ride to work with Jose.[137/]

Marcos has not worked for Respondent since his October 1980 layoff.

(b) Sprinkler Crew Operations

A sprinkler crew was first formed in 1979, Jose Rea was its foreman and remained in that capacity until November 1980 when he left Andrews employ.[138/] The separate sprinkler crew was formed because the substantial increase in the use of spinklers made it

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137. There is no evidence that Rea was aware how Jose got to work; therefore, Rea's denial is not totally incredible.

138. Rea worked for Andrews approximately six years. Before he made foreman, he served as a timekeeper for field workers and distributed paychecks. During 1978, Rea also functions as assistant foreman to Amador Rendon during the irrigation-sprinkler season.

impractical to have irrigators and sprinkler workers under a single foreman as in previous years.

Irrigators continued to do some sprinkler work. At the outset of the planting season there is not much work available for irrigators so they lay the sprinklers. The operation begins during the first half of September. After three or four hundred acres have been planted, irrigators become more involved in irrigating and people are hired for the sprinkler crew. The first six hired are sons of the irrigators.[139/] Prior to formation of the sprinkler crew, the six sons did other kinds of work as well, e.g., spraying ditches and shovel work.

The next group hired consists of long time Andrews employees. Persons in this group move on to other Andrews operations before the end of the sprinkler season; some go to Bakersfield when the lettuce season begins and others go into lettuce thinning crews in Imperial Valley when that season begins.

In early October, about two weeks after the start of the sprinkler season, the regular sprinkler crew is hired. Rea testified Respondent had a list which he used as the basis for hiring the 1980 crew. His criterion was to hire first those persons having seniority.[140/] All workers having seniority were hired into the 1980 sprinkler crew. As work picks up about the middle of

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139. Rea testified this was the practice during the six years he was employed.

140. A worker acquires sprinkler crew seniority by working 30 days in the crew during a sprinkler season; if the season runs less than 30 days, seniority is acquired by working the entire season. Exceptions were made for certain workers who were permitted, to leave early to work in Respondent's Bakersfield harvest.

October, additional workers are hired from among those having seniority but not yet recalled or, if necessary, by hiring people on the list who have not acquired seniority. With respect to hiring non-seniority people on the list, Rea testified he hired without regard to the number of days worked, i.e., a person having twenty days service would not necessarily be hired before one with ten days service. The crew remains at peak until late October or the first of November at which time the new people are let go.

Amador Rendon hired some people into the sprinkler crew because of their experience with the pumps used in the irrigation process. According to Rea, these people are hired into the sprinkler crew and are pulled out of the crew for pump repair-or maintenance as the occasion arises.

Sprinkler crew members do not assemble at a common location at the start of a day; they report directly to the field in which they worked the previous day. Nor do they assemble at a common location at the end of the work day. Normally sprinkler workers work in trios. Days worked in lettuce thinning are not counted toward earning sprinkler crew seniority. This was Andrews' general practice; i.e., work in one classification did not count toward acquiring seniority in another. Marcos Jimenez acknowledged his awareness of the company's seniority practice.

Once those having seniority were hired, Rea had discretion as to the selection of additional employees. His evaluation of a person's work performance was one factor considered when hiring a non-seniority worker. Rea testified he had received complaints about Marco's work performance in 1979 which he discussed with

Marcos. A second factor considered in hiring non-seniority workers was whether a person showed up looking for work.

In 1979 Marcos asked for work when Rea called seeking Jose Jimenez. Rea called for Jose because he had been at Holtville every morning looking for work, and Rea had told him to would be hired at a later date. Marcos was later hired because Jose kept asking 'Rea to put him to work.

When a sprinkler crew member is laid off, Rea makes no effort to recall him if additional work becomes available. It is incumbent upon the person to keep checking back to ascertain whether work is available. Once a layoff begins, any need for an additional worker thereafter is only temporary.

There are some individuals who attained sprinkler seniority as the result of work performed in 1980 who had not worked in the crew in 1979.

(2) Enrique Castellanos

Paragraph 9 of the complaint alleged that Respondent unlawfully refused to rehire Enrique Castellanos on or about October 6, 1980.

Castellanos began working regularly for Respondent in October 1976 in the Imperial Valley as a lettuce thinner. He was hired by Manuel Ortiz.

In 1976 and 1977, Castellanos worked intermittently during October and November thinning lettuce. He did not work in 1973, having incurred an industrial accident on July 5 in Bakersfield.

In 1979 Castellanos worked in thinning crew No. 2 until December 11, 1979. His foreman was Salvador Alonzo (nicknamed El

Tigre). He requested and received permission from El Tigre not to work on December 12, the birthday of the Virgin of Guadalupe. Castellanos told El Tigre he didn't know whether he would return on the 13th or 14th, El Tigre responded it didn't make any difference; that if Castellanos returned and the crew was still working, he could work; but if there were no work, El Tigre would not be able to give him work. Castellanos was not ready to return until December 17th. He did not do so because he was told by coworker Antonia Resendez that Crew #2 finished work on the 15th.[141/]

In October 1979, Respondent's three lettuce crews engaged in four work stoppages. Castellanos was involved in two of the four. He was off work when the other stoppages occurred. The first stoppage occurred around the middle of October. Eleven members of Crew #2, including Castellanos, initially walked out.[142/] The balance of the crew followed immediately. Most of the initial 11 are still employed by Andrews.

As members of Crews $2 left work the day of the first work stoppage, Ortiz told El Tigre to get their names. At that time the thinning crews were paid daily in cash. Ortiz testified he wanted the names of those who were walking out in order to know their hours worked that day for payroll purposes. When it became apparent that everyone was leaving, El Tigre stopped taking names. Ortiz denied his purpose in taking names was to discharge those who left work.

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141. Resendez corroborates Castellanos' testimony on this point.

142. Ortiz testified he had no recollection of Castellanos being among this group.

Thinning Crews 1 and 3 were also in the area and also stopped work.

In late November or early December 1979, Castellanos, while at work, was observed by Manuel Ortiz wearing a shirt bearing a UFW flag on its back. Ortiz told Castellanos that he was the last one whom he excepted to see with "that fucking think on your back".[143/] Castellanos had worn the same shirt to work on other occasions. Several other members of the crew wore buttons, flags or other indicia of UFW support. On the day Ortiz spoke to Castellanos about his flag, other crew members were wearing similar flags.

Castellanos customarily learned when work was started by going to the Caliente, a bookie establishment where workers gathered to find out whether there's going to be work.

In September 1980 Castellanos had a conversation with El Tigre regarding commencement of work on October 2. El Tigre told him not to get on the bus until he had checked with Ortiz. Castellanos said he would be unable to work on October 2 because of an interview with the Department of Employment. El Tigre told him he had three days within which to show up following commencement of work.

The first day on which Castellanos showed up for work was October 4 at the Shopping Bag pick up point. He was accompanied by fellow worker Juan Ochoa. Castellanos asked Ortiz if there was

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143. Castellanos did not deny that Ortiz's remark was intended as a joke. He testified that he and Ortiz were fairly good friends at the time. Ortiz denied such was the case and further denied he spoke to Castellanos about his shirt. Antonio Resendez corroborates Castellanos regarding the substance of the conversation. Ortiz's denial is not credited. Ortiz admitted permitting Castellanos to take a day off because of sun stroke and that he supplied Castellanos with coffee on that occasion.

work. Ortiz responded that only Crew #1 was going out and that it would not work a full 8 hours. Ortiz told Castellanos and Ochoa to show up on October 6th to see whether there was work.

Ochoa did not recall whether he worked on the 6th. Castellanos showed up on the 6th. When he asked Ortiz for work, he was told the crew was going to be reduced by 20 or 30 people. Castellanos asked Ortiz for a paper to take to the Unemployment Office; Ortiz responded he didn't need it because he was not on the seniority list.[144/]

In 1980 Ortiz hired the Imperial Valley lettuce thinning crews. The first day of the season he hired 80 workers, all of whom had seniority. There were another 20 seniority workers present who did not get hired. When an additional crew was needed, Ortiz hired workers from the seniority roster.

Once all seniority people are hired, Ortiz prefers to hire people with prior thinning service with Andrews.

At some point after October 6, Castellanos testified he was told by coworkers that Manuel Ortiz, Jr. was working in Crew #1. Castellanos had never seen Ortiz Jr. in the fields before October 1980. Manuel Ortiz denied his son ever worked for Andrews. An unrelated person named Manuel Ortiz had worked in a lettuce thinning crew in 1979 but did not do so in 1980.

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144. Ortiz specifically denied having had this conversation. He testified that Castellanos sought work in 1980 on the opening day of the lettuce thinning season. Ortiz told him he was not on the seniority list, to wait until new workers were hired and he would be put to work. Castellanos departed in a disgusted mood, stating he knew where to go to correct the matter, and Ortiz did not see him for the balance of the season.

(3) Guadalupe Contreras

Paragraph 10 of the Complaint alleges Respondent refused to rehire Guadalupe Contreras on May 20 and June 2, 1981, because of her activities on behalf of the UFW.

Contreras has an employment history with Respondent dating back to 1965 or 1966. During the period of her employment she has thinned lettuce and melons and worked in a melon machine harvesting crew in the Imperial Valley. The last year she worked in an Andrews melon harvest was 1974. She sought work in the melon harvest each year thereafter until the year Andrews did not harvest melons. In 1980 she sought but did not receive melon harvest work. Despite not-receiving melon machine work, Contreras continued to work each year in lettuce and melon thinning. She worked the 1981 melon thinning season which began in February. She was hired the first day she sought work.

In 1981, Contreras telephoned Respondent's Holtville office seeking work three times prior to May 21st. Sometime prior to May 21st, Contreras and a co-worker encountered Respondent's foreman Bocanegra at the unemployment office. He told them Andrews was going to put on two additional harvesting machines. Thereafter, Contreas and co-workers Brisuela and de la Torres went to the pickup point at the border to ascertain whether work was available. She asked Ramon Quishuis, melon crew foreman, whether she was to be hired onto the additional machines.[145/] Quishuis told Contreras and

145. Ramon Ruben Jescas Quishuis was a machine crew foreman in 1981. He testified he spoke to Contreras only one time after she sought work in 1975 until 1981; the one occasion was at her father's wake. Quishuis places the conversation on a Wednesday morning two days after work started. He has spoken with her husband three or four times during the 1975-81 period.

the others to check back the following week because the machines were not yet to be added.[146/] Qushuis denied making such a statement. Every day thereafter Contreras went to the border seeking work.

The Wednesday following her initial conversation with Quishuis, Contraras saw Bocanegra and asked for work. He told her to wait. Brisuela and de la Torres began work that day. Bocanegra was about to add her name to the list of people he was going to hire when Quishuis arrived and told him not to add any more manes to the list because there might be older workers whom he would have to hire. Quishuis denied making this statement.

Prior to talking to Bocanegra that morning, Contreras confronted Quishuis and demanded to know why she had not been hired since 1975 and whether Andrews was going to give her work that year. Quishuis told her she knew why Andrews did not give her work.[147/] Contreras responded that she knew nothing, adding that it appeared to her that the company had wrong information about her because all the problems the company had occurred since she had not been working.[148/] Contreras also spoke with foreman Poncho Amayo at the

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146. Melon harvesting at Andrews customarily lasts two to three weeks. Machine crews started two or three days after sack crews; however, in 1981 the machine crews started one or two days before the sack crews. Sack crews are limited to male workers. Women are used in the machine crews.

147. Apparently the reason given by Quishuis related back to 1975 when her husband got angry because Andrews would send her to talk to him rather than dealing directly with him whenever the company wanted to talk to him.

148. Quishuis testified to two conversations with Contreras at the border; each of which was limited to her asking whether there was work and Quishuis' response that there was not. He denied having any conversations with other foremen about not hiring her.

pickup point that morning. Amayo told her he was going to hire her if additional workers were needed. She testified she also spoke with Angel Avila while at 'the border that day.[149/] She asked why she was denied work with Andrews. He asked whether she had talked to Quishuis. She responded that Quishuis stated that since 1975 Avila had issued orders that she not be hired. Avila denied having issued such orders.[150/] He said no one was denied work, that Andrews had an agreement which required the hiring of all the 1979 strikers. He told her that if her name weren't on the list it was because she had not gone out on strike. Avila told her to continue checking and if there were work, she wouldn't be denied.

Thereafter, Contreras sought work daily for about a week. She stopped when Amaya told her the melon crop was no good, and the company was going to cease harvesting.

In 1981 she worked from early October until sometime in December in one of Respondent's lettuce thinning crews. Although she did not work at the outset of the season, she was hired the first day she sought work.

Contreras testified she filed her charge in the instant case because of a seven week delay in receiving her unemployment insurance; a delay which she attributed to Respondent's unsuccessful appeal of her claim. She has testified against Andrews in three or four ALRB proceedings. Contreras' explanation for not filing ULP

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149. In 1981, Rafael Ramos was the melon harvest supervisor; Avila was assistant supervisor.

150. When testifying, Avila denied ever instructing other foremen not to hire Contreras; he also denied that anyone ever spoke to him about not hiring her.

charges prior to 1981 was because her husband held her back and because Quishuis, godfather to her children, might have thought she was going to hurt him. She changed her mind in 1981 because she was being blamed for all Respondent's problems.

Avila acknowledged a conversation with Contreras about 5:30 a.m. two or three days after the melon harvest began.[151/] she asked for work. He explained that because of rain the previous day only sack crews were going out.[152/] Contreras departed. This was the only occasion on which Contreras spoke to him about work in the melon harvest. Avila had no recollection of seeing her speak with other foremen that morning.

1981 Melon Harvest Hiring Practice

Quishuis testified the 1981 harvest hiring was based upon a list of those having worked the entire 1979 harvest as well as those who worked before and after the strike.[153/] There is no melon harvest seniority.

During the 1981 harvest, Respondent used from two to five machine crews. Seventeen or eighteen workers per crew needed to operate properly.

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151. Avila was a sack crew foreman. He has never been a machine crew foreman. He is not involved in hiring machine crew workers.

152. Quishuis corroborated Avila's testimony regarding the rain. It is his recollection that one machine crew was able to work a field where the ground was solid.

153. There was no melon harvest in 1980 in the Imperial Valley.

(4) Lettuce Crew No. 5

Paragraph 15 alleges that Respondent effected a layoff of Imperial Valley lettuce Crew Number 5 on or about January 28, 1981. Paragraph 16 alleges Respondent unlawfully refused to hire Crew 5 on or about February 16, 1981.

(a) Background

The Imperial Valley lettuce harvest season customarily runs from early December until sometime in March the following year.[154/] Five crews were used during the 1981 harvest season. Crews 1, 2 and 3 began the season; Crews 4 and 5 were hired at a later date.[155/] In January all five crews were working; customarily the five crews work from one to four weeks. Each usually starts with eight trios; additional trios may be added as the harvest volume increases. In addition to piece rate workers actually engaged in the harvest process, a crew may utilize hourly workers to perform certain auxiliary functions.

(b) Seniority System

With respect to lettuce harvest crews, Respondent asserts it operates on the basis or area and crew seniority. Bakersfield and Imperial Valley crews obtain and accumulate seniority only in their respective areas. Crew Number 1 is the first hired and last laid off; crews four and five are the last hired and first laid off. By operating in this fashion, an individual's length of service with

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154. The December 1980-March 1981 season is referred to as the 1981 season.

155. The crews are ethnically separated, numbers 3 and 4 are Filipino crews; one, three and five are Mexican crews.

Respondent is irrelevant; it is his crew placement which is crucial.[156/] Eddie Rodriguez admitted that hourly paid workers having no prior service with Andrews were hired into Crew 1 following the layoff of Crew 5. According to Rodriguez, a member of a low seniority crew has no entitlement to move to a higher seniority crew -in the event of a vacancy. The foreman of the higher seniority crew may fill the vacancy as he chooses; he is not required to recall a member of a lower seniority crew on layoff at the time. Transfer from one crew to another in the event of need for additional workers is also possible, again depending upon the discretion of the crew foreman needing additional help.[157/]

At the time crew 5 was laid off in 1981, Respondent anticipated it would be recalled; it was not.[158/] Rodriguez testified the failure to recall Crew 5 was attributable to a bad lettuce market which caused Andrews to harvest less lettuce than anticipated. Lopez testified he observed some Crew 5 members working following the crew's layoff.

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156. Rodriguez offers this practice as an explanation of why, in the 1981 season, with the advent of the Crew 5 layoff, no one was moved to Crew 2 to displace persons with less service with Andrews. A worker hired into Crew 5 is relegated to that crew unless he is selected by a foreman to work in a higher seniority crew.

157. Transfers between Mexican and Filipino crews are not permitted.

158. General Counsel witness Gregorio Lopez testified that at the time Crew 5 was laid off, Ramon Hernandez stated the crew would be called if needed. Hernandez also told Lopez that he would be recalled by telephone. Lopez testified he was customarily recalled by phone.

All available workers on the preferential hiring list established following the 1979 lettuce work stoppages in Bakersfield were hired for the 1981 harvest. Some were hired into crews other than Crew 5, including Crew 1. Some continue to work in Crew 1.

In hiring for the 1982 harvest, a foreman is expected to use the 1981 seniority list for the crew as his basis for hiring. All available people on the list are to be hired before anyone without crew seniority is hired.[159/]

(c) Union Activity

Rodriguez supervised the 1979 Bakersfield lettuce harvest. He conceded awareness that the majority of the 1981 Crew 5 members participated in the 1979 Bakersfield area work stoppages.

B. ANALYSIS

In seeking to establish a violation of section HS3(c) the General Counsel must establish by a preponderance of the evidence that a discriminatee engaged in union activity of which the employer was aware and that but for his union activity the discriminatee would not have been terminated or refused rehire.[160/]

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159. Testimony regarding the operation of the seniority system taken during the non-bargaining phase of the proceedings is generally consistent with Respondent's explanation of its hiring priorities and practices made to UFW negotiators during the course of bargaining.

160. Jackson & Perkins Rose Co. (1979) 5 ALRB Mo. 20.

> [I]f the General Counsel establishes that protected activity was a motivating factor in the employer's decision, the burden then shifts to the employer to show that it would have reached the same decision absent the protected activity. The burden referred to in this formula is the burden of going forward with the evidence or 'burden of production[1], not the burden of proof, which always remains with the General Counsel. Martori Brothers Distributors (1982) 8 ALRB No. 15, pp. 2, 3.
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> The burden that shifts to defendant, therefore, is to rebut the presumption of discrimination by producing evidence that plaintiff was rejected . . . for a legitimate non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. (Citation omitted.) It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. Texas Department of Community Affairs v. Burdine (1981) 450 U.S. 248, at 254; cited with approval in Martori Brothers, supra.

We turn not to apply the foregoing test to the alleged discriminatees.

Marcos Jimenez

Marcos engaged in protected as well as union activity of which Respondent was aware. However, the activities in which he engaged were similar to those in which some and perhaps all his fellow sprinkler crew members engaged, i.e. the 1979 work stoppages and wearing the customary indicia of UFW support. There is evidence of Respondent's anti-union animus over the years as well as evidence of such animus during the time frame encompassed in this proceeding. Jimenez and others were laid off at a time when there remained sprinkler work to be done; persons not having previously worked for Respondent were utilized on an intermittent basis to perform sprinkler work following Jimenez's layoff.

Rea made no effort to recall Marcos or any of the others laid off. Following his layoff, Marcos did not seek sprinkler work

from Rea. Assuming, without deciding the foregoing evidence suffices to make a prima facie case, the burden shifted to Respondent to raise "a genuine issue of fact" regarding whether its action vis-a-vis Jimenez was discriminatory. Respondent met this burden by presenting credible evidence regarding the method used for hiring the sprinkler crews; Marcos[1] lack of seniority; the universality among sprinkler crew members of the kind of union and protected activity in which Marcos engaged; and a plausible explanation for its intermittent use of nearby Holtville workers following Marcos' layoff. Respondent having raised a question of fact regarding the reason for Marcos[1] layoff, it was incumbent upon the General Counsel to produce evidence sufficient to resolve the factual issue in favor of the discriminatee. It failed to do so; thus, the allegations of paragraph 8 have not been proved. General Counsel has failed to prove by a preponderance of the evidence that but for his 1979 activities Marcos would have been retained at work when Crew 5 was laid off in late January 1981.

Enrique Castellanos

The General Counsel established that Castellanos particpated in two or four work stoppages in 1979 among Imperial Valley lettuce thinning crews. There is some dispute regarding whether his supervisor was aware that Castellanos was among the first eleven workers to depart on the occasion of the first walkout, but it is uncontroverted that the entire crew departed shortly thereafter. The General Counsel also presented testimony that Castellanos[1] foreman jokingly commented about his wearing a UFW flag at work. This evidence, coupled with Respondent's anti-union

animus, sets out the circumstances upon which General Counsel seeks a finding that Respondent's October 1980 failure to hire Castellanos was discriminatory.

The General Counsel failed to make a prima facie case and the allegations of paragraph 9 must be dismissed. Moreover, if one were to conclude a prima facie case had been made, Respondent's evidence raises a genuine question of fact as to the reason Castellanos was not hired in 1980.

He had not attained seniority in the 1979 season. Seniority workers are hired first. On the occasion on which Castellanos presented himself for work, only seniority workers were working and there remained a residue of about 20 seniority workers who had priority hiring rights over Castellanos. The evidence presented by Respondent establishes that its 1980 treatment of Castellanos was consistent with its regular thinning crew hiring practices.

I recommend the allegations of paragraph 9 be dismissed.

Guadalupe Contreras

General Counsel failed to make a prima facie case that Respondent's failure or refusal to hire Contreras into a melon machine harvest crew in 1981 violated the Act.

On several occasions Contreras spoke out against foremen to her fellow workers and had testified as a General Counsel witness in prior unfair labor practice proceedings involving Sam Andrews. While she has not worked the Imperial Valley melon harvest for some years, she has continued to work, including during 1981, the melon and lettuce thinning seasons. Respondent's failure to hire her for

the 1981 Imperial Valley melon harvest was consistent with its practices. It would be speculation to conclude she was not hired for the melon harvest because of her union or protected concerted activities. Speculation is not sufficient basis for finding an unfair labor practice.

I recommend the allegations of paragraph 18 be dismissed.

Lettuce Crew No. 5: In the 1981 lettuce harvest in Imperial Valley, Crew 5 consisted primarily of employees who had engaged in intermittent work stoppages during the 1979 Bakersfield lettuce harvest. Respondent's response to the 1979 stoppages was to replace all employees involved. In Sam Andrews' Sons (1983) 9 ALRB No. 24, the Board held Respondent's replacement of those workers engaging in partial recurrent work stoppages and Respondent's subsequent elimination of their seniority for engaging in such conduct did not violate the Act. Thus, the Crew 5 members came into the 1980-81 Imperial Valley season without any seniority and Respondent was entitled to deal with them accordingly.

Consistent with Respondent's policy Crew 5 was the last formed and the first laid off. While there may have been some Crew 5 workers hired into Crew 1, there is no showing that the manner of their movement was inconsistent with Respondent's practice when individual movement from one crew to another is involved.

The General Counsel's position regarding the hiring and layoff of Crew 5 rests upon the conclusion that Respondent's conduct was retaliation against earlier protected concerted activity. Since the conduct allegedly giving rise to the retaliation was not protected, the premise falls. AS of the 1980-81 harvest season,

Respondent was under no compulsion to place those terminated for their 1979 Bakersfield activities in a crew other than 5. Its only constraint was to treat Crew 5 members in a manner consistent with its practices. This it did.

I recommend that the allegations of paragraphs 15 and 16 be dismissed. VI. INTERFERENCE WITH ACCESS

Paragraph 11 alleges that Repsondent since August 10, 1981, has denied UFW representatives and striking Sam Andrews employees reasonable access to its premises for the purpose of communicating with non-striking employees.

(1) Background

The UFW struck Respondent's Bakersfield operations in early July 1981. On August 20th, the Kern County Superior Court issued a preliminary injunction which stated in pertinent part:

> Defendant Sam Andrews' Sons . . . are prohibited from interfering with, obstructing or otherwise preventing "lunch break" access to Sam Andrews Sons employees by United Farm Workers organizers. "Lunch Break" access shall be the "sole access" to Sam Andrews' Sons farms and it shall be limited to one UFW organizer to every fifteen employees.

Shortly after the order issued, there was a dispute between the parties regarding the number of organizers permitted by the order. David Villarino, director of the UFW's Lament field office, interpreted the order as permitting the union one organizer per group of 15 workers and additional organizers for every additional 15 workers in that group. The Andrew's position was that the total number of workers on a given day should be divided by 15 to obtain the number of organizers permitted access. To illustrate: If there

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were a total work force of 150 on a given day, Respondent contended 10 persons should be allowed access irrespective of the number of groups into which the work force was divided. The UFW on the other hand contended the one to fifteen ratio should be applied on a per group of workers basis irrespective of the total work force on that day. Thus, if the 150 workers were divided into 15 groups of 10 workers each, the UFW contended it was allowed 15 organizers.

The parties returned to Superior Court sometime after August 20 to seek an interpretation of the order. The judge's interpretation coincided with that of Andrews.

Initially it was difficult for the union to tell how many people should be permitted to take access. They had only rough estimates of the number of people working the 14,000 to 20,000 acres Respondent farms in the area. The Union's difficulties were compounded by the fact that the work was primarily irrigation work which is done in small groups in a multitude of areas, and by the fact the cotton crop was at a height which made it difficult to ascertain where workers were located. Scouts were sent out each morning to check the properties to get some idea of the workers locations. As a means of estimating the number of workers, a head count was taken at the Andrews' labor camp as workers left to go to work; a head count was also taken at the various entrances to Respondent's fields.

Villarino testified that if two people arrived at a location where the number of workers was less that 15, one would speak to the replacement workers and the other would remain in the car.

Villarino had no recollection of contacting Andrews to ascertain how many workers were going to be on the job on a particular day. Nor did he have any real recollection of calling the Respondent's labor relations person (Robert Garcia) to tell him the number of people who were going to take access. After saying he didn't remember making calls for this purpose, Villarino testified that he called the company daily until the UFW's attorneys told him daily notification in the court order did not require calling Respondent; thereafter Villarino ceased calling daily and had no recollection of ever calling again for this purpose. He remembered talking to Garcia on one occasion, and Garcia told him the number of workers to be use that day.

Garcia testified that during the first week of the strike Villarino either phoned or came by the office each day the UFW took lunchtime access to provide Garcia the names of the organizers who were coming onto the property that day. On the day after the injunction issued, upon receiving the list, Garcia told Villarino that based on the current work force compliment, the number was too many; that it would be excessive access if the UFW brought that many people on. Villarino responded that he did not care how I interpreted the order; this was the number who were going to take access.[161/] Garcia did not respond. The number of organizers Villarino listed was approximately 18.

Two days later Villarino came by the office with a list of the organizers going on the property that day. He recited the

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161. This conversation occurred before the order's meaning was clarified by the court.

names; when he reached the eighth or ninth name, Garcia told him that for that day, that was the maximum number of organizers permitted under the court order; Villarino said he didn't care and proceeded to give Garcia two more names. There was a discussion regarding the meaning of the court's order with Garcia asserting the UFW was again taking excessive access. The UFW took access that day. Garcia was notified by Andrews' foremen that 20 to 22 organizers came onto the property.

August 19, 1981

Macedo, a striking Andrews employee, was among those who took access on August 19, 1981.[162/] He had no knowledge of how many others took access that day; nor does the record reveal the number.

Macedo and Jose Gonzalez arrived at Field 14 about noon; there were four workers near the road picking up lines. Macedo approached and sought to speak to them. No other UFW organizers were present.[163/] Angel Gonzales arrived shortly thereafter in his pickup.[164/] He told Macedo to get out because he was on private property. Macedo responded he had a right to go in and talk to the people. Angel said that didn't make any difference and again told

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162. Macedo remembered he took access on the 19th but could not remember the month. Angel Gonzales[1] testimony placing the incident in August is credited.

163. Jose Gonzales did not testify. No explanation was offered for his failure to do so.

164. Stipulated to be a supervisor within the meaning of Labor Code section 1140.4(j).

Macedo to get out immediately. Macedo departed,[165/] and he and Jose proceeded to another field about a quarter of a mile away.

Following their confrontation, Angel saw Macedo about 10 minutes later in another field. Angel was about & half-a-mile away in his pickup. Before he arrived at their location, Macedo and Jose departed. Angel saw the pickup a third time about five minutes later on a dift roan on the opposite side of the same field. As they approached, Angel stopped in the middle of the road. The Mecedo-Gonzales vehicle made a U-turn and drove off. They made no further effort that day to speak to workers.

August 21, 1981

During 1981, Gilberto Lopez Mesa was employed by Respondent as an irrigator. He participated in the strike which began around July 9, 1981. On August 21st, he and Arturo Rodriguez visited Andrews field number 267 during the workers' lunch break.[166/] There were three workers eating lunch; Rodriguez remained in the car while Lopez spoke to them for about ten minutes, after which he and Rodriguez went to a site two fields away to speak to two additional workers. As they were traveling to the second field, they were confronted by Angel Avila, the lettuce foreman, who attempted to run

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165. Angel Gonzales' testimony regarding the incident is somewhat different. He stated he told Macedo to leave and that Macedo departed without responding. This seems unlikely. Macedo is credited.

As he was driving to the point where he observed Macedo, Angel contacted Frank Castro, the top foreman, by CB radio to advise of the organizers presence. Castro told him to tell them to there were already enough organizers on the premises and to tell them to leave.

166. Rodriguez was a non-employee UFW organizer.

them off the road.

Thereafter Lopez and Rodriguez proceeded to a second field where Lopez began talking to two workers. Avila arrived and took pictures of both organizers. After taking his pictures and checking their I.D.'s, Avila stated they could not talk to the workers. Lopez continued to do so until he felt their lunch period was over. Thereafter, he and Rodriguez unsuccessfully sought out other workers.

(2) Analysis and Conclusions

General Counsel's claimed access denials are two occasions in August 1981 -- the 19th and the 21st.

It is impossible to ascertain from the evidence whether Respondent's conduct vis-a-vis Macedo's access attempt on August 19th violated the Act because we do not know whether his access exceeded that allowed by the Superior Court in its TRO. Thus, no finding will be made regarding this incident.

The same problem is presented with respect to the violation alleged to have occurred on August 21st. Angel Avila photographed UFW organizers Lopez and Rodriguez as Lopez spoke to a group of two workers taking their lunch break; however, Avila took no action to remove them. Lopez continued to speak to the two employees until he felt their lunch break was completed.[167/]

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167. The photographing of Lopez as he spoke to workers violated section 1153(a). The incident was not alleged as a separate violation of section 1153(a). The incident was admitted, albeit Avila justified his conduct by testifying he wanted to have proof that Lopez and his companion were among the organizers present that day. When non-alleged conduct is fully litigated and

(Footnote continued----)

In view of the daily access taken by the UFW in numbers ranging up to 20 striking employees and organizers, and in view of the failure of General Counsel to establish by a preponderance of the evidence that the interdicted access was not excess access, I find the two incidents were not violative of section 1153(a), and I recommend the allegations of paragraph 11 be dismissed.

VII. SURVEILLANCE AND IMPRESSION OF SURVEILLANCE

(1) Summary of Facts

October 27, 1981

Villarino directed the 1981 strike in Bakersfield. He personally took access during the lettuce harvest on several occasions; his recollection was that the harvest began on October 26 and that he took access the next day at approximately 10:45 in the morning.[168/] Access was attempted at that time because Villarino observed the lunch wagons go into the fields, and he saw the crews stop working. The lunch wagons move from crew to crew and start serving about 10:30 a.m. and finish about 12:30 p.m.

(Footnote 167 continued——)

establishes a statutory violation, finding such conduct to be a separate violation of the Act is appropriate notwithstanding the absence of amendment of the complaint to conform to proof. (D'Arrigo Brothers Company (1982) 8 ALRB No. 45; George A. Lucas & Sons (1981) 7 ALRB No. 47.) Avila testified he sought to establish a violation of the access agreement, Lopez was the only organizer speaking to workers; therefore Avila's conduct cannot be excused as seeking to verify a clear and unmistakable access violation and was, therefore, coercive. (Patterson Farms, Inc. (1982) 8 ALRB No. 57; cf. Harry Carian Sales (1980) 6 ALRB No. 55.) However, it was an isolated event and is de minimus. (Porter Berry Farms (1981) 7 ALRB No. 1.

168. Villarino had previously taken access to Andrews' properties.

There were two crews gathered on the service road at the site where Villarino came into the field. When he arrived, there were 80-90 workers gathered around the lunch wagon eating lunch and talking among themselves. Angel Avila was standing next to the lunch line about 15 feet away from Villarino.[169/]

Villarino approached Avila and told him he wanted to conduct union business with the workers.[170/] Avila said that he was not going to leave and that he didn't have to leave.[171/] While the two were speaking, the crew was still on its lunch break. Villarino spoke to the workers, but when there was no worker participation or discussion, he departed.

Following this incident, Villarino returned to the picket line. Garcia drove by, and Villarino told him the foremen were engaging in surveillance of the workers while the union was attempting to meet with them and conduct union business. He told Garcia the law required that foremen remove themselves. Villarino said he wanted Garcia to make sure this didn't happen again. Garcia replied that the foremen didn't have to leave because they had a job

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169. Angel Avila was the Crew 1 foreman and admittedly a supervisor within the meaning of the Act.

170. Villarino conceded that a foreman customarily eats with his crew. Avila admits he told Villarino he didn't have to leave because he was eating.

171. It is uncontested that Avila did not leave. He testified he told Villarino he would leave when he finished eating and that he did so. The conflict between Villarino's and Avila's testimony on this point is insignificant.

to do and were present in the normal course of their duties.[172/]

October 30, 1981

On October 30, Villarino visited the same location during the lunch break. Some workers were serving themselves; other had begun eating along side the road or at the edge of the fields. There were approximately three crews totalling 120 workers in the area. Villarino was accompanied by three other UFW representativs. Initially, the four were together; but they split up when the crews began returning to their respective fields. The purpose of the access was to elect a representative to the negotiating committee and to invite the workers to a general meeting.

When the UFW representatives arrived at the start of the lunch period, the following supervisors were seated among the workers eating their lunch: Rafael Ramos, Angel Avila, Phillipe Orozco, Ramon Hernandez, Teddy Rodriguez and Bill Villamore. During the 20 minute lunch period, worker interaction with Villarino was minimal. When the workers finished eating, one crew walked into the middle of the field where the stitcher truck was located. The other crews went to their respect work sites. Villarino and Ramirez walked with Crew No. 2; Alvarez and another representative went to Crew No. 1.

Villarino followed Crew 2 into the field to speak to the workers while they were away from the foremen who had remained in

172. Garcia testified he told Villarino he could move the workers to another point in the field to talk to them. Villarino denies Garcia made such a statement. Since one of Respondent's foremen is admitted to have said the same thing to Villarino, Garcia's testimony is credited on this point.

the vicinity of the lunch wagon. About 10 minutes remained of the lunch break. When they got to the general work area, the workers sat down, and Villarino began to talk with them. Orozco and Hernandez arrived and sat among the 20 or so workers to whom Villarino was speaking.[173/] Villarino reminded them that the law said he had a right to conduct union business in private with the workers and asked them to leave until work started. Orozco responded that there is no election and no negotiations and we are not leaving. Initially Orozco was seated, but during the course of speaking to Villarino he stood up. Villarino said he would have to file a charge. Orozco replied, if you want to file a charge, file a charge. Villarino departed. During the course of the interchange, Villarino told the workers that Orozco was violating the law and would go to jail if he violated the court order.

November 13, 1981

November 13th was the next occasion when Villarino personally took access. Accompanied by Roberto Flores, Villarino sought to speak to 30-35 workers in the Orozco crew at approximately 11:00 a.m. As he approached, he saw Orozco sitting among the workers. He asked Orozco to please leave so he could conduct union busines. Orozco told him to take the workers somewhere else if he wished to talk to them.

Villarino and the crew members moved to another location;

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173. There was another UFW representative present but Villarino was the only one who spoke.

Orozco did not follow.[174/]

November 16, 1981

On November 16, about 11:00 a.m. Villarino, accompanied by Javier Ramirez, went to Santiago Ranch to speak to Ramos' crew. When they arrived, there were three supervisors among the workers at the edge of the fields. Some of the crew were still working; some had stopped. The lunch wagon was moving to another part of the field. Villarino and another representative distributed leaflets in the presence of Respondent's foremen who listened to what Villarino and others were saying. Villarino asked Ramos and the other foremen to leave.[175/] He got no response. When he finished distributing leaflets, Villarino went to visit another crew in an adjacent field. As he arrived, Rafael Ramos left his crew and came to where Avila's crew was eating.[176/]

When Villarino got to Avila's crew, he approached the loaders. As he was talking to the loaders, he overheard Ramos, who was on the opposite side of the truck, say that the union was good, but it was better to have a job. Villarino departed.

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174. Orozco's version of this incident is substantially the same as Villarino's. It differs slightly in that Orozco places the events at the edge of the field where work was to commence at a point when three or four minutes remained on the lunch break. It differs also in the Orozco attributes Villarino as saying he was going to put Orozco in jail and that Orozco would lend his wife to the bosses.

175. Respondent witness John Heraz testified that Villarino did not ask Orozco or the other foremen present to leave. Since it is unlikely that Villarino would fail to do so, Heraz is not credited.

176. Ramos is also an admitted statutory supervisor.

November 19, 1981

On November 19th, Villarino took access to Avila's crew during their lunch break. He was accompanied by Avelino de la Torre.[177/] Villarino passed out leaflets containing information regarding an ALO decision on bad faith bargaining and the effects of the make whole remedy and its meaning in terms of money. He also talked about electing a negotiator. Angel Avila was present on the outskirts of the group. Villarino asked him and his assistant foreman (Francisco Amaya) to leave. Avila said he wasn't going to leave because this was where he normally worked. The workers had not yet returned to work following lunch. They were sitting on boxes reading the leaflets.[178/]

When Avila said he wouldn't leave, Villarino responded that was the reason that there are so many problems in the fields, because of the "Cabrones."[179/] Avila didn't respond. His assistant, Amaya, stood up; he had a lettuce knife in his hand; he rushed toward Villarino and then stopped about 15 feet before reaching him. Villarino told the workers, "They are angry because it's the truth." Avila said it's time to go back to work; Villarino and de la Torre departed.

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177. De la Torre did not testify.

178. Avila testified the crew was ready to start working when Villarino arrived. Some had commenced working, but Avila says he told them to stop until all workers were ready to begin. Amaya testified the crew was already to work when Villarino arrived. Amaya is not credited; juxtaposed to that of Avila and Villarino, it is implausible.

179. Villarino translated "Cabrones" as God damn foremen.

Avila testified he told Villarino it was too late to talk to the crew and told him to leave. However, Villarino continued to talk to the crew, telling them that he was tired of the damn-ass foremen who were listening; that the foremen were a bunch of sons of bitches and that he was going to break the company. Avila further testified that Villarino was so offensive that assistant foreman Amaya approached him and asked why Villarino was so offensive. As is customary Amaya had a lettuce knife on his person and in its holster. Avila denied that Amaya brandished the knife or otherwise threatened Villarino.

Amaya admitted having the lettuce harvest knife on his person but denied he removed it from his waist while talking to Villarino. He testified he asked why Villarino was talking to them in that matter, telling him that they (Avila and Amaya) had never bothered him.[180/]

Because the lettuce harvest was winding down, this was the last occasion on which Villarino took access. As he recalled, the lettuce harvest ended on November 23.

(2) Analysis and Conclusions

An employer does not engage in unlawful surveillance when its supervisor is present at an unscheduled union meeting in a common living area at the employer's camp even though asked to leave, under circumstances in which the supervisor has as much right

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180. Both Avila and Amaya concede that Villarino spoke disparingly of them and to them before the workers. In that context it is unlikely that Amaya made the temperate response to which he testified. I credit Villarino[1]s version of events and find that Amaya approached at a distance of 15 feet from him brandishing a knife.

as the workers to be in the area.[181/] Here, the evidence is that supervisory personnel customarily ate lunch with their crew. There is no evidence that Villarino's lunch appearance at any particular crew was prescheduled, either as to day or crew. Nor is there any contention the foreman's practice of eating with his crew is inherently violative of section 1153(a). The basics of the fact situation in Caratan and the fact situation in the instant case are not distinguishable. In each, a statutory supervisor was present at a location where he had a right to be and declined to leave upon request when union organizers sought to conduct an unscheduled free-time meeting. If anything, the facts here are stronger for finding no violation than in Caratan. In the instant case, Villarino was able to move the workers away from the supervisor and go on with his meeting. In Caratan, there was no other place to hold the meeting. Avila's conduct on October 27th did not violate section 1153(a).

During Villarino's lunch time access of October 30, 1981, Crew 2 members, followed by Villarino, departed from the general eating area populated that day by several supervisors and members of other crews in order to meet with him during what remained of the lunch break. Two supervisors arrived and sat down among the workers and declined to leave. Their conduct violated Labor Code section 1153(a). Their presence cannot be excused either on the ground they had a right to be there or that they did not intend to interfere with the interaction between Villarino and the crew members. The

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181. M. Caratan, Inc. (1979) 5 ALRB No. 16.

facts do not establish any right in the supervisor to follow his employees and intrude upon their union meeting held during free time, particularly in a situation in which they made a deliberate effort to leave his presence. Moreover, the supervisor's intent is irrelevant. The test is whether his conduct could reasonably be perceived by the workers as an incursion upon their right to communciate with the UFW representative. Clearly the action of Orozco and Hernandez could be expected to be so perceived. Their action violated section 1153(a).[182/]

The only other incident which merits discussion occurred on November 19, 1981. While Avila and Ayala were initially engaged in permissible surveillance, i.e., they had a right to be present, Ayala engaged in conduct violative of section 1153(a) when he brandished a lettuce knife in response to what he perceived to be disparaging remarks. His response was inappropriate under the circumstances; his abortive physical attack on Villarino can be expected to have had a chilling effect upon the willingness of their workers present to exercise their section 1152 rights.

To summarize: Except as discussed above I find the General Counsel has not proved the surveillance allegations in the complaint; therefore I shall recommend that the allegations of paragraphs 13 and 14 be dismissed. With respect to paragraph 12, the evidence establish unlawful surveillance on October 30; and as noted the evidence established an unalleged but fully litigated violation of section 1153(a) on November 19.

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182. E. & J. Gallo Winery, Inc. (1981) 7 ALRB No. 10; Merzoian Bros., et al. (1977) 3 ALRB No. 52.

VII. THE REMEDY

Having found that Respondent San Andrews' Sons failed and refused to bargain in good faith in violation of section 1155.2(a) and sections 1153(a) and (e) of the Act, I shall, pursuant to the provisions of section 1160.3, recommend that Respondent be ordered to meet with the UFW, upon request; to bargain in good faith; and in particular to refrain from unilaterally changing employees' wages or working conditions and from failing and refusing to furnish information relevant to collective bargaining as requested by the UFW; to make whole those employees not hired during the 1980 Imperial Valley melon harvest as a result of Respondent's discriminatorily motivated decision not to have a melon crop in Imperial Valley in 1980;[183/] and to make whole its agricultural employees for the loss of wages and other economic benefits they incurred as a result of Respondent's unlawful conduct plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

Because Respondent manifested a continuing pattern of illicit conduct, I shall recommend that the make-whole remedy commence December 28, 1978, the date upon which Respondent engaged in conduct which, in view of the totality of the circumstances, first constituted an unlawful failure and refusal to bargain in good faith, O. P. Murphy (1979) 5 ALRB No. 63, and continue until such time as Respondent commences to bargain in good faith with the UFW

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183. Respondent had no 1982 melon crop in Imperial Valley. The reasons for that decision were not litigated in this proceeding.

and thereafter bargains to contract or impasse.

The complaint seeks an order requiring that Respondent reimburse the UFW for expenses incurred in negotiations. No argument in support of such remedy was set forth either in General Counsel's or Charging Party's briefs. While Respondent has been found to have violated section 1153(a) and section 1153(e) of the Act, its conduct during the course of negotiations was not so outrageous or frivolous as to warrant the imposition of the UFW's costs of negotiation as a remedy, particularly is this true in view of the manner in which the UFW conducted itself during the course of negotiations. I shall not recommend this remedy.

I shall recommend 'dismissal of the complaint with respect to all allegations thereof in which the Respondent has been found not to have violated the Act.

Upon the entire record, the findings of fact and conclusions of law set forth above, I issue the following:

RECOMMENDED ORDER

By authority of Labor Code section 1160.3, Respondent, Sam Andrews' Sons, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW), the certified collective bargaining representative of its agricultural employees.

(b) Failing or refusing to provide to the UFW, at its request, information relevant to collective bargaining.

(c) Making crop decisions for other than business reasons

and having as an object retaliation for engaging in union or protected concerted activities.

(d) Instituting unilateral changes with respect to its employees' wages without first notifying the UFW and affording the UFW, as the certified collective bargaining representative of Respondent's agricultural employees, a reasonable opportunity to meet and bargain with Respondent as to such proposed changes.

(e) Engaging in surveillance of union organizers and workers during lunch break union meetings or creating the impression it is engaged in such surveillance.

(f) 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) Rescind, upon request of the UFW, the certified bargaining representative of Respondent's agricultural employees, the wage increases given in June 1980, October 1980, and September 1981.

(b) Upon request, meet and bargain collectively in good faith with the UFW, as the exclusive certified collective bargaining representative of its agricultural employees, and if agreement is reached, embody such agreement in a signed contract.

(c) Make whole its agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's refusal to bargain and by its failure to bargain in

good faith for the period from December 28, 1978, and thereafter until such time as Respondent commences good faith bargaining with the UFW which leads to a contract or a bona fide impasse; such amounts to be computed in accordance with the Board's Decision and Order in Lu-Ette Farms,Inc. (1982) 8 ALRB No. 55.

(d) Make whole all agricultural employees who lost work as a result of Respondent's decision to discontinue its 1980 cantaloupe crop for all economic losses suffered by them; such amounts to be computed in accordance with Board precedent, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 for the period from ten days after the date of issuance of this Decision and Order until: (1) the date Respondent reaches an agreement with the UFW regarding its decision; or (2) the date Respondent and the UFW reach a bona fide impasse; or (3) the failure of the UFW to request bargaining about the decision within ten days after the date of issuance of this Order or to commence negotiations within five days after Respondent's notice to the UFW of its desire to so bargain; or (4) the subsequent failure of the UFW to meet and bargain in good faith with Respondent about the matter.

(e) 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 relevant and necessary to a determination, by the Regional Director, of the makewhole period and the amounts of makewhole and interest due under the terras of this Order.

(f) Sign the Notice to Agricultural Employees attached

hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(g) Provide a copy of the attached Notice, in all appropriate languages, to each employee hired by Respondent during the twelve month period following the date of issuance of this Order.

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Recommended Order, to all agricultural employees employed by Respondent at any time subsequent to December 2B, 1978 until such time as Respondent commences good faith bargaining with the ur,7 which leads to a contract or a bona fide impasse.

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

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

nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(k) Notify the Regional Director in writing, within 30 days 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: July 29, 1983

ROBERT LEPROHN
Administrative Law Judge

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 have violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by unilaterally changing our employees' wages without notifying or offering the United Farm Workers of America, AFL-CIO (UFW) a change to bargain, by refusing to provide bargaining information to the UFW, by discontinuing our 1980 Imperial Valley cantaloupe operation in retaliation for worker's exercise of rights granted by section 1152 of the Act; and by engaging in unlawful surveillance of employees and UFW organizers. 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 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 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, on request, provide information relevant to collective bargaining to the UFW.

WE WILL NOT make any change in your wages or working conditions wihtout first notifying the UFW and giving them a change to bargain on your behalf about the proposed changes.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement. In addition, we will reimburse all workers who were employed at any time during the period from December 28, 1978, to the date we began to bargain in good faith for a contract for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW plus interest.

WE WILL NOT eliminate the production of any crops except for business reasons, and-we will not fail or refuse to bargain with the UFW regarding the effects of such a decision upon bargaining unit members.

SAM ANDREWS' SONS

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 92243. 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.