STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BRUCE CHURCH, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos . 79-CE-24-EC 82-CE-97-EC 82-CE-98-EC 82-CE-102-EC 82-CE-123-SAL 11 ALRB No. 9

DECISION AND ORDER

On May 2, 1984., Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Decision. Thereafter, the Respondent and the Charging Party each filed exceptions and supporting briefs. Respondent filed an answering brief as well.

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

The Board has considered the record and the ALJ ' s Decision in light of the exceptions and briefs and the answering brief and has decided to affirm the rulings, findings, and conclusions of the ALJ only to the extent consistent herewith.[2/]

The ALJ properly found that following February 6, 1979,

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

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

Respondent lawfully ceased providing bus transportation from Calexico to Holtville due to mass demonstrations which prevented employees from boarding buses in Calexico. We affirm his conclusion that implementation of the change was not unlawful since it was justified by Respondent's concern for the safety of employees and their property.

In the wake of strikes against a number of growers in the Imperial Valley in early 1979 by the United Farm Workers of America, AFL-CIO (UFW or Union), mass demonstrations in Calexico prevented employees from boarding Respondent's buses on February 6. Respondent's support services manager Robert Shuler observed UFW negotiating committee member Octavio Orajo physically obstruct the entrance to one bus and saw union negotiator David Martinez in the crowd. Shuler reported the incident to Respondent's vice-president Mike Payne. Payne then concluded that the most prudent course would be to relocate the pick-up point from Calexico to a fenced-in yard in Holtville where the employees and their cars would be better protected.

Respondent and the Union were actively engaged in negotiations at the time of Payne's decision to make the change. Union negotiator Martinez learned of the change in pick-up points from a member of the negotiating committee. He immediately protested to company negotiator Kenneth Ristau who, at the February 8 negotiating session, refused to return the pick-up point to Calexico.

It is clear that Respondent did not notify the Union in advance and did not bargain with it regarding the change in transportation, a mandatory subject of bargaining. This unilateral

change would normally constitute a per se violation of section 1153(e). (Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85.) However, an employer may make a unilateral change in wages or other terms or conditions of employment without bargaining with the union where exigent circumstances exist. (Joe Maggio, Inc. (1982) 8 ALRB No. 72.) Payne's decision to relocate the pick-up site was motivated by a concern for the personal safety of Respondent's employees as well as for the security of its property. Those concerns were justifiable under the circumstances and we conclude that Respondent's action was therefore not unlawful.

We overrule the ALJ's finding that Respondent's subsequent refusal to reinstitute bus service from and to Calexico violated the Agricultural Labor Relations Act (Act). There is no evidence to support the ALJ's finding that the disruptions ceased on March 18, 1980, or that Respondent refused to reinstitute service from Calexico. The record contains no evidence that the circumstances which gave rise to the change in bus service ever ceased. The ALJ cites the Decision in Bruce Church, Inc. (1983) 9 ALRB No. 74, and states a reference is made therein to March 18, 1980, as the time when Respondent first began to receive unconditional offers to return from strikers and from that he infers that disruptions ceased on that date. However, the fact that some workers made unconditional offers to return to work cannot support an inference that the Calexico disruptions ceased. Further, the record is devoid of any evidence regarding the bus situation subsequent to February 8, 1979. Absent such evidence, we find that General Counsel has not met its burden of establishing a violation of section 1153(e). Similarly,

there is no evidence that anyone who participated in the strike was later deprived of bus service so as to support a finding of a violation of section 1153(c).

With respect to the allegation of discriminatory discharge of broccoli crew members, we affirm the ALJ's conclusion that Respondent's conduct with respect to those employees violated the Act. However, a correction in the ALJ's Order is required. In his conclusion, the ALJ finds that Respondent violated the Act by suspending the employees while in his Order he refers to discharging them. The Order should be corrected to conform to his finding of suspension which is a more accurate reflection of what actually happened; i.e., the workers were told they were being fired, they were given tickets saying they were suspended pending termination, and the Respondent ultimately determined to suspend them for 48 hours.

ORDER

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

1. Cease and desist from:

(a) Suspending, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any other term or condition of employment because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act), or otherwise exercised his or her rights under the Act.

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

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

(a) Make whole the following employees suspended in November 1982 for all losses of pay they have suffered as a result of the discrimination against them:

Jesus Alcala	Medrado Magana
Ruben Alteaga	Joe Martinez
David Esparza	Ramon Maya
Alberto Flores	Abram Ramos
Pedro Gomez	Roberto Rico
Arturo Madrigal	Cesar Torres

Such amounts are 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.

(b) 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 backpay period and the amounts of backpay and interest due under the terms of this Order.

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

(d) Mail copies of the attached Notice, in all

appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the year commencing November 1982.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on all 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.

(f) 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 who work in Respondent's broccoli crews 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.

(g) 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

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report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: March 20, 1985

JYRL JAMES-MASSENGALE, Chairperson

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro and Salinas Regional Offices, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Bruce Church, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by suspending twelve workers for protesting their working conditions. 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 a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

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

WE WILL pay Jesus Alcala, Ruben Alteaga, David Esparza, Alberto Flores, Pedro Gomez, Arturo Madrigal, Medrado Magana, Joe Martinez, Ramon Maya, Abram Ramos, Roberto Rico and Cesar Torres backpay for the money they lost during November 1982.

WE WILL NOT, in the future, suspend any employee for protesting over working conditions.

Dated: BRUCE CHURCH, INC.

By: _____
Representative Title

By:

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 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161

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

DO NOT REMOVE OR MUTILATE.

11 ALRB NO. 9

CASE SUMMARY

Bruce Church, Inc.
(UFW)

11 ALRB No. 9
Case Nos. 79-CE-24-EC,
et al .

ALJ DECISION

The ALJ found that following February 6, 1982, Respondent lawfully ceased providing bus transportation from Calexico to Holtville due to mass demonstrations which prevented employees from boarding buses in Calexico. While he held that Respondent was not under any obligation to bargain about the change, while the conditions which gave rise to the decision to make the change prevailed, he concluded that it had been five years and the "exigent circumstances" which excused the failure to bargain were no longer in effect. Thus, he found Respondent's failure to reinstitute bus service violated the Act.

No violation was found by the ALJ in Respondent's closing of a labor camp for which it lost the lease as the Union did not discuss the problem with Respondent nor specifically request negotiations regarding the effects of the loss of the camp. The ALJ also found that the General Counsel failed to establish that Respondent harassed and pressured Guadelupe Arvizu because of her union activity.

While finding that allegations of direct bargaining with broccoli crew members and unilateral changes in their working conditions should be dismissed, the ALJ found a violation in Respondent's discharge or suspension of 12 members of the broccoli crew because they protested their assignment to "second cut" a field which had been first cut by another concern.

BOARD DECISIONS

The Board affirmed the ALJ's finding that Respondent lawfully ceased providing bus transportation since it was justified by Respondent's concern for the safety of employees and their property; however, it overruled his finding of a violation in Respondent's refusal to reinstate bus service as there was no evidence in the record regarding the bus service subsequent to the change.

The ambiguity in the ALJ's decision regarding the broccoli crew was corrected with the Board finding that the crew members were suspended. In all other respects the ALJ's findings were affirmed.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BRUCE CHURCH, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos, 79-CE- 24-EC 82-CE- 97-EC 82-CE- 98-EC 82-CE- 102-EC 82-CE- 112-SAL 82-CE- 123-SAL 82-CE- 134-SAL 83-CE- 54-SAL

Appearances:

Devon Ann McFarland, Esq.
Norman K. Sato, Esq. for the
General Counsel

William D. Claster, Esq..,
Gibson, Dunn & Crutcher for
Respondent

Clare McGinnis for the
United Farm Workers of
America, AFL-CIO [1/]

Before: Matthew Goldberg
Administriative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

1. Ms. McGinnis did not enter a formal appearance until the third day of this four-day hearing.

I. STATEMENT OF THE CASE

Beginning February 6, 1979, the United Farm Workers of America, AFL-CIO (hereafter referred to as the "Union") filed a series of charges and served them on Bruce Church, Incorporated, (hereafter referred to as "respondent" or "the company"). The dates that these charges were filed, and when they were served, are as follows:

Charge Number	Date Filed	Date Served
79-CE-24-EC	2/6/79	2/6/79
82-CE-97-EC	5/11/82	5/11/82
82-CE-98-EC	5/11/82	5/11/82
82-CE-102-EC	5/13/82	5/12/82
82-CE-123-SAL	11/4/82	11/4/82

Additionally, certain individuals filed charges and served them on the company, as enumerated below:

Person Filing Charge	Charge Number	Date Filed	Date Served
Manuel Hernandez	82-CE-114-SAL	9/30/82	9/30/82
Arturo Madrigal	82-CE-134-SAL	11/26/82	11/24/82
Joe Matinez	83-CE-54-SAL	4/14/83	4/14/83

The charges alleged various violations of section 1153(a), (c) and (e) of the Act.

Based on charge number 79-CE-24-EC, the General Counsel for the Agricultural Labor Relations Board caused to be issued, on March 22, 1979, the initial complaint herein. Subsequent amendments and consolidated complaints were issued, culminating in the "Second Amended Consolidated Complaint," dated July 15, 1983, which framed the matters to be litigated and determined by this decision. Copies of all charges, complaints and notices of hearing were each duly served on respondent. Respondent timely filed various answers, each denying, in substance, the commission of any unfair labor practices.

Commencing July 27, 1983, a hearing was held before me in Salinas, California.[2/] All parties were given full opportunity to present testimonial and documentary evidence, to examine and cross-examine witnesses, and to submit oral argument and post-hearing briefs. Based upon the entire record in the case, included my observations of the respective demeanors of each witness who testified, and, having read and considered the briefs submitted to me since the close of the hearing, I make the following:

II. FINDING OF FACT

A. Jurisdiction

1. Respondent is and was, at all times material, an agricultural employer within the meaning of section 1140.4(c) of the Act.

2. The Union is and was, at all times material, a labor organization within the meaning of section 1140.4(f) of the Act.[3/]

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2. As the hearing opened, General Counsel moved to dismiss the allegations stemming from charge numbers 82-CE-112-SAL, 82-CE-134-SAL, 83-CE-54-SAL. Said motion was granted, and the allegations were stricken from the consolidated complaint.

3. Respondent's answer, in response to the jurisdictional allegations in the complaint, merely states that "it is engaged in the growing and harvesting of vegetables in various counties of the State of California and other states," while denying "generally and specifically" that it is an "agricultural employer." Similarly, respondent denied the Union's status as a "labor organization," claiming that it lacked sufficient information to form a belief as to the truth of this allegation. These jurisdictional elements all are clearly established by prior adjudications of which I take administrative notice (cf. Ev. Code §451), including 9 ALRB No. 74 and 7 ALRB No. 20. Cases recognizing the Union's status as a labor organization are all too numerous to mention.

B. The Unfair Labor Practices Alleged

1. Cessation of Bus Transporation

Respondent ceased providing bus transportation for its workers from Calexico to Holtville following February 6, 1979. To this date, the service has not been reinstituted.

Respondent would characterize the situation as one where it merely "changed the pick-up point" at which workers gathered to be transported to the fields. However, in practical effect, respondent's workers, since the date above, have been deprived of the benefit of free transportation from Calexico to Holtville. According to Mike Payne, respondent's general manager, "most" of the members of the twenty-three crews employed at the time were transported to the fields in that manner.

Prior to the cessation of this bus service, the workers gathered at various pick-up points in Calexico and boarded the company buses which would stop there. As is commonly known, during the beginning of 1979, the Union struck a number of growers and packers who had fields and/or harvesting operations located in the Imperial Valley.[4/] It formally declared a strike against respondent on February 9, 1979. However, intermittent work stoppages, or "rolling strikes," had occurred at the respondent's premises beginning on February 5.

Strike activity in the Imperial Valley, generally, in the

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4. Should common knowledge not suffice per Evidence Code section 451(f), the strike and conduct occurring during it are we11-documented in Bruce Church, Inc._ (1982) 9 ALRB No. 74; Mario Saikhon (1982) 8 ALRB No. 88; and Admiral Packing (1981) 7 ALRB No. 43.

early months of 1979 was marred by outbreaks of violence: mass demonstrations and rock throwing accompanying certain picketing, rushing of fields by large numbers of strikers, and individuals being prevented by demonstrators from boarding company buses belonging to this respondent as well as others. The Union's strike activities became subject to restraining orders, based in part on the court's concern, reflected in the injunction papers, that the County's law enforcement capabilities were inadequate to handle potentially massive disturbances, and prevent possible damage to lives and property. It should be emphasized, however, that no evidence was adduced herein of any actual violence involving respondent occurring prior to cessation of bus service from Calexico. The overall level of Union misconduct which took place at Bruce Church during the 1979 strike was found by the ALJ in 9 ALR3 No. 74 not to rise to the level of that shown in Admiral Packing, supra, (9 ALRB No. 74, ALJD at p. 77), and was not considered a defense to the general refusal to bargain charges in the earlier Bruce Church case.

It was in the context of the Imperial Valley disturbances, somewhat, that Mike Payne, respondent's vice president and general manager, determined that the bus service from Calexico be discontinued. General Counsel seeks to minimize the impact of the disruptions and outbreaks of violence occurring during those days by, at various times, ignoring the well-established fact that such activities took place; arguing that even if such acts took place, respondent was not subject to them directly; and lastly, contending that if respondent was subjected to certain disruptions, there was

no actual proof that the Union was responsible for them. Such contentions are somewhat disingenuous.

Direct proof was adduced that massed demonstrations, fomented by the Union, prevented workers from boarding company buses on the morning of February 6, 1979. Robert Shuler, then respondent's Support Services Manager, testified that he observed negotiating committee member Octavio Orajo physically obstruct the entrance to one of the company buses that morning. He also saw Union negotiator David Martinez at that time standing in the crowd at the pick-up point, as numerous workers were either dissuaded or prevented from entering the buses. Shuler relayed this information to Payne, who testified that it was the problems with the buses experienced by respondent's workers, as well as the general level of conflict which pervaded the area during those months,[5/] which led him to the conclusion that the most prudent course to follow would be to relocate the pick-up point to a fenced-in yard in Holtville[6/]

That the Union should be held accountable for the mass demonstrations and the preventing of people from boarding the

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5. Only two incidents involving serious strike misconduct which predated the change, one on January 29, 1979 and another on February 4, were utilized by Judge Work as a basis for establishing the need for a restraining order designed to hold the Union's strike activities in check. The judge also relied on other incidents, including the death of Rufino Contreras, occurring after respondent's change in the pick-up point. However, police reports were received in the instant hearing of extensive strike activity and related disturbances in Imperial County occurring in January, 1979.

6. Payne asserted that workers' vehicles might be better protected in this area. When the workers were picked up in Calexico, their vehicles would be parked in unsecured areas near the various pick-up points.

company buses should not be subject to serious dispute. "Actions of union supporters are not ipso facto attributable to the union, absent a showing of some union involvement in or union instigation of the actions of the supporters." (Matsui Nursery (1983) 9 ALRB No. 42 (emphasis supplied); see also Select Nursery (1978) 4 ARLB No. 61; Western Conference of Teamsters (1977) 3 ALRB No. 57.) The Union's involvement in the demonstration is clear, as evinced by the active participation of a member of its negotiating committee, and the acquiesence of negotiator Martinez as the incident unfolded-There is no evidence that the Union sought, at any time, to deter or disavow any of these actions. Judge Work of the Imperial County Superior Court, who issued the Temporary Restraining Order on March 9, 1979 alluded to above, found that the "UFW has exhibited a pattern of massive demonstrations at . . . fields where agricultural activities are taking place, and has shown both an inability, and a lack of desire, to prevent personal injury and property damage to others. In addition, UFW has indicated its intent to overtax the joint law enforcement capability to keep the peace and enforce the law . . . " Such a "pattern," once established, has rendered a union liable for picket line and other activity in conformity with that pattern, despite the fact that the perpetrators were not acknowledged union agents. (Western Conference of Teamsters, supra.) Similarly, in the instant case, the Union might be responsible for forces which it has set in motion and which it shows no inclination to control.

Respondent and the Union were actively engaged in negotiations during the time of Payne's decision to make the change

in question, having met on the 1st, 2nd, 8th and 9th of February, 1979. David Martinez, chief Union negotiator, testified that he first learned of the change in the pick-up point from a member of the negotiating committee. Martinez immediately protested to company negotiator Ken Ristau about it. According to Martinez, when the Union negotiator asked Ristau to return the pick-up point to Calexico, "he refused."[7/]

It is clear that respondent did not notify the Union in advance regarding the change in the pick-up point; nor did it bargain with the Union over this issue. It is also clear that full or partial transportation to the work site[8/] is a mandatory subject of bargaining, as it involves an "emolument of value" construed by this Board to be included within the definition of "wages." (Sam Andrews' Sons (1983) 9 ALRB No. 24; Martori Brothers (1982) 8 ALRB No. 23.)[9/] Respondent was thus under a general obligation to

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7. Ristau's testimony from a prior hearing, 79-CE-87-SAL, was admitted pursuant to stipulation. In that testimony, Ristau stated that at the February 8 bargaining session he told Martinez that the company decided to move the pick-up point after experiencing the blocking of its buses in Calexico a few days earlier.

8. As previously discussed, the change is not viewed as one simply involving a shift in the location were workers gather to be transported to the fields.

9. Respondent suggests that since no evidence of "hardships on employees, . . . or additional costs" to them was adduced by General Counsel herein, the requisite proof was absent for establishing bus transportation as "wages," and hence a mandatory bargaining subject. As a consequence, the company was relieved of its responsibility for bargaining over same. In Sam Andrews, supra, the Board adopted, sub silentio, the drawing of the inference that bus transportation was an "emolument of value," a similar absence of affirmative proof notwithstanding. As Jackson Browne has noted, "Nobody rides for free." (Browne, "On the Boulevard.")

bargain about any changes regarding transportation arrangements for its workers.

The central issue thus becomes: was respondent relieved of its obligation to bargain over this issue by the problems it experienced directly at its pick-up point, and by the general level of strike-related conflict which existed throughout the Imperial Valley in the beginning months of 1979? Respondent argues that Colace Brothers, Inc. (1980) 6 ALRB No. 56, "is a case virtually on all fours with the instant one." There, in the face of an on-going strike and the threat of violence breaking out, the employer unilaterally decided to alter the method of recalling harvest employees, and the method by which these employees were transported to its fields. The Board determined that Colace Brothers did not violate the Act by failing to bargain over these changes, since "the changes relate solely to Respondent's decision to obtain, and its method of obtaining, replacement workers during its strike. The continuing obligation to bargain during an economic strike does hot extend to an employer's decision to hire temporary replacement workers or to the method by which the employer obtains them."[10/] (6 ALRB No. 56 at p. 3.)

By contrast, Payne made no reference to obtaining replacement workers when he described the rationale for changing the pick-up point. Rather, it was his stated concern for worker safety and property, and undoubtedly also for the security of the company's

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10. In Colace Brothers, the pick-up point was changed from Calexico to El Centro, a location that respondent maintained would be more convenient for the replacement workers, as most of them lived in close proximity to the latter city.

buses, which motivated him to make the change. Viewed in this light, can it still be said that respondent was relieved of its obligation to bargain over what it considered to be protective measures?

This Board has recognized that "exigent circumstances" may relieve a respondent of its duty to bargain over a particular matter, and thus permit a unilateral change in wages or working conditions, without giving rise to a violation of section 1153(e) of the Act. The Board has also noted that "whether any particular exigencies or circumstances will be found to justify an employer's unilateral changes . . . will be decided on a case-by-case basis." (Maggio, et al. (1981) 8 ALRB No. 72.)

In Mario Saikhon, 8 ALRB No. 88, the Board discussed the application within the "exigency" doctrine of NLRB precedent to the effect that "violent or coercive union-sanctioned strike misconduct can so inhibit good faith bargaining that the employer is entitled to condition the continuance of bargaining upon the union's assurance that such misconduct will cease." (See, e.g., Laura Modes Company (1963) 144 NLRB 1592, and cases cited on page 5 of the Saikhon opinion.) It thereby recognized this defense to a refusal to bargain based on an employer's failure to "meet and confer." Among the "basic elements" of the defense cross-referred to by the Board in Saikhon are "where the misconduct was severe, the union was clearly responsible for it, and the employer asserted it as a reason for refusing to meet." (Admiral Packing, supra, ALO decision, p. 68.)

Here, of course, the discussion involves a change in only

one subject within an entire panoply of bargaining matters. The parties were negotiating a contract throughout this period: violence or misconduct was not claimed as the basis for refusing to meet. Nevertheless, an analogy to the failure to "meet and confer" situations may still be drawn. Respondent's negotiators did assert to the Union that the reason that the pick-up point was being changed without bargaining was the company's concern about the buses being blocked. The Union's condonation of, complicity in, and responsibility for the conduct was also established. Regarding the "severity" of the misconduct, the record evidence is scant: work stoppages had occurred in the week prior to the change; the day before the change, workers were prevented from boarding the buses. No actual destruction of property, or physical harm to persons, was established.

However, to insist that actual damage must take place before an employer legally might take steps to avert such damage can only have deleterious consequences. The Act's preamble refers to a "potentially volatile condition in the state" which the Act's promulgation seeks to quell. Surely an employer should not be forced to wait until damage or injury actually occurs before it takes reasonable measures to avoid such consequences. Payne's testimony established that his decision to relocate the pick-up site was motivated by a concern for personal safety as well as the security of property. Given the climate of events at that time, it was a reasonable one under the circumstances.

Additionally, an employer is permitted, during the course of labor strife, to take reasonable steps to protect its business

and insure against predicted economic losses. (See, e.g., Seabreeze Berry Farms (1981) 7 ALRB No. 40; Mackay Radio and Telegraph (1938) 304 U.S. 333; N.L.R.B. v. Brown (1965) 380 U.S. 278.) Despite the absence of testimony regarding the necessity of changing the pick-up point, as per Colace Brothers, in order to secure a "replacement" work force, an inference can be drawn that the change was required so that respondent might be able to bring its own non-striking employees to work. Payne's decision can thus be viewed as permissible not only because he sought to prevent harm to persons and damage to property, but also because it was a means by which respondent might ensure that it had a work force to harvest its crop, as opposed to one which was prevented from utilizing company transportation to the work site. Respondent was not, therefore, under any obligation to bargain about the change in the pick-up point, at least insofar as the conditions which gave rise to the decision to make the change prevailed.

However, more than five years have elapsed since respondent provided bus service from Calexico to its Imperial Valley fields. Respondent's workers have been deprived of the benefit of free transportation of the between fifteen and twenty miles from Calexico to Holtville, and return, since they went on strike in 1979. This benefit, as noted, is considered an "emolument of value." Bargaining is required, in ordinary circumstances, over any changes involving this "mandatory subject."

Contrary to respondent's assertions, the obligation to bargain is not extinguished as a result of union misconduct, but is merely suspended. (See Arundel Corp. (1974) 210 NLRB 525.) The

"exigent circumstances" which gave rise to the unilateral change, and which excused the failure to bargain concerning its implementation, are no longer in effect. Respondent's refusal to reinstitute bus service from and to Calexico after the volatile conditions in the Imperial Valley subsided thus not only violates section 1153(e) (see Sam Andrews' Sons, supra), but also violates section 1153(c) of the Act: it can easily be viewed as penalizing employees, by eliminating a previously-enjoyed benefit, for exercising their protected right to strike. (See Julius Goldman's Egg City (1980) 6 ALRB No. 61; Akitomo Nursery (1977) 3 ALRB No. 33.)

Accordingly, it is determined that respondent violated sections 1153(a), (c) and (e) of the Act by refusing to reinstate bus transportation from Calexico after the disruptions occasioned by the 1979 strike had ended.[11/]

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11. In 9 ALRB No. 74, reference is made to March 18, 1980, as the time when respondent first began to receive "unconditional" offers to return to work from its strikers. Since strikers evinced a willingness to return as of that date, it is inferred that disruptions all but ceased by that date. The remedy shall therefore commence from that time.

2. Santa Maria Labor Camp Closure

By letter dated April 2, 1982, respondent officially notified the Union that the lease would not be renewed for the facility it utilized as a labor camp for its lettuce harvest workers in Santa Maria. Respondent had been using the camp since 1976. The property, jointly owned by three members of the Ferrari family, had been the subject of two successive three-year lease arrangements. The second three-year term expired on February 28, 1982.

Prior to that actual expiration date, Roy Ferrari, one of the co-owners, informed respondent that the lease would not be renewed. According to his testimony, which was basically uncontroverted, in mid-January, 1982, Ferrari telephoned Alfredo Santos,[12/] who works for respondent in their Guadalupe office. Ferrari asked Santos to meet him at the camp and open it up so that it might be inspected by two of the Texeira brothers, who were prospective lessees.[13/]

Following the visit to the camp, Santos telephoned Ray Serna, who is in charge of respondent's labor camps, and asked him whether the company was going to renew the Santa Maria lease. Within a few days thereafter, Ferrari received a call from someone in respondent's Salinas office.[14/] It was at this time, estimated

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12. Santos was stipulated to be a supervisor and hence an agent of respondent. His actual title was ranch manager in Santa Maria.

13. Santos, not Ferrari, had the key to the camp.

14. Ferrari was unable to recall his name.

by Ferrari to be about two days after the visit by the Texerias, that Ferrari informed the company that, because of dissatisfaction with the tardiness of the lease payments, the lease would not be renewed.[15/]

Santos stated that he attempted to find alternate accomodations in March, to no avail. A company internal memorandum, dated March 23, 1982, informs various supervisory personnel that the former Santa Maria labor camp facility would no longer be available, and that Ray Serna and the Field Personnel Representatives should provide assistance to those "who need housing and who specifically request such service."

The camp had actually been used to house one lettuce ground crew, numbering between thirty and thirty-five individuals for the months between April and November. There had been no cost to the workers for the housing, nor for any of the utilities used there. Arnulfo Noriega, a member of that ground crew, stated that in 1982, alternative housing in Santa Maria cost him thirty dollars per week.

Prior to their arrival in the Santa Maria area, some of respondent's harvest workers who would be working there were employed by the company in Arizona. These employees were apprised

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15. Santos testified that a few days after the Texeiras' visit he called Roy Ferrari to ask him about the lease. Santos stated Ferrari's response was "he didn't have any intentions at that time," and denied that Ferrari said anything further about renewing or not renewing the lease. Santos also stated that the first he heard about the lease not being renewed was in the beginning of March, when Serna came down to Guadalupe. Santos "knowledge" and testimony notwithstanding, at all events, based on Ray Ferrari's account, I find that respondent was placed on actual notice that the lease would not be renewed no later than February 1, or at least two months prior to the official notification to the Union.

by foremen in Arizona of the housing situation about two weeks before they were scheduled to arrive in Santa Maria.[16/] The Union itself, as indicated above, was formally made aware of the non-availability of the camp by letter to Peter Cohen, the Union's local representative, dated April 2.[17/] Cohen spoke to David Martinez, the Union negotiator, about the letter, then forwarded it to him at Union headquarters in La Paz.

The letter itself, sent by Robert Shuler, after notification of the non-renewal of the lease, states that employees seeking housing should be referred to Ray Serna. The letter closes: "Should you have any questions or a desire to talk further about this matter, please feel free to call me."

The Union did not discuss the problem with respondent, nor specifically request negotiations regarding any of the effects of the loss of the labor camp lease. On May 11, 1982, the Union and the company resumed collective bargaining for a complete contract after a hiatus of about eight months. According to Martinez, because the parties had not met for this period, the Union "put together an extensive request for information, such as we put together when we are about to start negotiations with an employer." That request was hand-delivered to the company at the bargaining session.

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16. As noted, the company, on March 23, circulated a memo to supervisory personnel regarding the non-renewal of the labor camp lease.

17. Shuler had, on prior occasions, discussed and resolved work-related problems with Cohen.

The "information request" is an exceedingly generalized one. Among the items contained in the request was the inquiry: "5. Does the Company provide housing, either camp housing or family housing, for any employees. If so, to whom, where, on what terms, and what are the requirements for eligibility." Martinez maintained that this general request served as the Union's response to the April 2 letter from Shuler to Cohen.

Despite the clear language of the request, Martinez asserted that the May 11 letter was "asking for information regarding this closure and any other changes the company may have made." No such specific reference is contained in the letter. Further, although the request, in other portions, solicits information regarding wages and hours worked for a four-year period and information for a two-year period on overtime wages, holiday and vacation pay, no time spans are noted for the query regarding housing. In short, no benefit history was requested. Therefore the language quoted above could not arguably support the inference that the Union was asking about "changes" in regard to housing[18/] in its

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18. Notably, on direct examination Martinez provided the following response:

> Q: (By Ms. McFarland) After you talked to Peter Cohen, and you had gotten the letter, did you do anything specifically regarding the Santa Maria housing issue?
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> A: No.
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> Q: Why not?
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> A: The change was already made. It was too late. We should have negotiated it before it happened.

Martinez could not remember whether anything specifically was said at the May 11 meeting regarding the closure of the Santa Maria camp.

May 11 request.

a. Analysis and Conclusions

General Counsel alleged in its complaint that respondent "ceased providing housing for its workers near its Santa Maria operations without notifying and bargaining with the UFW." At the pre-hearing conference and at the hearing itself, however, General Counsel made clear that it was alleging that respondent was refusing to bargain about the "effects" of the camp closure.

Respondent initially contends, in essence, that since the decision not to renew the lease was not made by the company, it has no obligation to bargain over the "effects" of the decision. Citing Cardinal Distributing Co., Inc. (1983) 9 ALRB No. 36 and First National Maintenance Corporation v. N.L.R.B. (1981) 452 U.S. 666, it argues that "effects bargaining" has been mandated only where an employer, motivated by economic considerations, has decided to impliment its own exclusive decision to relocate, subcontract, or partially close.

The issue of who made the decision which had an ultimate effect on unit employees begs the question. The underlying rationale in Cardinal Distributing and First National Maintenance was that bargaining over management decisions substantially affecting employment availability should be required only where the benefit to the collective-bargaining process and labor management relations outweighed the burden placed on the conduct of the particular business. Resolving this balancing test in favor of management having unfettered discretion regarding partial closures, the Supreme Court and the Board nonetheless concluded that the

employer was obligated to bargain over the effects of the partial closure decision on its unit employees.

In the instant case, the issue is not one having a "substantial impact on the continued availability of employment." (First National Maintenance Corp. v. N.L.R.B., supra, at 679.) No "balancing test" is required, since the "burden" of bargaining about this issue on the conduct of the business here is non-existent. Rather, the problem should be examined in terms of whether respondent is obliged to bargain over the "effects" of a discontinuation of an employee benefit or, more simply, over the discontinuation of a benefit. That question must be answered in the affirmative.

Company-provided housing is generally considered an "emolument of value" and hence a mandatory subject of bargaining, particular where, as here, the accommodations are economically advantageous to employees. (See Morris, Developing Labor Law, 2d Edition, pp. 792-793 and cases cited therein; Filice Estate Vineyards (1978) 4 ALRB No. 81; see also Pacific Mushroom Farms (1981) 7 ALRB No. 82; cf. Cattle Valley Farms (1982) 8 ALRB No. 54.) Unilateral changes by employers involving such employee benefits ordinarily would constitute a per se refusal to bargain. (See, generally, N.L.R.B. v. Katz (1962) 369 U.S. 736; Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 83; Pacific Mushroom Farms, supra.) Here, however, the decision to discontinue company-provided housing did not rest solely with respondent's management. The Ferraris, not respondent, determined not to renew the lease.

Nevertheless, the essential factor is that a number of

respondent's employees were the beneficiaries of rent-free accommodations while working in the Santa Maria lettuce harvest. Regardless of the actions of third parties which led to the eventual result, respondent's workers lost a benefit which they had previously enjoyed. Respondent was thus obligated to bargain about this loss, or, more properly, this change in working conditions.[19/]

Respondent did inform the Union, however, that housing would no longer be available for the Santa Maria workers. Admittedly, such notice was overdue,[20/] particularly in view of the fact that, inferentially, respondent was aware no later than February 1 that the camp lease would not be renewed.[21/] General Counsel argues that the giving of such an eleventh-hour notification was tantamount to a refusal to bargain, since the loss of the lease was a fait accompli, and the workers would be arriving within a few

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19. As noted, General Counsel would characterize the matter as one involving bargaining over the "effects" of the loss of the Santa Monica labor camp lease. It is simpler to view the issue as one where a benefit has been discontinued.

20. The company's letter to the Union, as will be recalled, was sent on April 2.

21. As recited above, the actual expiration date of the lease was February 28. Mike Payne did not write the memo to supervisors regarding the camp until March 23, despite his having learned of the loss of the lease, according to his testimony, "toward the end of February, or early March." He stated that his reasons for not doing so were that he "had no earlier communciation that [the lease] would not be renewed again, . . . there was some conflicting information as to whether we really were going to lose it or not and . . . I felt I had an obligation to seek alternative housing for the people . . ." Despite Payne's assertion that he might not have been told about the lease cancellation, respondent's agents Serna and Santos were aware of this fact. Regarding the "conflicting information," such testimony was uncorroborated, self-serving and completely controverted by Ferrari. Hence, it is not to be credited. Alfreda Santos, however, did testify that he looked for alternative sources of housing.

short days[22/] to begin the harvest. Accordingly, it is argued that little could be accomplished by bargaining, in the few days that remained, to alleviate the housing situation.

However, respondent did specifically invite the Union to discuss the matter. While actual living accommodations might not result from such discussions, other avenues might have been explored, such as providing for a housing allowance, or even an increase in the pay-rate to offset the loss of the benefit to the workers. At this point, one can only speculate on what might have been achieved through bargaining.

According to David Martinez, nothing was done "specifically regarding the Santa Maria housing issue" because "the change was already made. It was too late. We should have negotiated before it happened." When asked further, on cross-examination, why the company was not contacted regarding the housing issue, despite Schuler's invitation to discuss the matter, Martinez gave a number of evasive responses. Included among these were: "the letter wasn't directed to me"; "the company had been bargaining in bad faith for four years" and that the general request for information, discussed above, submitted by the Union on May 11, served as a response on the closure issue.[23/]

A failure to object to unilateral action has been held insufficient to constitute a waiver of bargaining rights regarding

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22. Respondent's Santa Maria lettuce harvest actually began on April 12.

23. Owing to the absence of affirmative proof, it is determined that no mention of the closure was made at the May 11 meeting.

that action. Such a waiver, in order to be effectual, must be "explicitly and unequivocally" conveyed. (Masiji Eto (1980) 6 ALRB No. 20. Strictly speaking, however, the issue here is not one of "unilateral" action, since it was a third party which forced respondent's hand. Respondent manifested a willingness, as opposed to a "refusal," to discuss the loss of company provided housing, or, as General Counsel would have it, the "effects" of this third-party decision.

In 0. P. Murphy Produce Co., Inc. (1981) 7 ALRB No. 37, at p. 24, the Board noted that a union, after receiving notice of a proposed change in working conditions, must demonstrate, in some fashion, "a desire or willingness to bargain over it." I have found that the Union's general request for information delivered at the May 11 meeting could not be construed, in any sense, as a response to the company's invitation to discuss the closure of the Santa Maria camp. Respondent may not be held liable for the failure of the Union, after notification, to present any demands to it on this issue. (See Triplex Oil Refining (1971) 194 NLRB 500.) A Union must exercise a degree of diligence in preserving its representational rights, or it may run the risk of waiving the right to allege that an employer has acted unlawfully. It "cannot be content with merely protesting the action or filing an unfair labor practice over the matter." (Citizens National Bank of Willmar (1979) 245 NLRB No. 47; see also I.L.G.W.U. v. N.L.R.B. (C.A. D.C. 1972) 463 F.2d 907; Sam Andrews' Sons, supra.)

Undoubtedly, the Union here was pre-occupied with the general state of negotiations and its greatest concern, at the time

of these events, was the resumption of collective bargaining after a not insubstantial hiatus. A myriad of issues needed to be explored as part of that process. Perhaps this particular item became submerged under the weight of other, more wide-ranging considerations. This is not to say, however, that respondent is to be liable for the lack of attention the Union paid to this matter. The company, late notice notwithstanding, did not manifest a "refusal to bargain" about the closure of the Santa Maria camp. Rather, it invited the Union to discuss the issue. The Union did not pursue the invitation.

Accordingly, it is recommended that this allegation be dismissed.

3. "Harassment" of Guadalupe Arvizu

General Counsel alleged that since March, 1982 Union supporter Guadalupe Arvizu has been subjected to pressure and harassment by respondent's agents. The evidence preferred in support of the allegation attempted to show that the pressure, etc. assumed two basic aspects: first, that Arvizu has been cautioned by her foreman, Manuel Guizar, not to speak about the Union, and has been interrupted by him when she discusses Union matters with her fellow workers; second, that foreman Guizar has not permitted Arvizu to either change functions (from cutter to packer) or shift sides of the machine on which she is working.[24/]

Arvizu has been visibly active in Union affairs. She participated in strike activities during 1979 and performed picket duty. More recently, in March 1982, she was a Union observer for a representation election held at one of its Arizona harvesting sites. She has also served as a member of the Union negotiating committee, and has attended negotiation sessions on numerous occasions between May and November of 1982.

In addition to being a prominent supporter of the Union, Arvizu is no stranger to Board proceedings. The parties stipulated that charges were filed on her behalf by the Union in seven distinct

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24. The type of lettuce cutting machine used by respondent basically resembles an airplane. Cutters work behind the "wings," generally, and put the lettuce on a conveyor. (Four cutters also walk in front of the machine to remove the lettuce which would otherwise be run over by the machine's wheels.) The cutters on one side only harvest lettuce from one bed (either to the right or the left). Thus, if a cutter were to stay on that side throughout the day, it would necessitate turning only in one direction, and increase fatigue arising from twisting and bending solely in that direction.

situations. She has been called as a witness by either the General Counsel or the Union in five separate cases, including the present one. Two Board decisions, 9 ALRB No. 74 and 9 ALRB No. 75, treat allegations of discrimination and harassment directly involving this employee.[25/]

General Counsel relied solely on the testimony of Ms. Arvizu to substantiate the allegations which involved her. While the testimony of a sole witness can certainly suffice to support the finding of a violation, there may be a tendency, where the personal conduct of the witness is concerned, for the testimony describing that conduct to be somewhat self-serving. As will become apparent in the discussion of her testimony which follows, Arvizu displayed a tendency to engage in hyperbole in her depiction of "problems" occurring in the crew. Some of the accounts which she presented failed to comport with the realities of her work situation, even as she herself portrayed it. Most importantly, not one member of her crew offered any testimony to support her claims: to the contrary, crew members almost universally contradicted Arvizu's statements. In short, Arvizu[1]s credibility was so fundamentally called into

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25. In 9 ALRB No. 74, allegations concerning Avizu were dismissed owing to inadequacy of proof and problems with credibility. Additionally, the claim that Arvizu was given more arduous work for discriminatory reasons was dismissed on the basis of a business justification. In 9 ALRB No. 75, the ALO, resolving credibility conflicts in her favor, found that she had been told to stop talking about the Union and warned that she would be issued a disciplinary notice if she persisted. Regarding an allegation involving harassment attributable to discrimination based on her Union activities, the ALO was unable to determine, on the basis of the record evidence, whether the "harassment" was unlawfully motivated or whether it was because of foreman Guizar's "personal animosity toward Arvizu or a mutual incompatibility."

question that the probative force of her testimony is greatly diminished. General Counsel has not proven the allegation under consideration by a preponderance of the evidence because there cannot be sufficient credence attached to Arvizu's testimony to permit it to support a finding.

Guadalupe Arvizu had been employed by respondent for about ten years as of the date of the hearing. For the three years immediately prior to it she has worked in crews supervised by foreman Manuel Guizar. She described her function as a "cutter" working in a lettuce machine crew. The crew itself contains thirty-two workers: twelve cutters, twelve wrappers, four packers, two "lifters" and two closers. As previously described, the lettuce machine resembles an airplane. Four cutters and six wrappers work on each "wing." Arvizu stated that she works on the left "wing" at cutter position number four.

Arvizu maintained that she "always" talked about the Union, "almost every day." The specific topics varied, depending on then current events: the Union election in Arizona; the progress of negotiations; or, general information about union benefit programs, such as medical coverage. Arvizu testified that she would regularly be asked questions on these matters by fellow workers: she did not offer any information on Union matters that was not solicited.

Arvizu claimed that she has not been able to finish her conversations dealing with the Union. The foreman would always interrupt her:

> A: (By Ms. Arvizu) Sometimes I've been speaking about the union, of our rights, and he says to do my work, to not be talking about that.

Q: (By Ms. McFarland) Now, you said that you talked almost daily about the union. How often would Mr. Guizar interrupt you?

A: Well/ almost all day, because I am almost all day active, speaking.

Q: Since March of 1982, how often has Mr. Guizar stopped you from talking about the union?

A: Well, he is almost always stopping me from speaking about the union.

Q: When he stops you from talking about the union, does he do anything?

A: Yes.

Q: And what is that?

A: He stands there, right nearby. He's standing there, and sometimes he calls my attention.

However, according to Ms. Arvizu, when the topic of conversation is something other than one involving the Union, the foreman never interrupts, and often joins in. Arvizu has never heard Guizar tell anyone else in the crew to stop talking. She recalled an incident three months prior to the hearing: "I was speaking of the union, about if we had a union -- we would have a good deal, good benefits -- and Manuel went and said to me not to be speaking of that . . . . He said, 'Don't be talking.' And I said, 'Why shouldn't I be talking?' and he said, 'Because I work for the Company and shouldn't be talking of that . . . . The Company orders me that you not speak of that.'"

In support of the second aspect of the "harassment" allegation, Arvizu averred that her foreman, Guizar, does not permit her to exchange places with a wrapper. In other words, Arvizu claimed that she is forced to cut lettuce all day, unlike her fellow workers on the machine: wrappers and cutters (other than Arvizu)

generally exchange functions, some times as often as every two hours. This relieves the tedium and physical strain of the work.

Additionally, Arvizu maintained that Guizar did not permit her to change "sides" or "rows," again unlike his purported treatment of her co-workers. Arvizu testified that she cuts only on the right row, which causes her to spend the entire work day twisting and bending to that particular side. She asks Guizar to change "almost . . . daily." He has not let her do so since March of 1982. When she does make a change of her own accord, Guizar, she stated, tells her not to do it, and she goes back to her original position behind the machine.

Over the course of her cross-examination, Arvizu herself provided several indications that her testimony was not to be taken at face value. Initially, she indicated that the "wings" of the machine on which she works are from twelve to fifteen feet long. The machine's motor, although located in front of the "wings," is somewhat noisy. Arvizu, and presumably her co-workers, wear protective clothing, including a hat and a bandana, which covers her face, partially, and her ears and mouth. Despite all of the foregoing impediments to aural clarity, Arvizu steadfastly maintained that Guizar interrupts every conversation she has about the Union, while neglecting to do so when she speaks of anything else. Thus, Arvizu would have one believe that the foreman can hear the contents of every discussion she is engaged in, and selectively interrupt these conversations.[26/]

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26. Arvizu herself admitted that she could not hear workers on the other wing speaking; nor could she see what Guizar was doing at every monment during the work day.

Arvizu speaks about the Union a great deal, so much so as to appear inordinate. By her own estimate, she does so both morning and afternoon, on each and every work day. As noted, Guizar interrupts every conversation on this particular subject, even though part of his job is to walk around the entire crew to make sure that they are doing their work properly.[27/]

Other workers, Arvizu claimed, always start these conversations "because they don't have benefits." Among the workers named by Arvizu as participating in these discussions are "Micaela," "Gabriel," "Chabela," "Veronica," "Elva," "Noemi," "Sylvia," "Lupita," and "Mani."[28/] According to Arvizu, each of them has, at some point since March 1982, asked her about the Union and its benefits. They do so at the rate of three or four times per day. "Sometimes they [the conversations] last five minutes or ten minutes, because the foreman comes over right away and interrupts."[29/] The worker also testified that there is a rule that people on the machine are allowed to converse as long as it does not interfere with their work.

Regarding Arvizu's assertion that the foreman does not allow her to exchange jobs with a wrapper, the worker claimed on cross-examination that, since March of 1982, she has only wrapped

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27. Arvizu admitted that when the foreman is over by the other "wing" she cannot hear what he is saying.

28. Arvizu, in her direct examination, also referred to a Maria Torres and "Jorge" as two individuals with whom she discussed union benefits.

29. The foreman comes so often to interrupt, Arvizu stated, that she cannot remember how many times he has done so.

lettuce twice. "Almost daily" Arvizu attempts to change with one of the wrappers, and "almost daily," Guizar denies her permission.

Similarly, Arvizu claimed that she tries to change cutting positions "daily," and Guizar, "every day," refuses her permission. "Others cut wherever they like, and he never says anything." In total, Arvizu asks to change positions, as well as change functions, at each break, or four times per day, and Guizar purportedly does not allow her to do so.

When Guizar himself was called as a witness, as one might expect, he refuted many of the critical assertions made by Arvizu. The foreman reiterated that talking among the workers is permitted during work hours as long as it does not interfere with their work. He noted that Arvizu often speaks about the Union, and that he has never told her not to. In fact, the foreman claimed never to have told Arvizu to stop talking about any subject. However, when Arvizu tries to engage him in a conversation about the Union, he demurs.

Guizar stated that at times Arvizu works as a wrapper, trading places and functions with a co-worker. He never denies her permission to do so. Further, Guizar testified that the cutters who work on one side of the machine remain on that side, and always cut from the beds on a particular side of a row. He denied that Arvizu has ever asked him if she could change machine sides or cut from the opposite beds.

Despite the dissection of the foreman's cross-examination by the General Counsel in her brief, I am unable to conclude, as she asserts, that his answers were evasive, inconsistent, indirect, or indicated that, overall, his testimony was not trustworthy. To

illustrate her point, General Counsel seized upon testimony he offered at a prior hearing where he claimed to be unaware of Arvizu's Union activities, despite her open involvement with the Union. In the current proceeding, Guizar stated that he did not know if Arvizu was "a Chavista or not." However, he had earlier qualified this statement by asserting that he did not know what a Chavista is, "because a person may speak of Chavez, but I don't know if it (he, she?)[30/] is or not." Similarly, other aspects of his cross-examination, when viewed in their entire context, did not provide as serious a set of conflicts as General Counsel's brief would lead one to believe.

Nonetheless, a thoroughgoing assessment of Guizar's testimony is not altogether critical to resolving the issues herein-It is not a comparison of Guizar's statements to those of Arvizu which forms the basis for concluding that Arvizu's accounts are not wholly worthy of credence. Rather, it is the testimony of Arvizu's apparently disinterested co-workers[31/] which definitively controverts her testimony.[32/] Four different employees were called as witnesses by respondent. Each of them credibly refuted one or more aspects of Arvizu's testimony.

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30. Translated from Spanish, the sentence might contain any of these pronouns.

31. As noted, much of Arvizu's testimony might be considered self-serving. Guizar's statements could also, to some extent, be viewed in the same matter.

32. Noteworthy also is the fact that no disinterested witnesses were called to corroborate Arvizu's testimony.

Elva Zendejas Gutierrez[33/] works in Guizar's crew as a wrapper on the same side of the machine as Arvizu. She denied ever asking Arvizu about the Union, but stated that she has heard Arvizu talk about the Union "very often," nearly every week, but not every day. Zendejas has never heard Guizar interrupt one of these conversations about the Union, or about anything, or hear him tell Arvizu not to talk about the Union.

Zendejas has seen Arvizu wrap lettuce, and has even switched jobs with her.[34/] The foreman has never told her that she could not switch jobs with Arvizu.

Micaela Vasquez is a wrapper in Guizar's crew who also works on the same side of the machine as Arvizu. Like Zendejas, Vasquez stated that while she has heard Arvizu talk about the Union, she has never heard the foreman interrupt one of her conversations, or tell Arvizu not to talk. Further, she denied asking Arvizu about the Union, or talking on this subject with Arvizu during a break.[35/]

Isabel Lares both cuts and wraps in the Guizar crew on Arvizu's side of the machine. She has heard Arvizu talk about the Union with other employees but has not spoken about it with her-Lares has never heard Guizar interrupt Arvizu, or anyone else,

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33. Presumably she is the "Elva" to whom Arvizu referred.

34. During the course of Zendejas' cross-examination, it became apparent that a wrapper or cutter in the lettuce crew will have a primary function, i.e., to wrap or to cut, and might very well perform that function for the entire work day. However, as noted earlier, these jobs are commonly exchanged for brief periods.

35. When asked for an example of the type of conversations she had about the Union, Arvizu testified that she discussed health benefits with Micaela during a break.

either during work or during a break. Lares has seen Arvizu wrap "very often." She has herself switched jobs with Arvizu two to three times per week, but has never been told by Guizar that she may not do so. Lares also corroborated Guizar's assertion that cutters never change the bed from which they are cutting. On cross-examination, Lares stated that Arvizu often begins conversation about the Union "by herself . . . . Nobody starts it with her."

In a similar vein, wrapper Gabriela Ohlmeda stated that she has heard Arvizu speak of the Union, but has never asked Arvizu about it. Ohlmeda has never heard Guizar interrupt her, nor has she heard the foreman tell Arvizu that she could not talk. This worker switches jobs with Arvizu "when she wants," and has never been told by Guizar not to make the change.

General Counsel argues that the four worker witnesses should not be credited because of their "antipathy" toward the Union. Vasquez and Ohlmedo admitted that they worked during the 1979 strike. All four denied asking Arvizu about the Union. General Counsel asserts that this is somewhat anomalous, given Arvizu's well-publicized pro-Union fervor and her physical proximity during the work-day which would appear to encourage such conversations. However, the fact that these workers did not initiate conversations about the Union is not seen as unusual, particular when, by Arvizu's own admission, these discussions bordered on the incessant.

In spite of Arvizu's broad-reaching claims that she is constantly interrupted by her foreman when she speaks of the Union,

and that she is never allowed to change jobs with her co-workers, no other witnesses could substantiate these claims. Surely, if Arvizu's problems were as repeated and as wide-spread as she maintained, some one would be able to corroborate, or at minimum, take note of them. While it cannot be conclusively said that Arvizu's accounts were pure fabrication, it does appear that her pro-Union zeal has led her to perceive that she can expect unfair treatment because of her outspokenness on behalf of the Union. In this instance, at least, such expectations do not appear consonant with actuality.

Accordingly, it is determined that General Counsel has failed to establish, by a preponderance of the evidence, that respondent harassed and pressured Guadelupe Arvizu because of her activities on behalf of the Union. It is therefore recommended that this allegation be dismissed.

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4. Broccoli Crew Allegations

a. Introduction

General Counsel, in three separate averments, alleged that respondent "bargained directly with employees in the broccoli harvesting crew, thereby bypassing its employees' collective bargaining representative"; that respondent instituted a change in working conditions involving members of that crew without bargaining with or notifying the certified bargaining representative of its employees; and that respondent "discriminatorlly issued disciplinary tickets and discharged certain broccoli crew members due to their participation in union and concerted activities". Essentially, all of these allegations arise from a set of circumstances which flow along the same continuum.

b. The September Protest

(1) The Facts Presented

In September, 1982, twelve members of respondent's broccoli harvesting crew protested what they felt was the improper assignment to their crew of a "second cut" field which had been "first cut"[36/] by another concern.[37/] The workers are paid on a piece rate or

36. As the name implies, a "first cut" is the first opportunity to harvest the broccoli in a given field. In many instances the first cut does not remove all the broccoli from the field. Subsequent passes, or cuts, through the field may be made depending on yield and, presumably, profitability.

37. Respondent had harvesting arrangements with two outside companies, Veg-Pak and Associated Produce. These companies supplied their own work crews. Broccoli must be harvested within a day or two after reaching maturity. Should a large portion of the crop mature at the same time, the company might lack sufficient numbers of its own employees to harvest all of it. When these circumstances arise, respondent utilizes the services of Veg-Pak and Associated Produce to pack and sell the broccoli which cannot be cut by its own crew.

hourly basis, whichever is higher, and will generally earn more when the field they are working in contains more product. Hence, the protesting workers believed they were being denied the opportunity for greater earnings by being assigned a second cut, rather than a first cut.[38/]

After learning of the assignment, the workers expressed their dissatisfaction to Chris Garnett, supervisor for the broccoli crew, when they assembled at the shop prior to being transported to the field in question.[39/] The group told him, in the words of General Counsel witness Ramon Maya Rodriguez, "that we weren't going to go to work because we knew they were going to send us to a field that another company had done." Garnett asked that the entire crew of twenty vote to ascertain whether they would perform the second cut in that field. Eight workers voted to do the work, while twelve voted not to. Those twelve were informed by Garnett that if they did not want to perform the second cut, he would not require them to do so. Accordingly, the twelve did not work that day.[40/]

During the course of the discussion with Garnett, another individual present, identified by foreman Villalobos to be a "lawyer," told the group that he was unable to do anything about the assignment situation at that moment, "that he had to speak with

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38. While the first cut in most instances results in the greatest amount of product, testimony bore out that this is not always the case.

39. Crew foreman Jesus Villalobos was also made aware of the problem.

40. Principle reliance for this account is placed on the testimony of worker Ramon Rodriguez. Worker Arturo Madrigal also testified concerning these events.

[harvest department manager Ben] Miyaoka first." The "lawyer" also told them that they should proceed to the company offices, presumably to discuss the matter with Miyaoka. After going to the office and waiting for a while, the group was notified that the harvest department manager would be unable to meet with them that morning. An appointment-was made for a meeting with him to be held on the Tuesday following the Labor Day holiday.[41/]

The twelve did not work between the day of their protest and the time they had an opportunity to speak with the harvest department manager.[42/] The meeting took place as scheduled on Tuesday morning at 10:00 a.m. As this meeting provides the basis for the "bypassing" and change in working conditions allegations, its substance is discussed at length.

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41. Respondent maintains in its brief that the meeting with Miyaoka was "at the request of the employees." Maya did not specifically establish this point, nor did Miyoaka, who preferred the hearsay statement that Garnett had told him that "those employees wanted to talk to me." However, Arturo Madrigal stated that the meeting with Miyaoka had been set up after "we looked for him in order to be able to talk with him."

42. Although Maya was somewhat uncertain as to the exact days or dates of these events, he noted that the protest took place in mid-week or, roughly, on a Wednesday. Therefore, according to Maya, the group did not work for several days. Subsequently, however, Miyaoka intimated in his testimony that the protest occurred on the Friday before Labor Day: ". . . if I remember correctly, they worked on a Wednesday. They did not work on Thursday, and made that second cutting on Friday. And then it was Labor Day." Miyaoka mentioned that Garnett asked him the following Tuesday whether to issue warning notices to the twelve when they did not report for work that day. Miyoaka intially decided to do so. When Garnett informed Miyoaka that since the group had not worked Friday, they had not been told where to report, Miyaoka rescinded his prior directive. Thus it remains unclear whether the protest was on a Wednesday or a Friday. This conflict need not be resolved, since no remedy was sought for any loss of pay occasioned by this protest.

Ramon Maya supplied the following account of its content . The worker spoke first at the meeting, complaining to Miyaoka that "they were giving more work and better fields to another company than to us." Miyaoka responded that "he would do all possible that it would go better for us and that we would have more work . . . that he was not any longer going to give . . . fields to Veg-Pak." Miyaoka, according to Maya, also said that he was pleased with the workers' production, "that he was going to do all possible, that it would go well for us." Maya again stressed that they were not getting enough work, that the work was being given to other companies.

On cross-examination, Maya gave further details of the September meeting. He stated that some workers specifically complained about getting assigned second-cut fields that had been first-cut by crews from other companies. The workers disputed Miyaoka's response that at times the second cut might be heavier and therefore better. Maya additionally admitted that Miyoaka mentioned that it was for the company to determine who would work in which field, that it would continue to try to give the better fields to its own employees, but that there would be no further "votes" among the workers to decide whether to work in a particular field.

Maya asserted that following this meeting, he and the members of his crew worked more hours and got "better" fields to work in. However, he added that the meeting with Miyaoka took place soon after the beginning of the harvest.

Employee Arturo Madrigal also supplied information regarding the September meeting. He stated that apart from the

discussion regarding assignment of first cuttings, complaints were voiced that the workers were not receiving new work clothes after their old ones had gotten torn. Madrigal further testified that Miyaoka "promised us . . . that he was not going to give the company fields to Veg-Pak," that "he was going to do whatever possible to see that we would get -- to give us the first cut." Like Maya, Madrigal noted on direct examination that following the September meeting, for about a month, the crew was regularly assigned first cuttings.

On cross-examination, Madrigal modified some of these assertions. He agreed that Miyaoka told the workers that while the company would attempt to continue to assign "good" fields to its own employees, at times mistakes were made, and other companies might also be assigned to good fields. Further, Madrigal noted that Miyaoka did not promise the crew that it would only perform first cuts, and admitted that after the September meeting the crew continued to perform both first and second cuttings.

Ben Miyaoka, called as a witness by respondent, testified that "outside" companies harvested Bruce Church broccoli about three or four times per month during the fall, 1982 broccoli season. The individual responsible for making particular field assignments was Chris Garnett. Miyaoka stated that at certain times, Garnett would make errors in judgment, and would assign the lighter cuttings to the company's own crew.

Regarding the September meeting following the field assignment protest, Miyaoka testified that he told the group that it was for the company to decide which field would be harvested. He

explained ho the workers that they would occasionally be needed to perform second cuttings, since at times that would be the only work available, and the company could not lay off its own crew and bring in an outside crew to perform this work. Miyaoka also stated to the workers that the first cut was not always the best. He denied that he promised the crew that they would work only first-cut fields, or that they would have longer hours and hence more work. Further, he noted that following the September meeting, assignments were made to the broccoli crew in the same manner as they had been previously.

The Union was not a party to the discussion between the harvest manager and the workers. However, Maya indicated that the protesting group went to the Union office following the September incident. He testified that the group was concerned about not being paid for the "holiday" (presumably Labor Day) and for the day when they would meet with Miyaoka. He also stated that the group met with Union representative Lupe Baptiste before they met with Miyaoka. Maya could not pinpoint the date of the September visit to the Union office,[43/] but was able to delineate the date of a November visit to the Union office (discussed infra) regarding the protest which took place at that time.[44/]

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43. Maya was, by his own admission, confused as to when the group from the broccoli crew went to seek the assistance of the Union.

44. It was at that time that Baptiste signed a "paper" which he later took to the company. The "paper" was identified by Maya as charge number 82-CE-123-SAL, dated November 4, 1982.

Respondent introduced a statistical summary of the hours worked per day by the broccoli crew in the fall of 1982.[45/] According to the summary, the crew began work on August 27, then worked again on August 29, 31, September 1, and September 3. The meeting with Miyaoka took place on September 7, or, as noted previously, on the Tuesday following Labor Day. No distinct "change" in the number of working hours, as Maya testified, can be discerned from this record. Some days during the season the crew worked eight hours; others it worked as few as four or five, with no particular pattern evident. Although the crew night be said to have worked more days per week after the meeting than before,[46/] the season had just begun when the meeting took place. The fact that more days were worked after the protest is as attributable to the season moving into high gear, as it were, than to any other factors. As previously noted, once the broccoli has matured, it can remain in the fields only one or two days before it becomes necessary to cut it. The vegetable is planted about three months prior to harvest. Planting dates and weather determine when harvesting will take place: the number of hours the crew works, therefore, is not something which Miyaoka can significantly

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45. General Counsel did not refute any of the data on the summary.

46. Even this conclusion cannot consistently be drawn: some weeks the crew worked six days; others it worked only four.

control.[47/]

(2) Legal Analysis and Conclusions

By way of recapitulation, the September protest gave rise to two allegations in the complaint, to wit: (1) "On or about September 6, 1982, Respondent bargained directly with employees in its broccoli harvesting crew, thereby bypassing its employees' collective bargaining representative"; and (2) "On or about September, 1982, after said direct bargaining with employees, Respondent instituted a change in working conditions in its broccoli crew . . . without notifying and bargaining with the UFW." As precedent applicable to these situations, and central to its assertion that the Act has been violated, General Counsel cites the following well-established principle: where a union has been certified, an employer commits a per se refusal to bargain when it negotiates directly with employees, bypassing thereby the exclusive bargaining agent. (See, e.g, Medo Photo Supply Corp. v. N.L.R.B. (1944) 321 U.S. 678; AS-H-HE Farms (1980) 6 ALRB No. 9.) General Counsel thus makes the unwarranted assumption that Miyaoka in fact "negotiated" with the broccoli crew employees. Lacking from this analysis is an answer to the question, did Miyaoka, in meeting with a portion of the broccoli crew, actually bargain with these employees? To answer this question, it is essential to arrive at an understanding of what the term "bargain" means.

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47. Naturally, if additional crews are hired the total number of hours worked might diminish; the converse is also true. General Counsel did not argue or prove that the "outside" crews from Veg-Pak or Associated Produce worked any less in order to give respondent's crew more to do, as per the purported "change."

The statute defines bargaining, at least in terms of its "good faith" aspect, in part, as the "performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment or any questions arising thereunder. . . " (ALRA §1155.2(a)) While it might easily be said that Miyaoka and the broccoli crew employees met and conferred with respect to "wages, hours, and terms and conditions of employment, or any question arising thereunder . . .," I specifically find that, as the terra is most generally used, Miyaoka did not "bargain" with these workers.

Every meeting that takes place between supervisory personnel and employees does not constitute "bargaining," although it might, in a literal sense, be "conferring" with respect to "terms and conditions of employment," etc. To illustrate the point, consider where supervisors explain work rules or demonstrate techniques, or where an incident gives rise to a disciplinary problem, and is then discussed between worker and supervisor. What differentiates these types of meetings from "bargaining sessions" is that proposals are not exchanged and that concessions and agreements, per se, are not sought.[48/] They typically involve

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48. Most Board case law discusses the concept of bargaining in its "good faith" sense. (See, generally, Adam Dairy (1978) 4 ALRB No. 24); O.P. Murphy (1979) 5 ALRB No. 65; Bruce Church (1983) 9 ALRB No. 74.)In analyzing the good faith issue, the Board has looked to the "totality of the circumstances" involved in the bargaining, most principally in the exchange of proposals and counterproposals, to determine whether the parties exchanged in such conduct with a "sincere effort to resolve . . . differences" and "reach an agreement." (Bruce Church, supra.)

supervisorial personnel directing or explaining work-related matters. While accommodations are often made, it is not an "agreement" that is the object: worker and employer are on a "one-way street," engaging more in a monologue than a dialogue.

When the September meeting between the the broccoli crew members and Miyaoka is viewed in this light, it is clear that the supervisor did not actually, or even intend to, "bargain" with the employees. He was merely "telling it like it is": the company would try to assign its best fields to its own employees, as it had in the past; that, at times, mistakes in these assignments were made; mistakes notwithstanding, it was for the company to decide where the work would be done, and not for the employees to determine such by taking a vote.

In none of this can be seen the making of concessions or the solicitation of counterproposals. General Counsel's assertion that "promises" were made by Miyaoka in exchange for the crew's cooperation is totally undermined by the cross-examination of its own witnesses and by Miyaoka's testimony. These recitations clearly demonstrate that Miyaoka did not promise the workers that he would see to it that they were assigned only first-cut fields, or that they would get "more work." As a practical matter, the company could not guarantee first-cut fields alone to these workers. The sum total of Miyaoka's remarks to the workers at the September meeting was that he merely assured them that he would try to be more conscientious in the performance of his responsibilites in regard to

the crew,[49/] and that he attempted to allay thereby any of their feelings of job dissatisfaction.[50/]

Concerning the "changes" which General Counsel alleges took place following the meeting, the evidence simply does not support the conclusion that any changes were in fact made. General Counsel argues that after the September meeting with Miyaoka, the crew was given "more" first cut fields and "more" work. General Counsel's own witnesses retracted former assertions that they were solely assigned first-cut fields following the meeting. Miyaoka's testimony clearly established that field assignments were made after the meeting as they had been before, or in keeping with company policy and past practice. Further, as noted previously, the meeting took place in the first few days of the season. Additional work, in terms of longer hours or more days, was available to the broccoli crew not simply through the efforts of Miyaoka, but as the natural result of the season progressing to and through its peak.

Accordingly, it is recommended that these allegations be dismissed.

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49. Madrigal noted that Miyaoka, following the meeting, came out to observe the crew at its work. This conduct appears fully consistent with Miyaoka's assurances that he would personally see to it that the workers were assigned the best fields.

50. Regarding Madrigal's assertion that Miyaoka promised the crew "new equipment," no evidence was presented that the company actually did so following the meeting, or that it had completely neglected to do so prior to the meeting. As with the field assignments, it appears that Miyaoka simply assured the crew that he would be more attentive in his duty to see to it that worn out equipment was more quickly replaced.

c. The November Incident

(1) Factual Discussion

In November, a problem similar to that outlined above arose: members of the broccoli crew refused to perform a second cut on a field which had been first-cut by one of the "outside" companies. As Ramon Maya characterized the situation, the foreman had told the crew the day before the incident they were going to be working in a "new field." When the bus which transported the crew arrived at the particular field the next day,". . .we all got off and we saw it was a second field and we all got together and we didn't want to go to work." Maya stated that the workers were resentful over being "tricked" into thinking that they were being taken to a new or first-cut field.[51/]

Foreman Villalobos contacted the supervisor Chris Garnett, telling him that people in the crew were refusing to cut the broccoli in the field in question. By this time, eight of the twenty crew members had gotten off the bus and begun to work. The twelve remaining on the bus and refusing to work were the same twelve who had protested and met with Miyaoka in September.

Soon thereafter, Garnett arrived upon the scene. The following discussion, according to Maya's testimony,[52/] ensued:

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51. Maya noted that during the September meeting Miyaoka had told them that if the crew were to be doing a second cutting they would be advised in advance.

52. Garnett did not testify.

Garnett told the workers "that if we didn't want to go in that they were going to run us off . . . [w]e told him that if he was going to fire us, okay. That we weren't going to say that we would go in . . . that if he wasn't going to fire us, that was that . . . [Garnett] told Villalobos to give us a ticket to fire us and that we should leave our pants, our boots, and knives on the bus. And to let us go. "[53/]

As indicated, the twelve left their equipment with the foreman, and were then issued disciplinary tickets. The tickets, dated November 3, state (translated from Spanish): "Suspension pending termination for refusing to work on November 3, 1982." After being issued the tickets, the group asked Garnett if they could see Miyaoka or another of Garnett's superiors. Garnett refused, and declined to relay the request. They were then taken to the shop by bus so that they could return home. According to Maya, Villalobos was told by Garnett that the workers' checks would be distributed on Wednesday,[54/] and at some point Villalobos conveyed this information to the group.

After a visit to the ALRB offices on the day of the protest, the group returned to the company office the following day. As Maya testified, "we went for our checks and to ask about the

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53. In the course of being cross-examined on this point, Maya added that the group would not recommence working until they had an opportunity to speak to Miyaoka or any other of Garnett's superiors.

54. Friday was the usual pay day. However, Maya was apparently mistaken about which day the protest took place. November 3, the day of the incident, was a Wednesday.

ticket they had given us." The group spoke with a man named Ramiro, who was in "personnel," and another named Marcelino. Neither one could answer any of the worker's questions. Although Marcelino told the group he was making an appointment for them with the "lawyer" for the following day, when the workers re-appeared at the office, as instructed, once at 9:00 a.m. and again at 5:00 p.m. that day, they were unable to speak with anyone.

The day after, or Friday, according to Maya, the twelve returned to the office. After being told by Ramiro that they could then meet with Miyaoka, the group waited until he was able to meet with them. Miyaoka asked to see the disciplinary tickets they had received, saying that he had not been aware of the tickets, "that it was not right, that he didn't know what they had done with us." After Miyaoka reviewed the tickets, he informed the group that they had, in effect, been suspended for forty-eight hours.[55/] The following day, all twelve workers resumed their employment with respondent.[56/]

(2) Legal Analysis and Conclusions

It is determined that respondent violated the Act

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55. Apart from making a determination regarding the tickets, Miyaoka also conducted discussions regarding assignments of first and second cut fields similar to those he had in the September meeting.

56. Apparently, the workers had been under the impression that they had been fired, and inquired of Miyaoka whether this was in fact the case. Interestingly, when Miyaoka was called as a witness, he claimed that Garnett did not have the authority to fire them. Further, he stated that because the incident had arisen as a result of a misunderstanding, he was going to "void" the notices. The notices themselves actually state "void per instructions of B. Miyaoka. 11-15-82."

by suspending or discharging[57/] twelve members of its broccoli crew. While Miyaoka'a reinstating them soon thereafter served to mitigate respondent's liability for the unlawful acts of its supervisors, it did not vitiate such acts. (Cf. J.R. Norton Company (1984) 10 ALRB No. 7.)

When some of the members of the broccoli crew determined not to harvest the field in question on November 3, 1982, they engaged in a concerted effort whose object[58/] was to question respondent's harvesting assignments, i.e., a term and/or condition of their employment. In this respect, the protest was no different than the one they had engaged in the previous September. Had the workers merely withheld their services pending a clarification of the problem, respondent might have lawfully hired replacements to work in their stead or, perhaps in an effort to convince then to return, at least informed them that such was the company's right. (Anton Caratan & Sons, supra; Seabreeze Berry Farms (1981) 7 ALRB No. 40; Sam Andrews' Sons (1983) 9 ALRB No. 24; N.L.R.B v. Mackay Radio and Telegraph (1938) 304 U.S. 333.) Instead, respondent, through Garnett, resorted to the extreme measure of disciplining

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57. As noted previously, the notices received by the workers told them they were "suspended pending termination." Whether the personnel action is denominated a suspension or a termination is not particularly pertinent: either would be viewed as a violation of section 1153(a). (See Anton Caratan & Sons (1982) 8 ALRB No. 83.) An unlawful discharge which is announced but not effectuated has been held to restrain workers' rights. (Anderson Farms (1977) 3 ALRB No. 67.)

58. Respondent's contention that the object of the work action was unlawful is treated infra.

those who participated in the November protest, and violated the Act thereby.

As noted in Sam Andrews' Sons (1983) 9 ALRB No. 24 at 15, under N.L.R.B. v. Washington Aluminum (1962) 370 U.S. 91, a "one-time stoppage is presumed protected unless it is violent, unlawful, in breach of contract, or indefensible." (Emphasis supplied.) Although not a health-related protest as in Washington Aluminum, but an economic one, the walkout of the broccoli field workers is entitled to this same presumption. The right of employees to present grievances regarding their working conditions, and to act concertedly pursuant to that goal, is well-recognized, as is the right to strike. (Jack Brothers & McBurney (1979) 6 ALRB No. 12;[59/] Armstrong Nurseries (1983) 9 ALRB No. 53r Frudden Produce Inc. (1982) 8 ALRB No. 42; Seabreeze Berry Farms, supra; O.P. Murphy and Sons (1979) 5 ALRB No. 63.) Respondent wrote on the face of the disciplinary notices issued to the workers attempting to present a grievance regarding field assignments, "suspended pending termination for refusing to work." This statement is tantamount to an admission of unlawful conduct. Such discipline is clearly contrary to the Act, as it logically tends to restrain or coerce employees in the exercise of rights protected by section 1152.

Respondent argues that disciplining the broccoli workers was permissible under the rule announced in Emporium Capwell Co. v.

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59. That case is particularly apposite since the employer there encouraged employees to discuss their work-related problems with him. Miyaoka's commendable approach is not dissimilar, as he attempted to resolve employee grievances before they escalated into conflict with more serious economic consequences.

Western Addition Community Organization (1975) 420 U.S. 50. It contends that the work stoppage did not constitute "protected activity" since its object was unlawful. Under this theory, it interprets the November protest as an attempt by the workers to compel the respondent, via Miyaoka, to bypass the Union and bargain directly with them over their own working conditions.[60/]

In Emporium-Capwell, black employees mounted a protest against what they felt was a racially discriminatory work assignment and promotion policy. The employees were represented by a union which, under a collective bargaining agreement, had an established grievance and arbitration procedure. Nevertheless, the employee group purposefully determined not to resort to this procedure, as it felt that the Union had not been responsive to its concerns. Instead, it picketed and distributed handbills on its own initiative in an effort to force the employer to bypass the union and negotiate with the group directly on the issue of race discrimination. The Supreme Court held that such activities v/ere in derogation of the principle of majority rule and of the union's status as exclusive representative of the unit employees. The measures could only serve to dissipate the union's collective strength necessary to promulgate anti-discriminatory and other collective bargaining-related policies. Accordingly, discharges of the employees who participated in the protest were deemed lawful, as the activity for which they had been disciplined was not considered "protected."

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60. In support of this contention, respondent relies in no small measure upon evidence that the workers' insisted on talking with Miyaoka before they would resume their work.

By contrast, the employees herein had barely gotten their protest off the ground when they were "suspended pending termination." There was no collective bargaining agreement in effect, and no established grievance procedure, other than the one they had resorted to in September, i.e., meeting with Miyaoka to discuss the problem. Rather than spurning the Union and attempting to circumvent its representative status, as in Emporium Capwell, the broccoli employees sought the Union's assistance at a reasonably early opportunity. By inference, the company's willingness to adjust the employees' grievance soon thereafter might be viewed as a response to the Union's interaction in filing an unfair labor practice charge, Miyaoka's intervention and enlightened approach notwithstanding.

Interestingly, if one were to accept respondent's "unlawful object" theory, one would have to conclude, for the sake of logical consistency, that the broccoli employees "bargained" with the company in September, thus giving rise to a violation of the Act in those circumstances. As I have determined that the group did not bargain with the company in September, their efforts to discuss work assignments with Miyaoka in November would not constitute "unprotected" bargaining either.

It is concluded, therefore, that respondent violated section 1153(a) the Act by suspending its broccoli crew members who sought to present and discuss a grievance based upon working conditions.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that respondent Bruce Church, Inc., its agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act), or otherwise exercised his or her rights under the Act.

(b) Discontinuing any benefit without notice to and bargaining with the United Farm Workers of America, AFL-CIO-

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

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

(a) Make whole the following employees discharged in November 1982 for all losses of pay they have suffered as a result of the discrimination against them:

Arturo Madrigal Ramon
Maya Abram Ramos
Pedro Gomez Cesar
Torres Medrado Magana
David Esparza Ruben
Alteaga Alberto
Flores Jesus Alcala

Such amounts are to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(b) Reinstitute bus service from Calexico to its Imperial Valley work sites and return.

(c) Make whole all employees employed from March 18, 1982, forward for losses suffered as a result of the discontinuation of bus service from Calexico. Said compensation shall be for a stated amount for each day worked for each employee who would have availed him/herself of said bus service.

(d) Preserve and, upon request, make available to this Board arid 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 backpay period and the amount of backpay due under the terms of this Order.

(e) 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.

(f) 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 from March 1980 toward.

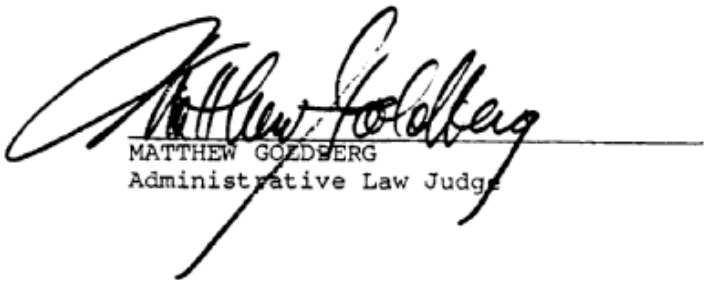
(g) Post copies of the attached Notice, in all

appropriate languages, in conspicuous places on its property for 60 days, the time(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.

(h) 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 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 right 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.

(i) 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 therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: May 2, 1984



MATTHEW GOLDBERG
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro and Salinas Regional Offices, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by firing twelve workers for protesting their working conditions, and by discontinuing company bus service from Calexico to our Imperial Valley fields and return.

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

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

WE WILL pay Arturo Madrigal, Ramon Maya, Abram Ramos, Pedro Gomez, Cesar Torres, Medrado Magana, David Esparza, Ruben Alteaga, Alberto Floras, Jesus Alcala, Roberto Rico, and Joe Martinez backpay for the money they lost during November 1992.

WE WILL NOT, in the future, fire any employee for protesting over working conditions.

WE WILL NOT stop providing a working benefit without notice to and bargaining with the United Farm Workers of America, AFL-CIO, your certified bargaining representative.

WE WILL begin again to provide bus service from Calexico to our Imperial Valley fields, and return.

WE WILL compensate all of our employees employed from March 18, 1980, forward, for the loss of the bus service.

Dated: BRUCE CHURCH, INC.

By: _____ _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas California 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE.