Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Respondent,	)	Case No. 82-CL-4-EC
and	)	
MAGGIO, INC.,	)	12 ALRB No. 16
Charging Party.	)	

DECISION AND ORDER

On June 14, 1985, Administrative Law Judge (ALJ) Arie Schoorl issued the attached Decision in this proceeding. Thereafter, Respondent, General Counsel, and the Charging Party each timely filed exceptions and a supporting brief, and the Charging Party filed an answering brief.[1/]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ as

[1/]With its answering brief, the Charging Party filed a motion to strike Respondent's exceptions and supporting points and authorities on the ground that they did not contain any citations to the record as required by Agricultural Labor Relations Board Regulations, California Administrative Code, Title 8, section 20282(a)(l). Respondent's exceptions do cite specific page numbers of the ALJ Decision to which exception is taken. Moreover, Respondent's brief makes numerous references to exhibits contained in the record, although it does not cite any of the transcripts. Since Respondent has cited some portions of the record, and the regulation does not require a party to cite every portion of the record which supports any exception, we hereby deny the Charging Party's motion.

modified herein and to adopt his recommended Order as modified herein.

The complaint filed herein alleged that since January 1982 Respondent, United Farm Workers of America, AFL-CIO, (UFW or Union) had engaged in surface bargaining with the Charging Party, Maggio, Inc., (Maggio) by failing to meet at reasonable intervals, failing to respond to the Charging Party's proposals and refusing to submit its own proposals, offering predictably unacceptable proposals, and failing to supply requested information. In its answer the UFW denied having bargained in bad faith and alleged as an affirmative defense that Maggio itself had engaged in bad faith negotiations.

The ALJ found that during the 34-month period of Respondent's alleged failure to bargain in good faith, only 16 negotiating sessions were held, with the UFW having cancelled seven scheduled meetings and Maggio having cancelled one. There were five extended periods when no meetings occurred.

The parties met five times from January 13, 1982, through April 20, 1982. The first extended gap in negotiations occurred between April 20 and August 4, 1982. A session scheduled for April 29 was cancelled by UFW negotiator David Martinez who told Maggio negotiator Merrill Storms that he was tied up with other matters in northern areas of the State.

During May, Martinez was required to go to Texas to attend to his seriously ill father, but after his return he agreed to meet June 15. Martinez subsequently cancelled the June 15 meeting as well, saying he wanted to meet with the workers'

negotiating committee[2/] to prepare a complete proposal. However, as the ALJ noted, it was Maggio, not the UFW, that proceeded to prepare a complete contract proposal and seek another meeting. Because the Union changed negotiators, it was unavailable to meet until August 1982.

The second extended gap was between August 4 and December 1, 1982. At the August 4 meeting, Maggio had presented a new contract proposal, and UFW negotiator Arturo Mendoza said he needed time to discuss the proposal with the negotiating committee and prepare a counterproposal. Storms wrote to Mendoza in August and September asking for the Union's response and suggesting possible meeting dates. Mendoza did not respond until November 16, 1982, when he submitted a counterprosal and said he was available to meet during the first week of December. The ALJ found that under the circumstances, three and one-half months to prepare a counteroffer was excessive.

The third gap in negotiations occurred from March 23 to August 10, 1983. For the first two months of this period the UFW's assigned negotiator was Esteban Jaramillo, whose only prior negotiating experience consisted of sitting in on sessions conducted by Mendoza. Jaramillo failed to request any meeting dates or to respond to Storms' request for meetings, and the ALJ found that the UFW had no intention of meeting during the two-month period. When Mendoza once again took over as the UFW

[2/]UFW negotiator Arturo Mendoza testified that the negotiating committee was comprised of Maggio employees nominated by the workers themselves.

negotiator, he cancelled three meetings in June and July 1983 because of conflicts in his schedule.[3/]

The fourth and longest gap between meetings took place between September 28, 1983 and June 18, 1984. Mendoza stated at the September 28 meeting that he needed time to consider Maggie's offer, but the Union failed to respond to the proposal or seek further meetings during the next nine months. The ALJ found that the UFWs explanation in regard to the nine-month gap (i.e. that the Union needed time to meet with the negotiating committee and review the Employer's offer) was clearly pretextual.[4/]

The fifth period during which no meetings occurred was between June 18 and October 26, 1984. David Ronquillo, who had replaced Mendoza as UFW negotiator on May 30, wrote letters to Storms during this period regarding a rumored takeover of Maggio, Inc., by Castle & Cooke, but Ronquillo did not request meeting dates until October 12. Shortly after an October 26 session, Mendoza replaced Ronquillo; the ALJ concluded that Ronquillo had served merely as a stop-gap replacement for Mendoza.

The UFW argues in its exceptions brief that, even if it was somewhat remiss in scheduling and cancelling meetings, its conduct was not designed or intended to prevent the reaching of a contract. The Union asserts that it made good faith efforts to

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[3/]Storms cancelled a July 6 meeting because he had to be in Salinas during *a* strike of Maggio shed employees.

[4/]We reject the ALJ's observation that a two- or three-month delay in responding to Maggie's proposal might have been valid. Even a two- or three-month delay in responding to a long-standing proposal would ordinarily be unreasonable.

schedule meetings, and that any delays were legitimate, not pretextual.

We affirm the ALJ's conclusions that the UFW was responsible for numerous excessive delays in negotiations, including the five extended periods when no meetings took place, and that the Union intentionally failed and refused to meet with the Charging Party. Most of the delays and cancellations of meetings by the UFW appear to have been the result of the Union's being understaffed. David Martinez and Arturo Mendoza, the UFW's principal negotiators, were also assigned to other union duties, such as contract administration, organizing, other negotiations, and litigation. Nevertheless, as the ALJ correctly stated, a party's duty to meet at reasonable times and places cannot be mitigated by the unavailability of its representatives. (Montebello Rose Co., Inc., et al. (1979) 5 ALRB No. 64; see also Insulating Fabricators, Inc. (1963) 144 NLRB 1325 [54 LRRM 1246].) The Union's frequent, prolonged delays in bargaining indicate that it did not treat its bargaining obligation as seriously as it would other union business (NLRB v. Reed & Prince Mfg. Co. (1951) 96 NLRB 850 [28 LRRM 1608] enforced 205 F.2d 131 (C.A. 1 1953) [32 LRRM 2225]) and, by its dilatory conduct, the Union has engaged in surface bargaining in violation of Labor Code section 1154(c).[5/]

The ALJ also concluded that the UFW's failure to respond to Maggio's proposals and to submit its own proposals demonstrated

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

that the Union had engaged in surface bargaining.

In July 1981 the UFW had made a package proposal[6/] based on the "Sun Harvest" contract,[7/] with some concessions.[8/] The parties did not meet again until the following January. On January 18, 1982, Maggio sent the Union a counterproposal consisting of three alternative package proposals. On January 28, the Union rejected Maggie's counterproposal and made its own counteroffer consisting basically of the previous Sun Harvest proposal.

The parties met in February, March, and April and bargained about individual articles. In June Respondent informed the Charging Party that it intended to prepare a complete contract proposal but needed time to meet with the workers' negotiating committee to do *so.* However, it was Maggio that presented a comprehensive proposal on August 4. The UFW did not respond to Maggie's offer until November 16, when it submitted a counterproposal increasing its general field wage request from the previous Sun Harvest rate[9/] to $6.80 per hour. When the parties met in December, Storms rejected the UFW's November offer as

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[6/]A package proposal requires acceptance or rejection of the proposal as a whole.

[7/]"Sun Harvest" refers to the collective bargaining agreement entered into by the UFW and Sun Harvest, Inc., in September 1979. A number of other growers and/or harvesters of vegetable crops also signed contracts with the UFW that were substantially identical to the Sun Harvest agreement except for local provisions.

[8/]This proposal preceded the alleged unlawful bargaining period herein, which was alleged to have begun in January 1982.

[9/]As of July 15, 1981, the Sun Harvest rate was $5.70 per hour. In September 1982, a new Sun Harvest contract increased the general field rate to $6.65 per hour, effective September 1, 1982.

regressive.

At the January 13, 1983, session Maggio offered an increase in the general field rate to $4.90 per hour. Storms told Mendoza that Maggio was at its bottom line for the time being, and that before it could move further, there would have to be substantial movement from the Union. On January 27, the UFW reduced its wage demand from $6.80 to $6.65, but Storms protested that the Union was still at Sun Harvest levels and had failed to make a complete response to Maggie's proposal.

In February 1983, Maggio made a package wage offer including a 5 cents an hour across-the-board increase and the 87½ cents piece rate for lettuce that the UFW had demanded. The Union rejected the offer.

In August 1983, Maggio submitted a new package proposal with increased wages and benefits. Mendoza said he would need time to consider the new proposal, but the Union never responded to the offer and requested no meetings until June 1984. At the June 18, 1984, session Ronquillo said the Union was still preparing a response to Maggio's proposal, but Storms said the proposal was almost a year old, and since the UFW had not responded, Maggio was taking it off the table. From June to October 1984, both parties insisted that the other make the first proposal, but neither did so.

The ALJ concluded that Respondent unreasonably delayed and failed to respond to Maggio's proposals and failed to make proposals of its own. The ALJ further determined that the UFW's steadfast adherence to Sun Harvest rates during bargaining

supported a finding that the Union's reason for delaying and cancelling meetings and failing to make proposals and counterproposals was that it expected that if no contract was signed, the Maggio employees would receive a makewhole award at Sun Harvest rates.[10/] The ALJ found that the prospect of such a makewhole remedy did not motivate the Union to avoid reaching an agreement with Maggio but did motivate it to be in no hurry to reach one and, if it did come to an agreement, to make sure the contract contained Sun Harvest wage rates and health benefits. Finally, the ALJ concluded that Respondent's delays and failures to schedule meetings and failure to present proposals and counterproposals clearly demonstrated that it failed to bargain with the due diligence required by the Agricultural Labor Relations Act (ALRA or Act), in violation of section 1154(c).

The UFW disagrees with the ALJ's conclusion that the possibility of makewhole motivated it to be in no hurry to reach an agreement. It argues that contracts are the "lifeblood" of unions, while the inability to obtain a contract exposes a union to a possible rival union petition or a decertification attempt, as well as to the loss of dues income. Further, the UFW asserts,

[10/] From late 1978 until February 1979, negotiations took place between the UFW and a group of agricultural employers, including Maggio, Inc.--known as "industry negotiations." When the negotiations broke off, both sides filed unfair labor practice (ULP) charges which were litigated and resulted in the Board's Decision in Admiral Packing (1981) 7 ALRB No. 43, in which the Board held that the employers, including Maggio, had failed to bargain in good faith and ordered a makewhole remedy. On March 30, 1984, the Fourth District Court of Appeal reversed the Board's Decision and annulled the Board's makewhole Order. (Carl Joseph Maggio, Inc., et al. (1984) 154 Cal.App.3d 40.) The California Supreme Court denied hearing on June 14, 1984.

contracts bring noneconomic benefits such as job security and grievance procedures, the loss of which is not remedied by makewhole. The Union claims that it repeatedly made substantial movement in all major contract areas during the course of bargaining, and that Maggio maintained inflexible positions on all major issues.

The UFWs claims regarding the parties' bargaining positions are not supported by the record. The Union's January 28, 1982, counterproposal was basically the same as the previous Sun Harvest-based proposal. Maggio's August 4, 1982, complete contract proposal showed movement in several areas . (including overtime, vacation and holidays) and increased the existing general field wage rate of $4.12 per hour to $4.53, $4.89 and $5.28 over three years. Respondent's November 16, 1982, counterproposal increased its basic wage request from $6.15 to $6.80 per hour. Although the Union in January 1983 reduced its wage request from $6.80 to $6.65, this was still higher than its previous request of $6.15. Maggio, on the other hand, significantly increased its wage proposal in January, February and August 1983, and increased its health plan proposal in March and August 1983.

Thus, we affirm the ALJ's conclusion that the Union's claim of bad faith bargaining by the Charging Party is not substantiated by the record. Further, we affirm the ALJ's conclusion that Respondent's failure timely to present proposals and counterproposals shows that it failed to bargain with due

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diligence, in violation of section 1154(c).[11/]

The complaint herein also alleged that the few proposals and counterproposals Respondent did offer were predictably unacceptable to the Charging Party. Storms testified that in never demanding less than Sun Harvest economics during negotiations, Respondent made predictably unacceptable proposals, since he had had extensive discussions with the UFW negotiators in an effort to demonstrate that Maggio could not afford to pay the Salinas Valley-based Sun Harvest rates. Storms also considered the Union's November 1982 increased wage demand to be regressive and predictably unacceptable.

We affirm the ALJ's conclusion that in adhering to Sun Harvest rates, the UFW was not offering predictably unacceptable proposals. The Union was anxious to reestablish with Maggio the same wage and benefit rates as those being paid in the Salinas Valley, a uniformity that had existed in the 1977-1979 Maggio-UFW contract. Since Maggio had previously agreed to the same rates as were being paid in the Salinas Valley, the Union's adherence to Salinas Valley rates in the instant negotiations cannot be categorized as unreasonable. Moreover, the question of whether Salinas Valley rates should be reestablished in a contract between the UFW and Maggio was an issue to be decided by the parties during negotiations, not by the Board.

[11/]We find it unnecessary to decide whether the ALJ was correct in concluding -that the expectation of makewhole motivated the Union to be in no hurry to reach an agreement. Rather, we find that regardless of its motivation concerning makewhole, Respondent engaged in surface bargaining.

The ALJ also held that the Union's increased economic demands in November 1982 were not regressive, since the Union was merely continuing to keep its demands consistent with the current Sun Harvest rates. However, the Union's new wage proposal was not only 15 cents per hour higher than the then-current Sun Harvest rate, but nearly 20 percent higher than the UFWs previous proposal. Such an unexplained sudden jump in wage demands would appear to be predictably unacceptable to Maggio, which had already expressed an inability to pay Sun Harvest rates.

Nevertheless, a predictably unacceptable proposal does not justify an inference of bad faith unless it acts to foreclose future negotiations or is so patently unreasonable as to frustrate the reaching of an agreement. (See Morris, The Developing Labor Law, 2d ed., v. I, p. 587, and cases cited therein.) The evidence herein does not indicate that the UFW was seeking to disrupt negotiations. Rather, as negotiator Mendoza testified, the Union proposed the increased wage rate as a bargaining posture, and in fact soon lowered its demand to the Sun Harvest rate of $6.65. As we find that the Union's increased wage demand was not designed to, and did not, foreclose negotiations or frustrate the reaching of an agreement, we do not infer bad faith from the proposal.

Finally, the complaint alleged that one indication of surface bargaining by Respondent was its failure to furnish, and delays in furnishing, information requested by the Charging Party. In March 1982 Storms informed the Union that Maggio had planted radishes and requested information about any contracts the UFW had

with other radish-growing companies. Storms never received the requested information from the Union, but did obtain some information on radishes through sources in Arizona. In April 1982 Storms requested copies of any contracts the UFW had with vegetable growers other than Sun Harvest. Storms testified that he needed such contracts in order to determine whether the Union had ever agreed to less than Sun Harvest provisions; however, the UFW never provided the information. In August 1982, Storms requested information about the Union's Robert F. Kennedy Medical Plan, Juan de la Cruz Pension Plan, and Martin Luther King Fund (for charitable and educational contributions). The Union did not provide the information about these benefit plans until four months later.

The ALJ concluded that the UFW was somewhat remiss in providing information to the Charging Party but not to the extent that negotiations were impeded. Concerning the radish grower information, we affirm the ALJ's conclusion that the UFW committed no bargaining violation in failing to supply this information since the Union's negotiators testified that no UFW-radish grower contracts existed and General Counsel and the Charging Party did not show otherwise. We also affirm the ALJ's conclusion that the UFW contracts with other vegetable growers were not necessary to the bargaining process, and thus the Union committed no violation in failing to supply them to Maggio.

However, we overrule the ALJ's conclusion that the Union did not violate its bargaining duties by failing to furnish information about the Union's benefit plans in a timely manner.

The requested information was not only relevant but reasonably necessary for Maggie's negotiator to test the validity of his proposals and formulate future proposals that might afford a possible basis for agreement. Therefore, we conclude that the UPWs unreasonable four-month delay in providing benefit plan information violated section 1154(c) in that the Union's conduct impeded negotiations by undermining Maggio's attempts to negotiate knowledgeably and to prepare realistic proposals. (Cardinal Distributing Co. v. ALRB (1984) 159 Cal.App.3d 758, 768.) The Remedy

Having concluded that Respondent has violated its statutory duty to bargain in good faith, we now consider the appropriate remedy for Respondent's unlawful conduct.

1. Makewhole

General Counsel and the Charging Party seek an order requiring Respondent to make whole Maggio's agricultural employees for all losses of pay and other economic losses resulting from Respondent's refusal and/or failure to bargain in good faith.[12/]

Section 1160.3 of the Act provides, in part, that

[12/]On March 18, 1986, General Counsel filed a request for oral argument on the issue of whether a makewhole remedy is available against a labor organization for violations of Labor Code section 1154(c). On April 4, 1986, the Charging Party filed a joinder in General Counsel's request and "its own request for oral argument.

The issues of whether makewhole can be awarded against a union, and whether makewhole should be imposed against the UFW in this case, were extensively addressed in the ALJ Decision and the exceptions briefs of General Counsel and the Charging Party. We find it is not necessary for the Board to hear oral argument on this question, and we hereby deny the requests.

when the Board finds that a person named in the complaint has engaged in an unfair labor practice, its remedial order may include a requirement that the person take affirmative action,

> including reinstatement of employees with or without backpay, and making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part.

Both General Counsel and the Charging Party admit that the statute does not expressly provide for a makewhole remedy against labor organizations, but they assert that the language, "to provide such other relief as will effectuate the policies of this part," gives the Board authority to award makewhole against a union.

The fundamental rule of statutory construction is that the intent of the Legislature should be ascertained so as to effectuate the purpose of the law. (Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 132.) Statutes are to be given a reasonable interpretation conforming to the apparent purpose and intention of the lawmakers. The legislative intent may be ascertained by considering not only the words used, but also such matters as the object in view, the evils to be remedied, the legislative history, and public policy. (English v. County of Alameda (1977) 70 Cal.App.3d 226, 233.)

In discussing the legislative history of the ALRA, the Charging Party acknowledges that the possibility of imposing the makewhole remedy against unions was not discussed during hearings

on the Act, and that any need to provide such a remedy against labor organizations was probably not even contemplated at that time.

The ALJ concluded that the statute does not allow makewhole against a union. He cited a portion of the testimony of then-Secretary of the Agriculture and Services Agency, Rose Bird, before the Senate Industrial Relations Committee when the proposed Act was being discussed:

> Senator, this language was just placed in because there has been a good deal of discussion with the National Labor Relations Act that it ought to be amended to allow "makewhole" remedy, and this is something that the people who have looked at this Act carefully believe is a progressive step and should be taken. And we decided since we were starting anew here in California, that we would take a progressive step. Now what we're talking here is only where an employer bargains in bad faith. You make whole the employee with backpay, and that's all we're talking about.
> (Emphasis added.)

Because the ALRA is modeled after the National Labor Relations Act (NLRA), and because the Board is required, pursuant to section 1148 of the ALRA, to adhere to applicable NLRA precedent, it is necessary, when interpreting the ALRA's remedial provisions, to examine the remedial provisions in the NLRA as they have been interpreted by the courts. We must also pay close attention to differences between the two laws. Section 10(c) of the NLRA provides, in part, that when the NLRB has found that a person has committed an unfair labor practice, it shall issue an order

> requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.
> (29 U.S.C. § 160(c).)

In Ex-Cello-0 Corporation (1970) 185 NLRB 107 [74 LRRM 17403 the NLRB held that it lacked the authority to award a makewhole remedy for an employer's refusal to bargain. The majority concluded that the language of section 8(a) of the NLRA, which provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession," precluded the award of such a remedy.[13/]

In International Union of Electrical, Radio and Machine Workers, (IDE) (Tiidee Products, Inc.) v. NLRB (Tiidee) (D.C. Cir. 1970) 426 F.2d 1243 [73 LRRM 2870], cert, den., 400 U.S. 950 [75 LRRM 2752] (1970), on remand, 194 NLRB 1234 [79 LRRM 1175] (1972), the D.C. Circuit held that the NLRB has ample authority to issue makewhole orders in cases involving employers' refusal to bargain, and remanded the case to the NLRB for consideration of a meaningful remedy for employees unlawfully denied the benefits of bargaining during the period of the employer's frivolous litigation. On remand, the NLRB adhered to its views on makewhole

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[13/]The ALRB contains identical no-concession language in section 1155.2(a).

Ex-Cell-0 was upheld in the D.C. Court of Appeal on the ground that the evidence did not establish facts which would justify a makewhole award. However, the court disagreed with the national board's conclusion that the NLRA prohibited makewhole. (IUAW v. NLRB (Ex-Cell-0) (1971) 449 F.2d 1058 [77 LRRM 2547].)

as expressed in Ex-Cell-O, although it accepted the court's opinion in Tiidee as the "law of the case." The national board still declined to award makewhole against the employer in Tiidee on the grounds that it was not practicable, since there was no way to ascertain, with even approximate accuracy, what the parties would have agreed to if they had bargained in good faith.

Despite continuing controversy over whether the NLRB has statutory authority to award makewhole,[14/] the national board has adhered to its position in Ex-Cell-O that it lacks such authority. Unlike the NLRA, the ALRA specifically provides for a makewhole remedy against employers. As noted in the legislative testimony of Rose Bird, supra, the drafters of the ALRA included the makewhole provision after due consideration of the history of the NLRA. As the Court of Appeal in Tiidee pointed out, a long delay resulting from an employer's refusal to bargain can cause employee interest in the union to wane, and thus result in the union having less credit with the employees. (International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE) (Tiidee Products, Inc.) v. NLRB, supra, 426 F.2d at 1249.) "Thus the employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively." (Ibid.)

The language of Labor Code section 1160.3, as well as the ALRA's legislative history, indicate that the makewhole remedy

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[14/] See, e.g., United Steelworkers of America, AFL-CIO v. NLRB (1974) 496 F.2d 1342 [186 LRRM 2984].)

was intended to be imposed only against employers. Ordinarily, there are sufficient incentives for a union to reach a collective bargaining agreement that do not exist for an employer. A union is under pressure from its members to obtain a contract as quickly as possible with the best possible terms. If it fails to do so, it suffers loss of dues income and risks the threat of a rival union petition or a decertification attempt. There are no incentives of a similar nature that exist for an employer.

Other principles of statutory construction support the foregoing interpretation of section 1160.3. As the California Supreme Court noted in J. R. Norton, Co. v. ALRB (1979) 26 Cal.Sd 1, 36, " ' A cardinal rule of construction is that . . . a construction making some words surplusage is to be avoided . . . . If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' [Citations omitted.]" Although the ALRA contains separate provisions making both an employer's and a union's failure to bargain in good faith violative of the Act, the makewhole provision specifies makewhole for the loss of pay resulting from the employer's refusal to bargain, and it must be assumed that the Legislature did not insert the word "employer" for no purpose. If the Legislature had intended to give the Board authority to order makewhole in cases involving union bargaining violations, then the words "the employer's" in the statutory phrase "making employees whole . . . for the loss of pay resulting from the employer's refusal to bargain" would be surplusage.

Under the statutory construction rule of expressio

unius est exclusio alterius, "the enumeration of acts, things or persons as coming within the operation or exception of a statute will preclude the inclusion by implication in the class covered or excepted of other acts, things or persons." (58 Cal.Jur.3d Statutes, § 115.) Under this rule, the reasonable interpretation of section 1160.3's makewhole language is that the enumeration of "employers" in the statute precludes the inclusion by implication of "unions" among those required to make employees whole for the refusal to bargain. This interpretation is even more compelling in light of the section's later language specifying that when a Board Order directs reinstatement of an employee, "backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him." (Emphasis added.) If the Legislature had intended the makewhole remedy to be available against unions, then it would logically have listed unions in the makewhole portion of the statute as it did in the backpay portion.[15/]

[15/] In his Decision herein, the ALJ advances several policy arguments against imposing the makewhole remedy against labor organizations. We are not in agreement with all of those arguments. Thus, we reject the ALJ's argument that makewhole should not be imposed against unions because such an award could so seriously deplete a union's treasury that funds would no longer be available for such purposes as strike benefits, publicity, and legal advice, and the power balance would consequently tilt in favor of the employer so that the policies of the ALRA would be gravely eroded. We do not believe that the possible insolvency of a labor organization should, as a matter of policy, preclude this Agency's award of an otherwise justified remedy if the remedy were statutorily permitted.

(fn. 15 cont. on p. 20.)

Therefore, we conclude that the fair and reasonable interpretation of section 1160.3--in view of the statute's language, its legislative history, the expressed policies of the ALRA, and traditional rules of statutory construction--is that the statute does not permit a makewhole award against a labor organization.

2. Attorneys' Fees and Costs

The Charging Party has excepted to the ALJ's failure to award it attorneys' fees and costs. It argues that such fees and costs are appropriate herein because of the length of the period of the UFW's bargaining violations and because the Union's primary defense—-that Maggio itself bargained in bad faith-- was frivolous.

We affirm the ALJ's conclusion that neither the UFW's conduct during negotiations nor its conduct in defense of this case warrants the imposition of the extraordinary relief of attorneys' fees[16/] or costs. There is no evidence herein that Respondent has repeatedly violated its statutory obligations or

(fn. 15 cont.)

We also reject the ALJ's argument that makewhole should be unavailable against a union because the remedy would cause discord between the union members who benefit from the makewhole award and union members outside of the bargaining unit whose dues would be used to pay for the award. Such discord, the ALJ argues, would weaken the union and adversely affect the necessary balance of power between the union and the employer. This argument provides no valid basis for denying makewhole, since it is not certain that the presumed discord would, in the long run, weaken the union, and it should not be the business of this Agency to ensure the institutional strength of any particular labor organization.

[16/]Member McCarthy believes that the ALRB is statutorily precluded from awarding attorneys' fees.

engaged in misconduct showing flagrant disregard for employee rights. (Autoprod, Inc. (1982) 265 NLRB 331 [111 LRRM 1521].) Neither is there evidence that in defending itself herein, the UFW has engaged in frivolous litigation. (International Union of Electrical, Radio and Machine Workers, AFL-CIO, (IUE) (Tiidee Products, Inc.) v. NLRB, supra, 194 NLRB 1234; Robert H. Hickam (1978) 4 ALRB No. 73.) Although the Union was unable to establish that the Charging Party engaged in bad faith bargaining or that Respondent itself was bargaining in good faith, the factual findings and conclusions of law were not so readily apparent, without litigation, that a reasonable party would not have proceeded to hearing.

3. Bargaining Order

We shall require Respondent to bargain with the Employer upon request, and to sign, mail, post, [17/] read, and provide copies of the attached Notice to Agricultural Employees as provided in our Order.

ORDER

By authority of of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, United Farm Workers of America, AFL-CIO, its officers,

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[17/] Members McCarthy and Gonot would require Respondent to post the Notice in all of its offices and union halls throughout California, since evidence indicated that the Union's bargaining operations were structured not along geographic lines but rather along the lines of specific crops or industries, without regard to where the crops or industries were located within the State. Moreover, a statewide posting obligation would be in accordance with prior Board precedent. (See, e.g., United Farm Workers of America, AFL-CIO (Odis Scarbrough (1985) 9 ALRB No. 17.)

agents, successors, and assigns, shall:

1. Cease and desist from:

a. Failing and refusing, upon request, to bargain collectively and in good faith with respect to rates of pay, wages, hours of work, and other terms and conditions of employment with the Employer, Maggio, Inc., on behalf of its agricultural employees.

b. Failing and refusing to meet at reasonable intervals with said Employer.

c. Failing and refusing to respond to proposals by said Employer.

d. Failing and refusing to submit its own proposals to said Employer.

e. Failing to furnish to said Employer requested information relevant to bargaining.

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

a. Upon request, bargain collectively in good faith with said Employer, with respect to rates of pay, wages, and other terms and conditions of employment for its agricultural employees and, if an understanding is reached, embody such understanding in a signed contract.

b. 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.

c. 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 Maggio, Inc., or its legal successor(s) at any time during the period from January 1, 1982, until the date on which the said Notice is mailed; the UFW shall seek the cooperation of Maggio, Inc., or its legal successor(s) in obtaining the names and addresses of the employees to whom said Notice shall be mailed.

d. Post copies of the attached Notice in all appropriate languages, in conspicuous places at all its offices and union halls throughout the Imperial Valley area 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.

e. With the consent of Maggio, Inc., or its legal successor(s), arrange for a representative of the UFW or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all its (their) 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 to answer any questions the employees may have concerning the Notice and/or their rights under the Act. The UFW shall reimburse Maggio, Inc., or its legal successor(s), for the employees' wages during this reading and question-and-answer period. The Regional Director shall determine a reasonable rate of compensation to be paid by the UFW to Maggio, Inc., or its legal succeessor(s) and relayed by it (them) to all nonhourly wage employees in order to compensate them for time lost at this

reading during the question-and-answer period.

f. Provide Maggio, Inc., or its legal successor(s), copies of the attached Notice so the Employer can deliver a copy of such Notice to each new agricultural employee it hires for a period of 12 months following issuance of this Decision or its enforcement if necessary.

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 therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved. Dated: September 18, 1986

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member

GREGORY L. GONOT, Member

MEMBER CARRILLO, Concurring:

I join the majority opinion in all respects insofar as it finds a violation of Labor Code section 1154(c) by the United Farm Workers of America, AFL-CIO (UFW) through its failure to bargain in good faith. I concur with the majority's conclusion that a makewhole award is inappropriate against a certified bargaining representative for its bargaining violation. My decision is not based upon statutory construction grounds, as is the majority opinion. Instead, it is based upon equitable grounds. Unions are sustained by general employee dues. It would be inequitable -- indeed, punitive -- to require one employer's employees -- who pay dues and fees pursuant to a union security clause in a contract -- to have to pay another employer's employees makewhole simply because their common collective bargaining representative breached its bargaining obligation to the latter group of employees. As such I would find that a contractual makewhole award against a union is not within the Board's available means of remedying a

union's bad faith bargaining violation.[1/]

Dated: September 18, 1986

JORGE CARRILLO, Member

[1/] A makewhole award against a union for its bad faith bargaining would present other conceptual and policy difficulties. Specifically, the Board would have to address the relationship between a union's breach of its duty to bargain in good faith under section 1154(c) and a breach of its duty of fair representation under section 1154(a)(l). The Board would also have to consider principles of agency and estoppel. For example, would unit members represented by a union be required to accept the consequences of their agent's bargaining misconduct, with decertification as their only remedy? If bargaining unit members directed or participated in the strategy of the bargaining misconduct, would they be estopped from securing a remedy? Would it be a prerequisite that a violation of the duty of fair representation be established before the union's principles -- the employees in the unit -- can secure a remedy against their agent's misconduct?

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Regional Office the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint that alleged we, United Farm Workers of America, AFL-CIO, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by our conduct, in failing and refusing to bargain in good faith with your employer, MAGGIO, INC., in that we failed and refused to meet at reasonable times with your employer to negotiate a collective bargaining agreement to contract, delayed and failed to present counterproposals and proposals of our own, and failed to furnish information requested by your employer.

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 NOT fail, delay or refuse to bargain in good faith with your employer, MAGGIO, INC., in respect to reaching an agreement or a collective bargaininga contract.

WE WILL bargain collectively in good faith on your behalf with your employer MAGGIO, INC., with respect to rate of pay, wages, and other conditions of employment and if an understanding is reached, we will embody such understanding in a signed contract.

Dated: UNITED FARM WORKERS OF AMERICA, AFL-CIO

By:_____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

United Farm Workers of America, (AFL-CIO) (Maggio, Inc.)

12 ALRB No. 16 Case No. 82-CL-4-EC

ALJ DECISION

The ALJ found that the Union's conduct in failing and refusing to meet with the Employer, failing to submit bargaining proposals, and failing to respond to the Employer's proposals, demonstrated that the Union had engaged in surface bargaining. The ALJ concluded that the language and legislative history of Labor Code section 1160.3 precluded the award of a makewhole remedy against a union. He also concluded that imposition of attorney's fees and costs was not appropriate in this case, since the Union's defenses were not frivolous.

BOARD DECISION

The Board affirmed the ALJ's conclusion that the Union violated Labor Code section 1154(c) by failing and refusing to meet with the Employer and failing to submit and respond to proposals. The Board also found that the Union violated its bargaining duties by failing to furnish information about the Union's benefit plans in a timely manner. Although disagreeing with some of the ALJ's policy arguments against imposing makewhole against a union, the Board affirmed the ALJ's conclusion that the language and legislative history of section 1160.3 precluded an award of makewhole against a union, and affirmed his conclusion that attorney's fees and costs were not appropriate in this case. The Board ordered the Union to bargain with the Employer in good faith and to mail, post, and read to the Employer's agricultural employees a notice of the Union's statutory violations.

* * *

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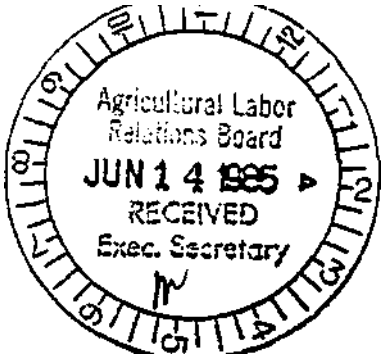
* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:	**Case** No. 82-CL-4-EC
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Respondent,	
and	
MAGGIO, INC.,	
Charging Party.	

Appearances:

Eugene Cardenas
for the General Counsel

Chris Schneider for
the Respondent

J. Rod Betts
for the Charging Party

Before: Arie Schoorl
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

ARIE SCHOORL, Administrative Law Judge:

This case was heard by me on October 29, 30, 31 and November 1, 2, 7, 8, 9 and 13, 1984 in El Centro, California. The complaint herein which issued on February 28, 1984, based on a charge filed by Maggio, Inc. (hereinafter called Charging Party or the Company) was duly served on Respondent United Farm Workers of America, AFL-CIO (hereinafter called Respondent or the Union) on July 26, 1982. It alleges that Respondent violated section 1154(c) of the Act. A first amended complaint was issued on October 5, 1984 and was duly served on Respondent.

At the outset of the hearing a motion to intervene, made by Maggio, Inc., as Charging Party, was granted. Each party was given full opportunity to participate- in the hearing and the General Counsel, Respondent and the Charging Party each filed a post-hearing brief.

Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the post-hearing briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent admitted in its answer, and I find, that it is a labor organization within the meaning of section 1140.4(f) of the Act and that the Charging Party is an agricultural employer within the meaning of section 1140(c) of the Act.

II. The Alleged Unfair Labor Practice

Respondent is alleged to have violated section 1154(c) of the Act in the following respects: Since on or about January 1982

Respondent has engaged in surface bargaining by the totality of its conduct as demonstrated by the following conduct:

(a) Respondent has failed to meet at reasonable intervals with the representative of the Charging Party.

(b) Respondent has unreasonably, or not at all, responded to the Charging Party's proposals;

(c) Respondent has refused to submit its own bargaining proposals;

(d) Respondent has offered proposals to the Charging Party calculated to be unacceptable;

(e) Respondent has failed or refused to supply information requested by the Charging Party.

III. Background Information

Maggio Inc., the Charging Party, grows and harvests carrots in the Imperial and Salinas valleys[1/] It also grows wheat alfalfa, broccoli, onions, radishes and other row crops.

From the summer of 1977 to January 1979, a collective bargaining agreement was in effect between Charging Party and Respondent. Late in 1978, Charging Party with other agricultural employers began to negotiate with the UFW for a new contract. The negotiations broke off in February 1979 and unfair labor practices were filed and litigation based on the mutual charges of bad faith bargaining by both parties commenced.[2/] After a hearing and an

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1. It principally harvests rather than grows carrots in the latter valley.

2. The mutual charges between various Imperial Valley agricultural employers and the UFW were consolidated into one compliand and one hearing.

ALJ decision, the Board issued a decision which became Known as Admirial Packing, et al. (1981) 7 ALRB No. 43. The Board determined that the employers' group (including Charging Party) had not bargained in good faith and ordered the makewhole remedy against the employers for such refusal to bargain.

On March 30, 1984, the Court of Appeals in Carl Joseph Maggio, Inc., et al. (1984) 154 Cal.App.3d 40, overturned in total the Board's decision in Admiral Packing Company, et al. (1981) 7 ALRB No. 43. The Court of Appeals held that both sides had engaged in hard bargaining and annulled the makewhole remedy. Subsequently the Supreme Court declined to hear the case on appeal and thus in effect affirmed the Court of Appeals decision.

IV. Respondent's Alleged Surface Bargaining

Section 1154(c) of the Act makes it an unfair labor practice for the employees' bargaining representative to refuse to bargain collectively with their employer in much the same way as its counterpart section 1153(e) imposes an obligation upon the employer to bargain collectively with their employees' representative.

Section 1152.2 defines the words "to bargain collectively" as "performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession."

In the instant case General Counsel has alleged that Respondent had failed to bargain in good faith, in that it has

engaged in surface bargaining with no intent to reach a mutually agreeable contract with Charging Party.

Both ALRB and NLRB authority holds that the bona fides of a parties' intention in this regard depends upon whether the party evidences a real desire to come to an agreement. The parties' behavior at and away from the bargaining table and the course of the negotiations themselves are some of the circumstances from which a determination can be made whether or not a party has bargained in good faith.

As was noted in N.L.R.B. v. Herman Sausage Co., Inc. (C.A. 5, 1960) 275 F.2d 229, 232:

> Bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail.

Furthermore, as was observed in Exchange Parts Company 139 NLRB 710, enf'd. 339 F.2d 829 (C.A. 5):

> It is patent that the Act requires that parties make expeditious and prompt arrangements to meet and confer. It does not contemplate protracted delays, unilateral cancellation of scheduled meetings, or other variations of negative conduct which have been held by the Board and courts to impede the bargaining process and otherwise frustrate negotiations so as to evidence a lack of regard for this aspect of the bargaining obligation.

Absent unusual circumstances, it is easier in surface bargaining cases to infer an improper motive on the part of the employer than on the Union since it is considered in a union's best interests to arrive at a speedy and mutually satisfactory collective bargaining agreement.[3/]

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3. Graphic Arts, Local 280 (1978) 235 NLRB 1084 [98 LRRM 1188, "A union"! by contrast (to an employer), rarely is motivated not to seek some sort of a contract."

However in the instant case, "unusual circumstances" are present . . . circumstances from which it can be inferred that it would be advantageous for the Union not to sign an agreement with the employer. The unusual circumstances are that during the entire period of negotiations, there existed the probablity that the Maggio employees would be entitled to a makewhole remedy which would compensate them for past services that is the difference between what they earned at the Charging Party and the higher level of wages provided for in the Sun Harvest contact.[4/] The Board had issued a decision, granting to such employees the makewhole remedy in 1981.[5/] On March 30, 1984 the Appelate Court overturned the Board's decision in respect to the makewhole remedy. However, the UFW appealed it to the Supreme Court which in effect confirmed the appelate court's decision by refusing to hear the case. The announcement was made on June 14, 1984.

General Counsel has alleged that the UFW has engaged in surface bargaining by the totality of its conduct as demonstrated by (a) failing to meet at reasonable intervals with the representatives of the Charging Party; (b) unreasonably; or not at all, responding to the Charging Party's proposals; (c) refusing to submit its own bargaining proposals; (d) offering proposals calculated to be

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4. Graphic Arts, supra, "The greater the rewards of recalcitrance to employer or union, the stronger the probability of indulgence-unto-excess by one or the other. And inferences, after all, derive from probabilities."

5. During the period of alleged bad faith bargaining on the part of Respondent, January 1982 through October 1984, the only collective bargaining contract that had been signed by the UFW with a vegetable grower in the Imperial Valley was with John Elmore, which contract was equivalent to the Sun-Harvest contract.

unacceptable; and (e) refusing to supply information requested by the Charging Party.

General Counsel contends that a strong inference can be drawn from (a) Respondent's desultory performance in negotiations with respect to meetings, proposals and the supply of information combined with (b) the expectation of the Union that bargaining unit members would receive makewhole, Sun Harvest level, benefits in the event no contract was signed, that the UFW was guilty of surface bargaining.

A. Respondent's Alleged Failure to Meet at Reasonable Times

1. Facts

I will first discuss the allegation that Respondent failed to meet at reasonable times with the Charging Party.

During the 34 month period of Respondent's alleged failure to bargain in good faith, only 16 negotiating meetings were held.[6/]

Respondent cancelled seven[7/] scheduled meetings and the Charging Party one.[8/] On various occasions, the Charging Party initiated requests for a meeting rather than Respondent.

Respondent's representatives arrived late for the following meetings: 20 minutes late February 22, 1982, 5 minutes late March 29, 1982, 28 minutes late August 4, 1982, 10 minutes late January

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6. January 13 and 28, February 22, March 29, April 20. August 4, December 1 and 6, 1982; January 13, February 16, March 8 and 23, August 10, September 22, 1983; June 18 and October 26, 1984.

7. March 10, April 29, June 14, 1982 and May 26-27, June 2-3, June 10 and July 20, 1983.

8. July 6, 1983.

13, 1983, 15 mintues late March 8, 1983 or March 23, 1983,[9] 10 minutes late September 29, 1983 and 15 minutes late June 18, 1984.

There were 5 prolonged gaps in negotiating sessions: April 20 to August 4, 1982 (3½ months), August 4 to December 1, 1982 (4 months), March 23 to August 10, 1983 (4½ months), September 22, 1983 to June 18, 1984 (9 months) and June 18 to October 26, 1984 (4 months).

During the three year period of Respondent's alleged bad faith bargaining, the UFW was represented by a succession of four negotiators. David Martinez represented the UFW until July 1982. Arturo Mendoza from July 1982 to March 1983, Esteban Jaramillo[10] March to May 1983, Arturo Mendoza again from May 1983 to May 1984 and David Ronquillo from May 1984 to October 1984.

During his tenure as the UFW representative, David Martinez was the director of UFW region 3 and was responsible for organizing, negotiations, contract administration, arbitrations and other duties as a member of the UFW executive board. During his tenure as the UFW representative, Arturo Mendoza was general manager of Respondent's vegetable division who oversaw contract administration, organizing, litigation and negotiations and also served as a member of the UFW executive board. In the summer of 1983 Cesar Chavez, UFW president, obliged executive board members to attend planning

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9. Not clear in the record which meeting in March 1983 Respondent representative arrived late.

10. There was testimony that the UFW had designated Esteban Jaramillo and Gilbert Rodriguez joint negotiators during this period but there was no evidence about Gilbert Rodriguez' experience as a negotiator and he did not participate in any contacts with the Charging Party about negotiations.

sessions. Such attendance by Mendoza compelled him to cancel some meetings. David Martinez and Arturo Mendoza were experienced contract negotiators. David Ronquillo had some experience while Esteban Rodriguez had none.

Josiah Neeper, an experienced labor lawyer and negotiator represented the Charging Party until February 1982 and thereafter Merrill Storms, another experienced labor lawyer and negotiator, represented the Company.

During the first few sessions Respondent's and the Charging Party's representatives spent a considerable amount of time discussing grievances: returning strikers, leave of absence, etc. However, Storms objected to such practice and thereafter virtually no time was spent on settling grievances.

The five extended periods of no bargaining meetings are as follows:

April 20 to August 4, 1982

At the April 20 session, the parties agreed to meet on April 29. Martinez cancelled the meeting because he was busy in the Salinas Valley. Martinez contacted Storms on May 10 and informed him that he was finishing his work in the north but that his father was gravely ill in Texas and therefore he was leaving for Texas.

On May 18 Storms sent a telegram to Martinez expressing his concern for Martinez's father's health and requesting Martinez to contact him as soon as possible. After his father's death, Martinez returned to California and the parties agreed to meet on June 15-On June 14, Martinez cancelled the meeting and explained to Storms that the negotiating committee needed time to prepare a complete

contract proposal.

On July 7, Storms wrote Martinez and informed him that he had dates available in July for renewed negotiations. On July 16 Storms informed Martinez by letter that the Company was considering planting lettuce in the Imperial Valley and that he was awaiting notification from the Union about a new negotiating date. On July 21 Arturo Mendoza contacted Storms and informed him that he would be responsible for negotiations in the future and suggested August 4 as the next meeting date.

August 4 to December 1, 1982

At the end of the August 4 meeting the parties briefly discussed the Company's latest contract proposal and Mendoza told Storms that he needed time to discuss it with the negotiating committee and that the Union would prepare a counterproposal.

On August 18 Storms wrote to Mendoza and reminded him that the Company had not received any response to its latest contract offer. On September 15 Storms wrote to Mendoza again of no response and suggested some dates for negotiations.

On November 16 Mendoza sent a contract counterproposal to Storms and stated that he would be available in the Imperial Valley for negotiations the last week of November and the first week of December. The parties agreed to meet on December 1, 1982.

March 23 to August 10, 1983

On March 23 Mendoza told Storms that Esteban Jaramillo and Gilbert Rodriguez would be the new negotiators for the UFW. Soon afterwards Storms and Jaramillo exchanged wage proposals for shop employees. Jaramillo informed Storms that he would be available for

negotiations in April. On April 6 Storms inquired with Jaramillo about meeting dates but received no reply from Jaramillo in respect to the shop employee wages or the dates. On May 15 Mendoza notified Storms that he had replaced Jaramillo as the Union negotiator and they agreed on meeting dates of May 26 and 27. Mendoza called and cancelled the May dates and the parties agreed on June 2 and 3. Mendoza cancelled those June dates and rescheduled for June 10. On June 7 Jaramillo called and cancelled the June 10 date as it conflicted with Mendoza's schedule. Jaramillo stated that he had no knowledge of Mendoza's available dates and that Mendoza would contact Storms in that respect.

Mendoza scheduled negotiations for the week of July 6. Storms cancelled the July 6 meeting as he had to be present in Salinas to advise Maggio regarding a strike of its shed employees. On July 7 Storms called Mendoza to set up a new date but Mendoza was not available until July 20. On July 15 Jaramillo called and cancelled the July 20 date because Mendoza had a schedule conflict-The parties met on August 10.

September 23, 1983 to June 18, 1984

Storms did not hear from Mendoza about the contract negotiations again until January 1984. In the interim Jaramillo contacted Storms in October about a problem with a tractor driver and in November a request about carrot harvest seniority.

Mendoza testified that the Union needed time during the autumn to review the employer's offer since the Union negotiator had to confer with the negotiating committee as the ultimate ratification of the agreement by the workers depended on

periodically consulting with them so that their ratification would be forthcoming at the time the Company and the Union negotiators reached an agreement.

Mendoza further testified that during the months of November and December, Storms and he were in almost daily contact on other farm labor litigation and that Storms failed to mention the Maggio negotiations.

On January 4, 1984 Mendoza sent a letter to Storms requesting information concerning the Maggio corporation settlement.[11/] On January 10 Storms replied and informed Mendoza that he had not been directly involved in the negotiations and settlement and that he was requesting the pertinent documents from his law firm's attorney who was involved and upon receipt of the settlement agreement he would forward the appropriate provisions to Storms in response to his request. On January 17, Storms sent the details of the settlement agreement relative to the disposition of the farm acreage and in addition sent information about the leasing arrangements the Company had with other agricultural entities.

The UFW did not contact Storms until May 30 when David Ronquillo sent a letter to Storms informing him that he was the new UFW negotiator and requesting to renew negotiations and suggested June 6, 7 or 8 as alternate dates. Storms immediately replied and

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11. On August 30 Storms informed Mendoza by letter that the officers and principals of the Maggio corporation had been in litigation for several years about a restructuring of the Company's operations and that a settlement was near. Storms pointed out that such a restructuring could reduce or terminate the Company's farming operation and that the employer would keep the Union informed about the terms of the settlement so the parties would be able to negotiate about the effects.

expressed his scepticism about the timing of the letter and the suggested dates. Storms pointed out that the Union had not contacted him for 5 months and then suddenly wanted to meet with him on three days in June, the very days that he was scheduled to be in *a* hearing with the same Union. In the same letter Storms offered to meet on a Saturday, June 9, with Ronquillo. Ronquillo replied and suggested that Storms secure another negotiator since there "should be no reason why I should have to wait three weeks because you have commitments elsewhere." Ronquillo described Storms' offer to meet on Saturday as somewhat unusual but that he would be willing to meet on that particular day or during the evening hours of the following week (after the hearing) or on Saturday, June 16. Ronquillo concluded with "better yet, that another person be assigned to do these negotiations".

Storms had his secretary telephone Ronquillo and informed him that he would be available for June 12 in the evening and on June 18 at 9:00 a.m. The parties held a negotiations session on June 18.

June 19, 1984 to October 26, 1984

On June 31, 1984 Ronquillo sent a letter to Storms informing him that Castle and Cook had advised the Union that it presently owned a controlling percentage of Maggio stock and requested a clarification from Storms on this point. Storms responded denying that Castle and Cook owned any part of the Maggio corporation and renewed his request for the name of the source of this information. On August 20 Ronquillo replied and explained that he had no information about such source and inquired whether the

Company had a new proposal for the Union. He also asked what Storms meant in his letter about the impact on negotiations, about the inquiries, about the supposed Castle and Cook ownership of Maggio.

On September 14 Storms replied and explained that what he meant by impairing negotiations was the time and effort the parties had wasted in dealing with the "unfounded allegations" by the Union which raised in the minds of the Company's negotiator questions about the Union's intent. Storms concluded that the parties should move on to more productive discussions.

In a letter of October 12 to Storms, Ronquillo expressed his disagreement with Storms' assertions that the Castle and Cook inquiries and clarifications had consumed so much time. Ronquillo requested that the Company make a new up-to-date contract proposal and concluded by suggesting the dates before October 26 or after November 8 since he would be out of town during that period of time. Storms responded and suggested some negotiation dates and concluded by requesting a Union contract proposal so that the future meeting would be "much more beneficial."

On October 22 Ronquillo replied and explained that the reason for his thirty day delay in answering Storms latest letter was because he had been very busy preparing for Abatti Brothers negotiations with Storms and added that Storms had failed to mention the Maggio negotiations and meeting dates at two Abatti bargaining meetings. Ronquillo suggested some meeting dates and a request for a modification of the Company's latest proposal.

Storms answered and stated that the Company would not make any further proposals at that time and suggested some meeting dates.

The parties met on October 26. At the end of the meeting, Ronquillo suggested November 9 as a tentative date for the next meeting date. Storms promised to keep that date open for a few days until Ronquillo confirmed it. On October 29 Ronquillo notified Storms that Mendoza had replaced him as the Union's negotiator.

2. Discussion

The record evidence clearly supports the allegation that the Respondent was responsible for not only numerous delays in negotiating with the Charging Party but also for five extended periods of no meetings.

The UFW negotiators cancelled seven meetings to one for the Charging Party. It can be argued that the UFW was understaffed and that its two principal negotiators David Martinez and Arturo Mendoza had other than collective bargaining duties to attend to both in the Imperial Valley and elsewhere, but that argument fails since the parties' duty to meet at reasonable times and places cannot be mitigated by the unavailability of its representatives.[12/]

The first extended period of no meetings extended from April 20 to August 4, 1982. • In April and May the UFW negotiator Martinez was busy in the Salinas Valley with other matters and then went to Texas because of his father's last illness and death. In June he cancelled a meeting "because the negotiating committee

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12. In Montebello Rose Co., Inc., et al., 5 ALRB No. 64, Respondent employer failed to discharge its duty to provide a representative who was available to meet with the UFW at reasonable times and with reasonable regularity. See N.L.R.B. v. Milgo Industrial, Inc. (1977) 229 NLRB 25, 96 LRRM 1345, enf'd F.2d 540, 97 LRRM 2079 (2d Cir. 1977); Insulating Fabricators, Inc. (1963) 144 NLRB 1325, 1326, 54 LRRM 1246.

needed time to prepare a complete proposal". However, it was the Company, not the Union, that proceeded to prepare a comprehensive proposal and initiate steps for the next meeting.

On July 16 Storms contacted the Union about another meeting and because of the new negotiators' unavailability the parties could not meet until August.4 when the Employer presented a comprehensive contract proposal.

Respondent scheduled no meetings nor presented any counteroffers until the middle of November 1982, a period of 3½ months after receiving the Company's August 4 proposal. During this interval, it was the Company that requested meeting dates not the Union. Moreover under the circumstances, 3½ months to prepare a counteroffer is excessive.

The third extended period of no meetings is from March 23 to August 10, 1983 (4½ months). For two months the UFV7 designated an inexperienced representative Esteban Jaramillo who had no negotiating experience whatsoever other than sitting in on ten negotiating sessions conducted by Arturo Mendoza. Jaramillo failed to ask for any meeting date and after exchanging shop wage offers did not respond to the Company's request for meeting dates or proceed to follow up on the wage offer exchange. It is evident that the UFW had no intention to meet with the Charging Party's representative during this two month period.

Mendoza replaced Jaramillo and proceeded to cancel three scheduled meetings in May and June due to conflicts in his schedule. Storms cancelled only one, a meeting scheduled for July 6, as he had to be present in Salinas to advise Maggio with respect to a strike

of its shed employees. Mendoza cancelled another meeting in July because of a schedule conflict.

Respondent argues that Martinez was busy with his duties as a member of the Executive Board and had to attend its planning sessions many of which lasted longer than expected and consequently Mendoza found it necessary to postpone meetings. However, I have previously concluded that such an excuse does not relieve Respondent of its duty to meet with Charging Party at reasonable times. (See footnote on page 14.)

The fourth and longest period of no meetings took place between September 23, 1983 and June 18, 1984 (9 months). Mendoza testified that the Union needed time during the autumn of 1984 so the negotiator could meet with the negotiating committee and review the employer's offer. However, the UFW failed to respond to the Charging Party's long standing proposal during this 9 month hiatus nor thereafter. Such an explanation might be valid for a 2 or 3 month delay but in respect to a prolonged period of 9 months it is patently pretextual.

Another explanation in respect to the delay according to Mendoza is that he and Storms saw each other virtually on a daily basis as both were involved in the same litigation and neither of them mentioned the Maggio negotiations. However, it would be up to the Union representative to mention the negotiations since an employer's duty to meet at reasonable times is incumbent upon requests to meet on the part of the Union.

Also by this time, the employer, after expending so much effort on thwarted attempts to arrange meetings with Respondent had

every right to leave it up to the Union's representative to broach the subject.

Respondent has no explanation of the January to May gap other than the question of the settlement of the partitioning of the Maggio properties. However, by January 17, Storms, in response to a January 4 inquiry by Mendoza, provided the UFW with all the pertinent details. So from January through May the Respondent has no valid explanation of its failure to ask for meeting dates.

At last on May 30 a new UFW negotiator David Ronquillo notified the Charging Party's representative Storms about new hearing dates. Storms responded and explained why he was not available for the next 3 weeks. In a reply letter Ronquillo had the affrontery to suggest that since Storms was not available the Company should supply another negotiator. In effect the UFW accused the Respondent of the exact behavior of which it itself had been blatantly guilty for over a two year period.

The fifth period of no meetings was between June 18 and October 26. Ronquillo spent his time writing letters to Storms discussing the possibility of a Castle & Cook takeover of Maggio. It wasn't until October 12 that Ronquillo requested meeting dates and the parties met on October 26, 1985. Shortly after the meeting Mendoza replaced Ronquillo. It appears that Ronquillo served as a stop-gap replacement for Mendoza and in effect reduced the number of meetings during his 5 month tenure to only two, the first of which was restricted to "get-acquainted" matters.

In view of the foregoing, I find that Respondent failed and refused to meet with the Charging Party and intentionally engaged in

such conduct.[13/]

B. Respondent's Proposals and Counterproposals and Alleged Failure to Supply Information

1. Facts

Now to turn to the discussion of the allegations (b), (c), (d) and (e) with respect to the alleged surface bargaining. The first three allegations can be summarized as whether Respondent responded to Charging Party's proposals and if it did were its responses unreasonable and/or calculated to be unacceptable and also whether it made any proposals of its own. Allegation (e) deals with Respondent's alleged failure to furnish the Company with information.

The Company and the UFW met twice in July 1981. At that time the UFW made a three package proposal[14/] based on its collective bargaining contract with Sun Harvest. It made three concessions: (1) Abandon the ALRB criterium of good standing regarding Union security[15/] and agree to a modified NLRB one. (2) Retract its demand for a jointly operated hiring hall and

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13. Although I do not rely on Respondent's repeated tardiness as an additional basis to support my finding that Respondent failed and refused to meet with the Charging Party, such tardiness is certainly consistent with such conduct on the part of Respondent.

14. Respondent did not make separate offers on each one of these proposed articles but placed each one in group of other proposed articles. To reach an agreement the Charging Party had to accept a group of articles as a "package" not separately.

15. NLRB good standby only requires that a member pay dues and initiation fees while ALRB good standing requires in addition that the member be in good standing with the Union according to the constitution of the particular labor organization.

agree to an Employer-operated hiring hall.[16/] (3) Change its demand for a full-time to a half-time paid Union representative and the compensation of two additional employees who would participate in the grievance procedure (at the second level).[17/]

In August the Company notified the Union about a proposal to grant an interim wage increase to shop employees. The UFW representative, David Martinez, contacted Respondent's negotiator Josiah Neeper and left a message protesting the proposed interim wage increase and reiterated the Union's desire for a complete bargaining agreement which would cover wages, hours and conditions of employment for all the employees. Martinez concluded the message by stating his intent to put the protest into writing in time for the next bargaining session.

The Meeting of January 13, 1982

The parties next met for negotiations on January 13, 1982 and Martinez delivered the written protest about the proposed shop employee wage increase to Neeper. Martinez and Neeper discussed the problem of the recall of the strikers and their unconditional offers to return to work.

Martinez requested crop and employment projections and Neeper supplied the appropriate information. Martinez requested a response to the Union's concessions and Neeper replied that the Company would soon do so. Neeper acknowledged that the Union

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16. The previous contract between the parties contained a provision for a Union-operated hiring hall. The UFW had proposed a modification, a jointly operated hiring hall, at a previous meeting.

17. The UFW put the proposal into writing at the July 30 meeting.

proposal was a serious one with substantive movement and he told Martinez that he would prepare a full response.

On January 18, 1982, the Company sent a written response by mail to the UFW in which Neepers presented a three-package counterproposal. The Company agreed to the ALRB version of good standing for Union security but tied such a concession to its definition of seniority. Moreover, the Company wanted clear language to the effect that its supervisors would perform bargaining unit work in certain situations that had been established by past practices. The reason the Company wanted clear language in this respect was because since the past practices had been established, the Union and the Company had been through an embittering strike and the Company was fearful that consequently the Union might not be so amenable to the continuance of past practices.[18/] The Company would concede to the Union request for a paid Union representative but limited to 4 hours a week in exchange for the Union conceding to its positions on Cost of Living Adjustment (COLA), Wages, Job Descriptions, Vacations and a general supplement. However, the Company in its remaining package proposals retained its position on all other items, e.g., Hiring, Work Hours and Overtime, Reporting and Standby, Injury on the Job, Travel Pay, and Mechanization.

The Meeting of January 28, 1982

At this meeting Josiah Neeper represented the Company and

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18. The parties had already agreed to supervisors doing bargaining unit work in emergencies or as part of the training of employees.

David Martinez the UFW.[19/] The UFW rejected the Company's counterproposal. Martinez told Neeper that the Company had returned to its 1979-80 positions after the Union had made a serious proposal. Neeper responded that the Company was willing to take its proposals out of the package formats and concede on individual articles if it could receive something in return, i.e., Union Security.

Neeper agreed to the Union request regarding "Records and Pay Periods" by which the Company would provide the Union with a list of the trust fund payments within 10 days after the end of the month and if not possible by the 20th. The parties made identical proposals on seniority. So in effect they came to an agreement.

The UFW proposed a Company operated hiring hall but with safeguards against foremen and anti-Union favoritism and repeated its request for a half-time paid representative. The Union's counteroffer consisted of Sun Harvest provisions[20/] on every article except severance pay, job descriptions, hiring procedures, records and paid Union representative.[21/]

On January 29, 1982, the Company sent the information with respect to crops and projected number of workers required in response to the UFW's request.

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19. The parties spent a considerable amount of time discussing grievances.

20. The Sun Harvest provision for Union Security was ALRB good standing.

21. The Union's offer on wages: Sun Harvest where crops and classifications are applicable, otherwise to be bargained.

The Meeting of February 22, 1982

The parties discussed grievances during the first part of the meeting. The UFW negotiator Martinez requested information regarding lettuce workers' past wages to determine severance pay demands since the Company planned to cease raising lettuce. Storms replied that such information would not be available until the end of the year when the W-2 forms were prepared.[22/] The Union renewed its proposal for half-time paid Union representative and the compensation of two committee members who would participate in grievance procedures at the second step. The Union also repeated its request for its version of "Records and Pay Periods". According to Martinez, the Company did not inform him that it intended to harvest radishes. Storms protested about too much meeting time being consumed in discussing grievances. In response to the protest, Martinez suggested that he, Martinez, formulate a list of subjects to be discussed at the next meeting and Storms agreed.

Martinez sent to Storms his suggested list of eight subjects to be discussed at the next meeting.

Martinez cancelled the next meeting which had been scheduled for March 10 because he had to file objections in an election in Arizona.

On March 10, Storms sent a letter to Martinez informing him that the Company had planted radishes and requested information about any contracts the Union had with companies which also grew radishes. In the same letter Storms suggested March 16 as the date

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22. The UFW did not renew its request and the Company did not furnish such information.

of the next meeting. Martinez called Storms on March 18 and explained that he did not have any information regarding contracts with radish growers. They decided to meet again on March 29 and thus Martinez would have more time to secure the radish information.

The Meeting of March 29, 1982

Storms requested discussion of the wages, hours and conditions of employment for the radish harvest which was to begin in a day or two. Martinez explained that he had not been able to locate any radish-raising companies, with which the UFW had a contract, but there still was one possibility which he would explore. Martinez caucused with the negotiating committee. At the conclusion of the caucus, Martinez requested $6.15 per hour for the radish harvest, which was to serve as the minimum even if a piece rate were adopted. He pointed out that accurate production records could be kept so a piece rate would be elaborated and retroactivity effectuated if an overall contract was achieved. The Company rejected the Union's proposal and offered $4.12 per hour and normal production records. However the Company agreed to offer the radish work to the bargaining unit employees according to seniority. The parties spent virtually the entire time of this session discussing the radish and onion crops and the hiring practices involved therein, so that little or no time was spent on the Martinez agenda of 8 subjects.

Storms testified that at the end of the meeting the two parties agreed that Martinez would call Storms by telephone on Friday at 12:30 noon and they would continue negotiations on the radish and onion harvests. Storms waited in his office for the

phone call at the designated hour but Martinez failed to make the call. Martinez admitted that he had not telephoned Storms but added that it was his understanding that he would only telephone if he had been successful in securing information about another grower who also raised radishes.

The Meeting of April 20, 1982

The parties met on April 20 and Storms renewed his request for copies of any contracts the Union had with any vegetable growers other than Sun Harvest. Storms testified that he needed such information so he could determine whether the Union had ever lowered its demands from the Sun Harvest provisions.

Storms informed Martinez that Joe Rodriguez, the labor contractor, for harvesting the onion crop, would grant preferential treatment to the Maggio seniority workers (strikers) who had not returned to work. Maggio would provide the Union with the wage rates, the time and the location of the onion harvest.

The parties preceded to discuss the working conditions for the radish harvest, e.g., grading, production per day, families under one social security number, etc.

Martinez asked questions regarding certain articles. Storms responded that the parties had agreed in principle about supervisors. He stated that the Company wanted to operate the hiring hall. Storms added that the Company would not pay the first three days of disability compensation for an on-the-job injury since it would encourage absenteeism but would pay the entire day's pay for the day of the injury. He concluded that the Company would pay the travel allowance as provided for in the previous contract (20¢).

Martinez reiterated that the Union wanted 300 a mile as was provided for in the Sun Harvest contract. Martinez inquired about any plans for planting lettuce in King City.

On June 14, 1982 Martinez cancelled a meeting scheduled for that day because, as he explained to Storms, he intended to present a complete contract proposal and needed time to consult with the negotiating committee in that respect.

On July 6, 1982 Storms informed Martinez by letter that the Company was considering the growing of lettuce in the Imperial Valley.

After numerous cancellations of meetings during the summer of 1982, the parties finally met on August 4. Arturo Mendoza replaced David Martinez as the UFW negotiator in July.

The Meeting of August 4, 1982

Storms requested information about the Union medical plan and also copies of any contracts with other vegetable companies[23/] Mendoza said he would comply and also send the annual information request to the Employer.

Storms presented a complete contract proposal including wages. The Company made some concessions. 1. It would compensate a paid Union representative for time spent on processing grievances but with a maximum of 5 hours per week. 2. The Company would provide the Union with a 60 rather than a 30 day notice of a changeover to mechanization. 3. It agreed to the majority of the Union's proposals regarding overtime pay and converting the

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23. Storms explained to Mendoza how his previous requests had not been complied with.

assignment of overtime from a mandatory to a voluntary basis.[24/] It agreed to a raise of the general field rate from $4.12 to $4.53, $4.89 and $5.28 per hour for the next three years. 5. 700 hours would be needed to qualify for vacation pay as in the Sun Harvest contract (also in the previous contract) 6. A new holiday July 4. 7. 38¢ per hour RFK fund, 40¢ per hour second year, 42¢ per hour third year. 8. 20¢ per hour pension plan for first year, 21¢ per hour second year and 22* per hour third year. 9. MLK fund 7¢ per hour. However, in exchange for these concessions, the Employer wanted a Union Security clause with the NLRB criteria,[25/] a Company-operated hiring system, and a 5-day probationary period for new employees.

Storms testified that the employer proposed a centralized hiring system that would be operated in such a way that it would bypass the foremen and thus satisfy the Union's fear of favoritism on the foremen's part. However Mendoza testified that the language of the proposal did not assure that such a system would be utilized

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24. The UFW argues in its post-hearing brief that the Company, in improving the overtime compensation was merely complying with the orders of the State Industrial Welfare Commision.

25. The previous contract contained a Union security clause based on the ALRB definition of good standing. Storms testified that the reason the Employer offered only NLRB language was *a* tactical move to provide leverage to bargain the UFW away from the "suspension" language in its proposed article. The Company was wary of the addition of "suspension" language to "discharge" as its principals thought the Union could use such an option to punish members of the bargaining unit.

since it would be at the option of the Company.[26/]

The previous contract provided that the Company furnish the employees with extensive information on their pay check stubs regarding hours worked per week, yearly accumulation of hours, piece rate breakdown etc. However in the Employer's proposal the providing of such information was conditioned on their being enough space on the pay check stub.

Mendoza testified that the general field rate increase to $4.53 per hour was lower than what the employer had offered in May of 1980. Mendoza testified further that the sum of 38¢ per hour for the RFK medical plan was considerably lower than the hourly rate needed to finance the fund at the current level of benefits according to the plan's actuaries, i.e., 55¢ per hour.

Mendoza commented that it was good the employer had made such an offer because the parties now knew where they stood. He added that he could not present a counteroffer at that time as he needed time to confer with the negotiating committee.

On August 10 Storms telephoned Mendoza in Salinas and requested information about the medical plan and any contracts the UFW might have with other vegetable growers. Mendoza said that he did not have the information in his office but would call Storms back but he failed to do so.

On August 12 Mendoza sent a letter to Storms requesting

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26. The exact language was "The Company shall have the option to conduct hiring from time to time as it may deem appropriate, under any of the following methods and any combination thereof." One of the "following methods" was through a centralized hiring procedure and the other was by the foremen in accord with past practices.

information about projected crops, employment, etc.[27] Storms replied in a letter that because of the summer vacations for office personnel, there would be some delay but the Company would provide the date in due time. On August 18 Storms wrote to Mendoza and reminded him that he had not received any response to its complete contract proposal of August 4. On August 24 Storms wrote a letter to Mendoza requesting information about the Union's funds.

On September 15 Storms sent a letter to Mendoza in which he pointed out that he had not received any UFW response to the August 4 contract proposal nor any attempt on the Union's part to schedule negotiations. Storms suggested some meeting dates and advised the Union that the Company would like to implement a raise in the carrot harvest rate on September 24 retroactive to August 1 and would do so if he, Storms, did not hear from the Union previous to the proposed effective date of the raise.

On September 23 Storms sent the first set of documents in response to the Union's request for information[28] and in the cover letter informed the Union about the implementation of the carrot harvest rate since there had been no Union response forthcoming.

On November 16, Mendoza sent a response to the Company's August contract proposal.[29] In the cover letter, Mendoza suggested

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27. The UFW's usual request.

28. But contained no data for the King City operations.

29. In September 1982 the UFW entered into a two-year agreement with Sun Harvest which provided for a general field hourly rate of $6.65, up from $6.15 and commensurable increases in all job classifications.

dates for a meeting and requested information regarding the King City operations and radish harvest figures. In the counterproposal, the UFW increased its request for wage raises from $6.15 to $6.80 per hour[30/] (with corresponding increases for all job categories)[31/] and retroactive to July 15, 1982) medical plan payments to be tied in with higher payments in the Sun Harvest contract, 21¢ an hour for pension plan, Cost of Living Adjustments (not in the previous contract but in previous UFW proposals) the tenth of every month for payment of dues and reports on hours worked, weekly and accumulated, etc., a bonus for tractor drivers.[32/]

Mendoza also testified that the reason to tie the RFK payment figure to the Sun Harvest figure was because what was contained in the latter contract was not a set figure but a mechanism to calculate the amount that should be paid into the fund to keep the benefits to the employees constant. There were built-in safeguards including arbitration to protect the employer from excessive increases.

Furthermore Mendoza testified that the Union increased the wage demands from the previous $6.15 to $6.80 an hour[33/] because the

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30. Shop employees $10.15 per hour effective July 15, 1982 and $10.50 per hour effective July 15, 1983.

31. No mention was made of the carrot crew harvest rate.

32. Tractor drivers for listing role work of 88¢ per acre. The Charging Party had offered such a bonus but at 60¢ per acre the first year, 62¢ the second year and 64¢ the third year. there was no such provision for a bonus in the Sun Harvest contract.

33. According to Mendoza's testimony, the UFW requested 15¢ more than the $6.65 per hour rate that was provided for in the new Sun Harvest contract as a bargaining posture and in fact the Union soon lowered its request to $6.65 an hour.

latter amount was for a contract that would terminate within a relatively short time, and now the Union was proposing a wage amount that would be in effect in an extended time in the future.[34/] The negotiating committee had recommended such an increase, even though they realized it was approximately the same as the Salinas area contracts because the wages in the two valleys had been the same during the 1970's and the difference in the rates came about due to the fact that in 1979 the Salinas growers signed with the UFW and the Imperial Valley growers did not.[35/]

Moreover, Mendoza testified that the reason for the Union's request that the Company report the hourly, etc., information by the tenth of the month was because the various fund functionaries had so requested.

Storms testified that the Employer objected to the COLA because of the wide market price fluctuations that were not necessarily concommitant with inflation and to the tenth of the month for reporting because it was overly burdensome. Storms added that the Company was prepared to raise its wage rate from ten to fifteen percent but could not pay the higher wages proposed by the Union because of the various differences between the Salinas and the Imperial valleys. He also pointed out that the proposed shop wage rates were even more than the amounts in the Sun Harvest contract

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34. Two-year duration.

35. The Charging party had signed a collective agreement with Respondent which was in effect from 1977 to January 1979. It was based on the "master" contract, Interharvest, which had been signed by and complied with by agricultural employers in both the Imperial Valley and Salinas Valley.

and that the Union had not made any payroll proposals for the Company's principal crop, carrots.

Storms did not have a copy of the Sun Harvest contract in November when he received the UFW counterproposal but received one in December. He noted that the Union proposal of $6.80 per hour for general field work was higher than what the Union had achieved in the new Sun Harvest contract, e.g., $6.65 per hour.

The December 1, 1982 Meeting

The parties met to negotiate on December 1st. Storms informed Mendoza that the Company rejected the UFW's November 16[36/] counteroffer as he considered it a movement away from its previous positions, i.e., increase in wage rates, COLA and medical benefits in accord with the Sun Harvest amounts.

Mendoza responded by providing the Union's reasons for such changes. He added that if $4.53 per hour was the employer's bottom line figure, the parties had a "big problem" and that he considered the Company's wage offer below that of three years previous. Storms responded that the Union had raised its wage figures but Mendoza retorted that $6.80 per hour was not the UPW's final demand.

Storms suggested that they discuss the lettuce harvest rates and offered the prevailing rate. Mendoza responded that such a rate was 87½¢ per hour and provided names of the companies paying that rate.[37/] Storms said that he wanted time to investigate rates

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36. Storms received the UFW offer through the mail on November 19, 1982.

37. Mendoza testified that Maggio had previously paid the same lettuce piece rate as Saikhon.

paid by other companies, especially Saikhon, as he was unwilling to accept the rates based on the Union's sampling of companies.

Mendoza requested additional information to what he had asked for in his November 16 letter. Storms delivered the information and informed him that the data for the King City operations would be soon forthcoming. Storms told Mendoza that the Company was looking for signs of a willingness to compromise on the part of the Union but had not seen any such disposition yet. As of December 1 the Company had not received any information about another UFW contract with a vegetable grower other than the Sun Harvest one.

The next day, at the conclusion of the Abatti negotiations, Storms informed Mendoza that the Company would provide bus transportation for the lettuce harvesters from Calexico (but not from the "El Hoyo") and that he would continue with the survey of prevailing lettuce harvesting rates and once concluded he would let Mendoza know the result. On December 2, Storms informed the UFW that the Company's lettuce rate would be 82¢ a box and that it would provide transportation for the lettuce workers from Calexico (but not from El Hoyo, as requested by the Union). On December 8, Storms received information from the Union on the Juan de la Cruz, Robert F. Kennedy and Martin L. King funds.

On December 10, Storms sent Mendoza the balance of the information with respect to the Company's Imperial Valley operations including information on the radish harvest[38/] and explained that

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38. Storms did not supply all the information requested by the Union but explained in detail how the Company did not keep records in a manner in which would enable it to provide such information without an overburdensome effort.

they were still preparing the King City information and would be sending it soom. On that same date the Union notified Storms that they had no information on any contract with a radish grower.

On December 21, the UFW mailed the remaining information of the Juan de la Cruz pension fund to Storms.

On December 27, the Union sent to Storms some remaining information on the funds that had inadvertently been left out of the December 8 letter.

On December 28 Storms sent a mailgram to Mendoza calling his attention to the fact that for several years there had been no pay raise and proposing a raise from $4.12 to $4.53 per hour for general field work. Storms suggested that the employees would be notified that the raise would be granted with the cooperation and the consent of the Union. In the mailgram Storms suggested that the week of January 3 for negotiations and if he did not hear from the UFW by that date, the Company would proceed to implement the raise to $4.53 per hour.

The next day Mendoza contacted Storms and informed him that the Union would not agree to the proposed increase and that he could not meet the week of January 3 and suggested meeting on January 13.

The Meeting of January 13, 1983

Storms offered a new and higher wage rate of $4.90 per hour (general field rate) and also the details of the carrot harvest piece rate. Storms informed Mendoza that the latest wage proposal would be the last one unless the Union made substantial movement.

The parties discussed the recall of strikers procedures, King City information and the lettuce harvest rates.

Mendoza insisted that the prevailing piece rate was 87½¢ and Storms contended in his opinion 82¢ was the prevailing rate. Storms queried Mendoza about the reason the UFW wanted higher rates for the lettuce workers and not for the rest of the crews and offered to raise the lettuce wage rates if the Union would lower its demands for the lettuce workers.

Mendoza expressed his unwillingness for such a trade off. The parties discussed the interim broccoli rates. After caucusing, the UFW would not agree to the Company's broccoli wage rate proposal.

Mendoza mentioned that the Company's current wage proposal was lower than its 1980 offer. The parties also discussed a suggested change for irrigators and time off.[39/] The session ended with the Union saying that it wanted more time to review the Employer's latest proposal.

On January 27 Mendoza sent a response to the Company's wage offer of January 13. The UFW rejected the offer but reduced its November 16 wage demands as follows: general field rate $6.80 to $6.65 per hour; 24 hour irrigator shift, $166.80 to $163.20, lettuce harvest piece rate, 89½¢ to 87½¢ per box; shop rate, $10.15 to $10.00 per hour and other rates proportionately.[40/] The Company's

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39. The Company changed the language of the article on overtime by eliminating the reference to the three hours unpaid time off during the 24-hour shift.

40. The UFW retained its language for bonus pay for tractor drivers. Not many of Maggio's and Sun Harvest's crops overlapped so it is difficult to compare except for wage rates for general field work, thin and hoe crew, pipe layers, and tractor drivers. Of course, no comparison could be made for irrigators because there were no 24-hour shifts in the Salinas Valley.

position was that the UPW was not bargaining in good faith as there had been no movement in the counteroffer. Storms asserted that the UFW was not trying and was still at the Sun Harvest levels and moreover the Union had failed to make a complete response to the Employer's proposal.

The parties agreed to meet on February 16. On February 8 Mendoza sent a letter to Storms demanding 87½¢ piece rate for lettuce harvesters as he had found out that Saikhon was paying such a rate.

The February 16, 1983 Meeting

At the February 16 meeting Storms and Mendoza discussed but were unable to resolve the lettuce piece rate even though Storms had previously said that the Company rate would depend on the Saikhon wage rate and the Union was asking for the rate. The parties discussed the question of overtime[41/] with the lettuce crew and the Employer agreed to take back the employees fired the day before due to their refusing to work overtime.[42/] The parties agreed on other minor problems having to do with the lettuce crew.

The Company delivered a new wage proposal with a 5¢ across-the--board increase in typewritten form.[43/] Storms delivered information on the King City crops and said he would mail additional King City data the next day.

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41. The UFW alleges the Company had unilaterally changed overtime from voluntary to mandatory.

42. The Union agreed to mandatory overtime if the Employer would pay time and a half after one nine hour day per week.

43. It included an 87½¢ lettuce piece rate but it was part of the package.

The parties also discussed the Company's decision to use a labor contractor to harvest the cauliflower crop[44/] (3 weeks duration) because of its lack of experience personnel. The Employer would take steps so the labor contractor would hire bargaining unit employees who had the cauliflower experience.

The parties also discussed the question of whether the shop employees were included in the bargaining unit but could not come to any agreement in that respect. On February 17 Storms sent the rest of the King City information to Mendoza.[45/]

The March 8, 1983 Meeting

The parties discussed the lettuce crew's misunderstanding of the overtime agreement and the resulting crew members' refusal to work over 9 hours. Mendoza told Storms that he would make sure that the crew members understood the agreement. Storms admitted that the shop employees were members of the bargaining unit and informed Mendoza that the Company would be waiting for a wage proposal from the Union regarding the shop employee categories.

Mendoza asked Storms whether the Company's package proposal had nullified the tentative agreements the parties' had reached on certain articles and Storms assured him it would not.

In respect to the RFK fund, Storms offered to agree to the

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44. The Company had not informed the UFW about its plans to raise cauliflower when it responded to the Union's information request in the Autumn of 1982.

45. However, the information was incomplete. The Company indicated that it was not sure of vacation pay on Citizen Participation Day and there was no information about vacation pay on New Year's Day. The Company had paid vacation pay on Independence Day even though such payment was not part of the previous collective bargaining contract.

contributions being raised every year according to the RFK actuary system but with a 6% cap. Later during the meeting Storms raised it to a 10% cap.

The Union rejected the offer. Mendoza testified that there were two objections: (1) If accountants determined a contribution rate higher than the previous year but with a 10 percent upper limit, the employees would receive a lower level of benefits than during the first year of the contract. (2) The plan provided no visual or dental care benefits.

The UFW's only proposal at this meeting was to change the retroactive date for wages from July 15 to November 15, 1982.

The Meeting of March 23, 1983

Storms asked Mendoza for comments on the Company's work rule proposals (Storms had delivered a copy of such to Mendoza at the previous meeting). Mendoza replied that he had not brought a copy. So Storms provided him with a copy which he proceeded to review. Mendoza told Storms that the Company could commence to implement such rules but that the Union would refrain from making any input as the Union preferred to negotiate the rules as part of a complete collective bargaining contract. According to Mendoza, the Union did not want to be in the position of instructing the employees to conform with the work rules without being able to tell them that the Union had secured certain employee benefits in exchange thereof.

The Company at the Union's behest agreed to rehire the lettuce crew. However, the Union requested the Company to reimburse the workers the wages for the day they missed due to the firing.

Storms told Mendoza that he would look into it.

The Company agreed to the Union's request for a day's wages compensation for the day (on an hourly but not a piece rate) an employee suffered a disabling injury on the job.[46/]

The Company and the the Union agreed to 20¢ per hour for the pension plan.

The UFW rejected the Company's latest wage proposal and the Company's offer of a 10% cap on the increased JFK contribution.

The UFW lowered its demand for 30¢ to 25¢ per mile for reimbursement for the irrigators' vehicle use. (Irrigators drove their private vehicles to job sites during the work day.) The Company offered 20¢ per mile as Storms pointed out, the Federal government permits only 20¢ per mile as a tax deduction.

According to Storms the Union changed its vacation proposal to make it easier for an employee to qualify for vacation pay: 500 hours down from 700 hours a year to qualify.[47/] On the other hand Mendoza testified that the Union's previous proposal was only based on a percentage of earnings and seniority and its proposal of 500 hours made vacation qualifications more difficult.

Mendoza suggested a caucus break to discuss shop wage rates. Storms commenced a monologue about the Union's bargaining motives, saying that it was not bargaining in good faith, that it

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46. However, the provision for such a payment was contained in the previous contract at both the hourly and piece rates. Workmen's Compensation insurance only pays after the first three days.

47. Previous contract provided for 700 hours to qualify for a vacation.

was playing games and that it was' relying on the Admiral make-whole remedy and accordingly Mendoza should make some significant moves. Storm's insistence along these lines irritated Mendoza to the point that he angrily told Storms that the only movement he would like to see would be for Storms and George Sturgis[48/] to move out of the room so he could caucus with the Union members.

Storms and Sturgis complied and left the room. Shortly thereafter, a member of the employee committee emerged and informed Storms and Sturgis that Mendoza and the committee were ready to resume negotiations.

Mendoza informed Storms that the Union would provide the Company with a shop employee wage rate and that Esteban Jaramillo would replace him as the UFW negotiator.

On March 26 Jaramillo sent a wage proposal for the shop employees and informed Storms that he would be available for negotiations commencing April 1, 1983. On April 6, Storms sent a counterprosal for shop employee wages[49/] to Jaramillo and queried him about his available dates for negotiations. Jaramillo did not reply to the query.

Jaramillo met with the negotiating committee which included two shop employees and they discussed the employer's counterproposal and came to an agreement that the preferred shop wages were very low compared to those of shop employees at other firms. Jaramillo did

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48. George Sturgis is general manager of the Charging Party's farm operations.

49. It was higher than what the employer was currently paying.

not notify the employer whether the Union had accepted or rejected the counteroffer.

On May 15, 1983 Mendoza wrote to Storms and advised him that he would resume responsibility as the UFW negotiator once again and that he would be available for negotiations the weeks of May 22 and 29. After various postponements and cancellations, the parties met on August 10.

The Meeting of August 10, 1983

Storms opened the meeting by providing the Union with information about the Company's planned crops and harvests.

Mendoza informed Storms that the Union would accept 3 of the Respondent's proposed articles: (1) The Company would be able to discharge employees without regard to the Discipline and Discharge article during a 5 day probationary period. Mendoza considered that concession significant movement on the part of the Union because previously they had insisted that the probation period had to be tied into the article on the hiring procedures. The Union agreed to continue to permit the supervisors to do some bargaining work that they had performed in the past (other than in training and emergency situations as provided for in the contract). The Union also agreed to the employer's proposed record and payroll (time limits) article.

The Company made a counteroffer with respect to the following articles: (1) General Field Rate $4.95 to $5.10 per hour- (2) Proposed higher wages for shop employees (raises in the 50¢ to 70¢ per hour range up from the previous 25¢ to 40¢ per hour range). (3) No COLA. (4) 55¢ hourly contribution to RFK fund but

with a 7% annual cap. (5) No retroactivity. (6) No paid Union representative. (7) Contract duration three years. Mendoza told Storms that he needed time to study the new proposals and thereafter he would contact him.

On August 30 Storms sent a letter to Mendoza advising him that the officers and principals of the Maggio corporation had been in litigation for some years about a restructuring of the Company and a settlement was near. Storms pointed out that such a restructuring could reduce or terminate the Company's agricultural operations and that the Company would keep the Union informed about the date and the terms of the settlement so the parties would be able to negotiate about the effects of such settlement.

The Meeting of September 28, 1983

According to Storm's testimony, he explained about the probable settlement terms: less acreage but that the Company would lease land and continue to employ the same number of workers so there would not be much impact on the bargaining unit members. Mendoza testified that Storms informed him that there would be a substantial reduction of acreage and therefore of employees.

Mendoza informed Storms that the Union needed time to review the Company's proposal of August 1982 together with the economics proposal of August 1983 and would thereafter respond with a new proposal.

From August through December 1983 the Union did not respond with a new proposal. In November and December both Storms and Mendoza were occupied with litigation concerning the Abatti Brothers agricultural firm and despite the fact they saw each other virtually

on a daily basis, neither of them broached the subject of the Maggio negotiations.

On January 4, 1984 Mendoza sent a letter to Storms requesting information concerning the settlement among Maggio's officers and principals. A week later Storms replied and informed Mendoza that he had not been directly involved in the negotiations and settlement and that he was requesting the settlement documents from the member of his law firm who was involved and upon receipt of said documents he would forward the pertinent provisions to Mendoza in response to his request. On January 17 Storms sent the details of the settlement agreement relevant to the disposition of the family acreage and in addition sent information regarding the Company's land that it was leasing.

The UFW did not contact the Company until May 30. A new UFW negotiator David Ronquillo contacted Storms and after an exchange of correspondence agreed to meet on June 18.

The Meeting of June 18, 1984

The parties spent most of the session discussing the current status of their respective positions on certain articles. Storms accused Ronquillo of not being prepared.

Storms provided Ronquillo with information about carrots, sweet corn, wheat and alfalfa and added that there would be no lettuce, egg plant, string beans or broccoli projected to be raised.

Ronquillo queried Storms about Castle and Cook ownership of the Maggio corporation and Storms denied it and asked what was the source of such data.

Ronquillo informed Storms that the Union was formulating a

response to the Company's long standing contract offer. Storms responded that the Company was taking such offer off the table because of the passage of time. Ronquillo replied that he could understand why the Company would remove its offer regarding wages and other changing conditions but could not understand why the Company would withdraw its agreement to the language of the articles already agreed upon. Storms concluded by saying that the Company would negotiate over crops and wages but it was now up to the Union to present a proposal and he requested that the Union submit one that would be tailored to the needs of the Company.

On July 31, 1984 Ronquillo sent a letter to Storms informing him that Castle & Cook had advised the Union that it presently owned a controlling percentage of Maggio stock and requested a clarification from Storms on this point. Storms responded to the letter once again denying that Castle & Cook owned any part of the Maggio corporation and renewed its request for the name of the source of this information regarding Maggio and Castle & Cook. On August 20, Ronquillo replied and explained that he had no information about the source of the information and inquired whether the Company had new proposal for the Union. Ronquillo concluded the letter asking what did Storms mean in his letter about the impact on negotiations caused by the Union's inquiries about the possible Castle & Cook ownership of Maggio.

On September 14, Storms sent a letter to Ronquillo and explained that what he meant by impact on negotiations was the time and effort the parties had wasted in dealing with the "unfounded" allegations by the Union of the Charging Party's ownership and also

the questions raised in the Company negotiator's mind thereby regarding the UFW's overall intent with regard to bargaining. Storms concluded by suggesting that the parties should move on to more productive discussions.

In the same letter, Storms explained why the Company had withdrawn its proposal of 1983: the changes of circumstances with the passage of time including the change in the crop makeup and requested that the Union submit a complete and up-to-date proposal.

In a letter of October 16 Ronquillo expressed his disagreement with Storms' assertions that the Castle & Cook inquiries and clarifications had consumed so much time. In addition, Ronquillo informed Storms that he could understand why the Company could have modified its 1983 contract proposal because of changed conditions but he could not understand the reason for the complete withdrawal. He requested that the Company make a new up-to-date contract offer and furthermore supply the Union with the latest information on crops no longer to be grown or harvested. Ronquillo concluded by suggesting dates for a bargaining session.

On October 18 Storms replied to the October 16 letter and informed Ronquillo that most of the statements in Ronquillo's letter were "inaccurate, self-serving and meaningless that neither deserved or required a reply."

However, Storms complied with Ronquillo's request for information, suggested future meeting dates and requested the Union to provide the Company with a proposal for a collective bargaining agreement so that the future meeting would be "much more beneficial".

On October 22 Ronquillo replied to Storms' October 10 letter and explained that the reason for this 30 day delay in answering Storms' letter of September 14 was because he was very busy preparing for the Abatti Brothers' negotiations with Storms and added that at the Abatti negotiation sessions on September 19 and October 3 Storms failed to mention Maggio and possible meeting dates.

Ronquillo repeated his request for information about the crops Maggio no longer intended to raise or harvest. Ronquillo concluded by suggesting some meeting dates and a request for a modification of the Company's latest proposal. Storms provided the Union with more detailed information about the Company's projected crops and harvests but prefaced it with a remark about how he had answered the Union's queries on this subject but since Ronquillo had professed that he did not understand the simple statements set forth in his letter he would elaborate. Storms commented further that for the last 4 years the Company had continued to keep the Union informed about the nature of the crops and harvests and despite that fact the Company had raised virtually no lettuce, the Union continued to insist the Company sign a collective bargaining agreement designed for the lettuce industry. Storms pointed out that the Company would be extremely happy to receive a Union proposal tailored to Maggio’s operations and that he believed the next move was up to the Union as the Company would make no further proposals at that time. Storms concluded by suggesting some meeting dates.

The Meeting of October 16, 1984

Ronquillo proposed that the parties exchange proposals in the blind which offer the Company rejected. Storms informed Ronquillo that the Company wanted a substantial movement by the Union in respect to wages since up to that time the Union had increased but not decreased its wage demands. Ronquillo responded that he thought that the Company owed the Union a proposal. Storms explained to Ronquillo that the agreements on the pension plan and injury-on-the-job had been reached as individual articles, but they could vary the terms of these respective articles within package proposals. The meeting ended and the parties planned to meet again within a matter of a few weeks.

Storms testified that there exists major differences between agriculture as practiced in the Imperial Valley and the Salinas Valley. In the Imperial Valley due to the shorter growing season, only two crops can be raised in a two year period while five crops can be raised during the same period of time in the Salinas Valley. The Salinas Valley is propitious for row and orchard crops while the Imperial Valley has no value for orchard crops, little value for row crops but excellent value for flat crops (including melons).

According to Storms the Imperial Valley has a high unemployment rate (40%) compared to a much lower rate for the Salinas Valley; and consequently higher wages are paid in the latter area. Many of the Company's competitors are smaller growers who hire workers through labor contractors and pay the federal minimum of $3.35 per hour with no fringe benefits. The Charging Party is a

grower and harvester while Sun Harvest is basically a harvester. Maggio is interested in rates for tractor drivers, irrigators, thin and weed crews, etc., while companies like Sun Harvest are mainly interested in wages for harvesters.

Storms testified that he repeatedly informed the UFW negotiators in 1980, 1981, 1982, 1983 and 1984 that the Charging Party because of the above-described factors could not afford to pay Sun Harvest rates as such rates might be appropriate for the Salinas Valley and harvesters but not for a grower in the Imperial Valley.

2. Discussion

General Counsel has alleged that Respondent's failure to respond to the Charging Party's proposals and to submit its own bargaining proposals indicates that it has engaged in surface bargaining. An examination of the facts demonstrates that such allegations are well-founded.

In July 1981 Respondent presented a three package proposal to the Company. The latter did not respond to the offer nor were any negotiating meetings held until January 13. On January 18 the Company rejected the UFW's offer and countered with an offer of its own. Ten days later at a January 28 meeting Respondent rejected Charging Party's latest offer.

The parties met at negotiating sessions in February, March and April but bargained on individual articles.

In June Respondent informed the Charging Party it intended to draw up a complete contract proposal but needed time.

The parties made no comprehensive offers until August 4, 1982 when the Charging Party presented a contract proposal to

Respondent. Despite the fact that Storms twice requested responses to the Company's offer, the UFW failed to do so until 3½ months later.[50/] (November 19, 1982)

At the December meetings the Company rejected the UFW's November 1982 offer as regressive.

In January 1983 the Company raised its general field rate offer to $4.90 per hour and concommitantly all other wage rates. Respondent rejected it and reduced its demand from $6.80 (in its November 1982 offer) to $6.65 per hour.[51/]

In February the Company raised its wage offer by 5¢ an hour across-the-board and included in it as part of a package the 87½¢ piece rate for lettuce that the UFW had demanded. The UFW rejected the wage offer.

In August 1983 the Company presented a new offer which consisted of the August 1982 proposal with higher wages and benefits. Respondent never responded to such offer despite the fact that one of the reasons its negotiator gave for not requesting any meetings thereafter was so he would have time to study it.

After nine months with no meeting request nor counteroffer by the Union, the latter informed the Company's representative at

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50. Respondent, in its post hearing brief, argues that its delay in responding to the Charging Party's August 4 offer was due to Storms' not providing necessary and relevant information until September 23 in answer to its information request of August 12. However, Respondent in failing to reply to Storms' inquiries about its lack of response did not communicate to Storms that the lack of information was the reason. Moreover, Respondent still took 8 weeks after the receipt of the information to make its counter offer in November.

51. This was the last wage offer made by the Respondent.

the June 1984 meeting that the Union was still considering the Company's August 1983 proposal. The Company's negotiator informed the Union that because of the passage of time the Company was withdrawing its proposal. From June to October 1984 both parties insisted that the other make the first proposal and none was made.

During two extended periods of time, August 1982 to November 1982 and August 1983 to June 1984 Charging Party had a comprehensive contract proposal pending, and the Respondent failed to make any response. Respondent took 3½ months to respond to the Charging Party's comprehensive proposal of August 1982. In August 1983 the Charging Party renewed its August 1982 proposal with updated economics and Respondent failed for over a period of 10 months to respond to it.

In June 1984 the Charging Party, after having its contract proposal pending for over 10 months withdrew it and asked Respondent to submit one of its own. As of the date of the hearing, Respondent had failed to do so (a period of five months).

Furthermore, in June 1982, Respondent's negotiator informed the Charging Party's negotiator that he intended to draw up a complete contract proposal but needed time to consult with the negotiating committee. No such proposal was ever presented until 3½ months after the Charging Party presented its comprehensive proposal of August 1982.

In view of the foregoing it is clear and I so find that Respondent did unreasonably delay and fail to respond to Charging Party's proposals and failed to make proposals of its own.

To further support his allegation of surface bargaining by

Respondent, General Counsel has alleged that what few counterproposals Respondent has presented, were unreasonable and predictably unacceptable to the Charging Party. I disagree.

The Charging Party argues that Respondent, in never demanding less than Sun Harvest economics during the negotiations, has made proposals that were predictably unacceptable.

Charging Party contends that it could not pay the Sun Harvest wages because of the difference between the Salinas Valley (where Sun Harvest mainly operates) and the Imperial Valley and also the difference between harvesters (Sun Harvest's principal activity is harvesting rather than growing while Charging Party's principal activity is growing) and growers. Charging Party points out that its negotiator informed the UFW of these facts over the entire bargaining period of 3 years but to no avail. Consequently Respondent in insisting on Sun Harvest levels made proposals that, according to Charging Party's argument, were predictably unacceptable to Charging Party and thus indicative of its bad faith bargaining.

Section 1152.2 provides that the duty to bargain in good faith does not "compel either party to agree to a proposal or require a making of a concession." It recognizes that unwillingness to yield on a particular issue can be consistent with good faith bargaining.

In those cases where the NLRB has found that a party's intransigence on a particular issue has been evidence of bad faith bargaining, the party's position has either been arbitrary or the issue in question has been of much more importance to the other

party. Of course in these situations, a strong inference can be made that the most likely explanation of the party's conduct was to avoid reaching an agreement with the other party.[52/]

In the instant case, the reason is obvious why it was important to the Union to reestablish the uniformity of wage rates and other benefits (in its contract with the Charging Party) with the general level of wages currently being paid in the Salinas Valley. In 1977-79, such uniformity existed, as the UFW[1]s contract with the Charging Party contained the same wage and fringe benefit levels as were contained in the "master contract" commonly referred to as the "Interharvest" contract. The Union's steadfast adherence to the Salinas Valley rates certainly cannot be categorized as unreasonable since the Charging Party had previously agreed to economic rates as were being paid' in such valley.U53/

Furthermore, I do not consider it the task of the Board to decide the question of whether Salinas Valley wage standards should or should not be reestablished in the UFW[1]s contract with the Charging Party. The issue should be decided by the parties in negotiations.

Charging Party argues that Respondent's November 16, 1984

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52. See Montebello Rose Co., Inc., et al., supra, for a discussion with respect to a party's position on a particular issue, which is pretextual, or "patently improbable" as justification for its stance and the inference to be drawn therefrom, i.e., a ploy to frustrate negotiations rather than a honestly held concern.

53. See, Borden, Inc. (1972) 196 NLRB 1170, 80 LRRM 1240, in which the NLRB found that a union's unyielding insistence regarding compulsory overtime and bargaining unit work was reasonable since preservation of bargaining unit work was a legitimate union goal and to reduce overtime was obviously in the area of legitimate union concern.

counterproposal is regressive in that the UFW has raised its economic demands.[54/] However, it cannot be inferred from that fact that it wanted to avoid making an agreement. The UFW was merely continuing to keep its demands consistent with the current Sun Harvest contract. As I have previously stated Respondent was not acting in an unreasonable manner since the Company had agreed to such comparable economic rates in the past.

In a review of NLRB cases, including those cited by the Charging Party, *a* frequent basis for determining surface bargaining is a party's insistence on a particular issue. In such cases the NLRB has found that such intransigence reflects an intention to avoid coming to an agreement.[55/]

In the instant case, I find that the prospective of a make whole remedy did not motivate the Union to avoid reaching an agreement with the Charging Party but rather motivated it to be in no hurry to reach one[56/] and, if it did, to make sure that it

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54. Respondent signed a new two year contract with Sun Harvest in September 1982 which provided for a cross-the-board raise of approximately 50¢ an hour (general field rate $6.15 to $6.65). In November 1982 Respondent raised its demand from $6.15 to $6.80 and soon afterwards lowered it to $6.65 an hour. Asking for more than you are willing to settle for is a time honored bargaining tool. See page 30 for discussion of Respondent's reasons for such proposals.

55. The NLRB stated in National Maritime Union (Texas Co.) (1978) 78 NLRB 971 that a party's intransigence on a particular issue has been found to evidence bad faith in bargaining when the record as a whole has indicated that such intransigence reflected an intention to avoid coming to any agreement.

56. This lack of concern about the frequency of meetings is consistent with my finding that Respondent failed to engage in the collective bargaining process with the degree of diligence that is required by the Act.

contained Sun Harvest wage and health benefits.

Charging Party further contends that the UFW's "Sun Harvest -- take it or leave it" attitude was clearly illegal' and cites Pine Manor Nursing Home, Inc. (1972) 230 NLRB 320, 325, "The mere willingness of one party in the negotiations to enter into a contract of his own composition does not satisfy the good faith bargaining obligation."

However, in the instant case, Respondent did not insist on a contract of its own composition. True, it insisted on Sun Harvest terms in respect to wages and the RFK health plan but it made concessions at various occasions during the negotiations in important areas such as: Union security, hiring, probationary period and paid representative.

However, despite the fact that Respondent's steadfast adherence to the Sun Harvest rates does not support a finding of its making predictably unacceptable proposals, it does support a finding that Respondent's reason for its delays and cancellations of meetings, and its failure to make proposals and counterproposals was because it expected that in the event no contract was signed with Charging Party, the bargaining unit employees would receive a makewhole award based on Sun Harvest rates.

The evidence of record establishes the clear inference that Respondent throughout the entire course of bargaining took little or no initiative calculated to carry out expeditious and comprehensive negotiations, which indicates Respondent's essentially desultory approach to bargaining.

Accordingly, I find that Respondent's dereliction in

scheduling meetings, its delays and failures to present counterproposals and proposals of its own, clearly demonstrates that Respondent failed to engage in collective bargaining with the due dilligence that is required by the Act and therefore has violated section 1154(c).

General Counsel has alleged that another indication of surface bargaining on the part of the UFW is its delay and/or failure to supply information to the Charging Party, i.e., copies of collective bargaining contracts with other vegetable growers, information about the various Union funds, etc.

However, I find that the Union and the Company were somewhat remiss at times in providing information to each other but not to the extent that it would indicate that either party did so in order to avoid reaching an agreement or to delay negotiations.

Furthermore, in respect to the copies of the collective bargaining contracts, I find that such information was either non-existent or not necessary to the bargaining process.

It is axiomatic that under both the NLRA and ALRA the parties are obligated to supply each other with the information that is necessary and relevant to the bargaining process. Perhaps there would have been information in a UFW contract with a radish grower that would have helped the parties determine the details of a piece rate harvest compensation, etc., but Respondent's negotiators testified that there was no such contract in existence and General Counsel and the Charging Party have not shown otherwise.

In respect to UFW contracts with other vegetable growers, it is difficult to see how they would be necessary to the bargaining

process. Moreover, the Charging Party's negotiator testified that the reason that he wanted to review the contracts was to determine whether the UFW had agreed to lower the Sun Harvest rate to other vegetable growers. This would have possibly helped him in his negotiating strategy but it certainly was not necessary information for the parties to work out an agreement.

Respondent argues as a defense to bad faith allegations against it that Charging Party was guilty of bad faith bargaining. Respondent contends that Charging Party's 1982-84 wage offers were below its 1980 wage offers, the provisions in its comprehensive contract proposals were by and large inferior to the provisions in the 1977-79 contract and that it rigidly adhered to virtually all of the provisions in its 1979 and 1980 contract proposals despite the fact that Respondent had made come serious concessions, i.e., hiring hall, Union security, etc.

It is true that Charging Party may have engaged in hard bargaining but its overall bargaining conduct certainly does not amount to bad faith bargaining. Even though Charging Party may have offered higher wages in 1980 it repeatedly raised wage rates in successive contract proposals in 1982 and 1983 that is progressively from $4.12 to $5.10 per hour. Furthermore, the provisions in its August 1982 offer, which was its principal contract proposal, where not inferior on an overall basis to provisions in the previous

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contract.[57/]

However, many provisions in the new offer were superior to provisions in the previous contract: (a) overtime; (b) rest periods 15 rather than 10 minutes; (c) July 4, a new holiday; (d) higher employer contributions to Union health, pension, etc. funds; (e) higher wage rate; (f) Company had to provide information to the trust funds in less time than previously.

Moreover, during the sessions Charging Party exhibited a degree of flexibility in such areas as the amount of payments to trust funds, overtime, paid Union representatives, travel reimbursement for irrigators, etc.

In evaluating Charging Party's conduct, it must be kept in mind that it was always willing to meet with the Union, to such an extent that it frequently initiated requests for meeting dates. Moreover, it promptly prepared and delivered proposals and counterproposals to the Union and explained the reasons for the provisions in such proposals. Its away-from-the-table conduct gave no indication of bad faith as it made no attempt to undermine the

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57. The provisions in the 1982 offer which were worse:

a. Union Security - NLRB rather than ALRB good standing;

b. Hiring - Company operated rather than a Union operated hiring hall;

c. Five day probationary period by which the employer can discharge an employee without complying with Discharge and Discipline provision of the contract. There was no such probationary period in previous contract.

d. Company could limit amount of information on pay stub because of space limitations. In the previous contract, space limitations did not permit Company to leave out information.

Union with unilateral innovations but rather consulted with the Union about projected changes.

It would be very difficult to categorize Charging Party's conduct as amounting to bad faith bargaining as its "totality of conduct" indicates a desire to enter into a contract with the Union to take into consideration the Union's demands, to make mutual adjustments and to reach a common ground.

V. REMEDY

General Counsel and Charging Party seek an order requiring Respondent to make whole Maggio Inc.'s bargaining unit employees for all losses of pay and other economic losses suffered as a result of Respondent's refusal and/or failure to bargain in good faith.

They both cite Section 1160.3 of the Act which provides in pertinent part:

> . . . if, upon the preponderance of the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the Board shall state its findings of fact and shall issue and cause to be served on such person an order to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part . . .

The aforementioned section clearly provides for the imposition of the makewhole remedy against an employer for refusal to bargain but none such remedy against a labor organization. General Counsel and Charging Party, in effect, admit that there is no language in the section that provides for the imposition of the makewhole remedy on the employees' representative. However, they point to the language in the section "to provide such other relief

as will effectuate the policies of this part" and thus contend that the Board has the authority to award a makewhole remedy against a labor organization.

Charging Party mentions the legislative history and asserts that the imposition of the makewhole remedy on a labor organization was not discussed.

However, Rose Bird, in her testimony before the Senate Industrial Relations Committee stated:

> Senator, this language was just placed in because there has been a good deal of discussion with the National Labor Relations Act that it ought to be amended to allow "make whole" remedy, and this is something that the people who have looked at this Act carefully believe is a progressive step and should be taken. And we decided since we were starting anew here in California, that we would take a progressive step. Now, what we're talking here is only where an employer bargains in bad faith. You make whole the employee with backpay, and that's all we're talking about. (Emphasis added.)

Technically, the subject of the Union being liable for a makewhole remedy was not discussed directly taut it is clear from the history that the language in the Act expressly providing for a makewhole remedy was intended to be only imposed against an employer.

Charging Party argues in effect that since there is no clear legislative history expressly excluding the imposition of such a remedy on a labor organization, one can look to the literal language of the statute where it authorizes the Board to provide whatever relief it believes will effectuate the policies of the Act. Charging Party points out that since Section 1140.2 of the ALRA provides that the policy of the Act is to "encourage the negotiations of terms and conditions of employment to a contract"

the Board can make an award of such a remedy as it would effectuate the policies of the Act to encourage the negotiation of terms and conditions of employment to a contract. Charging Party goes on to say that the imposition of a makewhole remedy against a labor organization in appropriate cases would effectuate the policies of the Act, since it would provide an incentive to both parties at the negotiating table to reach a contract, not just the employer.

There are fatal flaws present in General Counsel's and Charging Party's arguments.

First, there exist other incentives for a labor organization to reach an agreement that do not exist for the employer. A union is under pressure from its members to secure a contract in as short a period of time and with the most munificient terms as possible. If the labor organization fails to comply with the expectations of its members, the latter can vote in new officers to replace the incumbents, petition and vote in favor of decertifying the Union, organize a rival Union, etc.

Secondly, such a remedy could seriously debilitate a labor organization's ability to exercise its economic weapons, such as a strike, boycott, etc. By depleting a labor organization's treasury, it would reduce the amount of funds available for strike benefits, publicity, legal advice etc. Such a limitation of a labor organization's right to carry out such economic tactics, strikes at the core of the Act.[58/] in depriving the Union of such measures, it

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58. Section 1166 of the Act states: "Nothing in the Act, except as specifically provided for herein, shall be construed to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on such right.

tilts the power balance in favor of the employer and so rather than effectuate the policies of the Act it gravely erodes them.

The legislative history of the Act indicates that the legislature in determining what economic weapons should be available to an employer and a labor organization has endeavored to create a balance at the bargaining table. If party, management or labor, has a preponderance of power in negotiations, such a party can afford to be arrogant, rigid and unreasonable in its demands. On the other hand, if there exists an equilibrium of power, both parties will be more apt to be reasonable, flexible and cooperative and therefore the probability of reaching an agreement will be enhanced.

Thirdly, such a remedy would obviously cause discord between the bargaining unit members who benefit from the makewhole award and the union members outside the unit, whose dues pay for the award.[59/] Such discord weakens the union's institutional strength and consequently adversely affects the sought-for balance between the employer and his employees' representative so essential for reasonable approaches by both parties to collective bargaining negotiations.

A final detrimental effect, less obvious than the previous three but just as prejudicial toward the correct functioning of the Act, is the dichotomy that would be created between the union officers and the employees in the bargaining unit.

The latter would have an incentive to pressure the union

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59. The make-whole award against a union would be paid for out of the union's treasury which is funded by union members dues.

negotiators to maximize their demands of the employer. The employees would have nothing to fear from a Board's determination that the Union was guilty of bad faith bargaining as the ensuing makewhole remedy would redound in their favor.

In the instant case, the bargaining unit employees would resist agreeing to a hypothetical Union recommendation of accepting a general field hourly rate of $5.10 (the employer's offer) or even compromise figure of $5.60 when they could receive up to $6.65 per hour through makewhole if the Union is found guilty of bad faith bargaining.

Meanwhile the Union officers would be desirous of withstanding the employees pressuring for maximum demands, since the Union could very well end up with the legal obligation to pay a makewhole remedy to the employees. The resulting dichotomy would seriously interfere with the amicable relations between the Union officers and the individual employees and undermine the solidarity of the labor organization. Moreover, the pressure for maximum benefits from the bargaining unit employees would discourage the Union negotiators from lowering their demands so that an agreement could be reached with the employer.

The foregoing described effects of the imposition of the makewhole remedy on a Union would have an insidious rather than a salutary effect on the achievement of the purposes of the Act.

The Charging Party seeks attorney fees in this case. While I have found Respondent to have bargained in bad faith, its defenses were not so frivolous as to warrant such relief. For the same reason I reject the Charging Party's request for its bargaining

expenses incurred due to Respondent's conduct. See Robert Hickam (1979) 4 ALRB No. 73.

VI. Respondent's Motion to Reopen

On April 8, 1985 Respondent filed a Motion to Reopen the record to receive additional evidence. General Counsel and the Charging Party have each filed a memorandum in oppostion to such motion.

Respondent seeks to reopen the record so it can present evidence that the Charging Party was growing lettuce in December 1984 and growing and harvesting lettuce in January 1985 in the Imperial Valley. It alleges such evidence will prove that the Charging Party bargained in bad faith, one of Respondent's affirmative defenses.

Respondent alleges that it presented evidence at the hearing that the Charging Party regularly and intentionally withheld information from the UFW concerning the crops which the Company intended to grow.

Respondent asserted that such conduct by the Company undermined the collective bargaining process and hampered Respondent in its ability to present complete proposals to the Company on behalf of the bargaining unit workers.

Respondent has attached to its Motion to Reopen declarations under penalty of perjury to the effect that Respondent discovered in December 1984 and January 1985 that the Company was growing and harvesting lettuce in the Imperial Valley at that time and that the lettuce, so grown by the Company, was being harvested by Castle & Cook's subsidiary, Bud Antle Inc.

Respondent alleges that the Company in the course of negotiations in 1984 repeatedly informed Respondent that it had no plans to grow or harvest lettuce in the Imperial Valley in the "foreseeable future" and also that Castle & Cook had no ownership interest in the Company. Respondent contends that its newly discovered evidence would demonstrate the falsehood of the Charging Party's assertion and therefore the Company was bargaining in bad faith with Respondent.

Respondent further alleges that evidence with respect to the relationship between the Charging Party and Castle & Cook would demonstrate that Respondent was not engaged in dilatory tactics when it made inquiries of such a relationship during 1984.

Respondent bases its Motion to Reopen on evidence that it discovered in mid-December 1984 and mid-January 1985. However Respondent failed to file its Motion to Reopen until April 8, 1985, approximately *2%* months after Respondent learned of the new evidence.

The parties filed their post hearing briefs on or before February 4, 1985 and therefore Respondent had sufficient time to make its motion to reopen the record prior to the filling of the post hearing briefs.

Due to Respondent's delay in submitting its Motion to Reopen, I find that Respondent has waived its right to request a reopening of the record. See Keppelroan v. Heikes (1952) 111 C.A.2d 475, 245 P.2d 54.

Furthermore, the evidence that Respondent seeks to introduce into the record was not in existence at the time the

hearing closed on November 13, 1984. According to Respondent's declarations, the Company engaged in the growing of lettuce in December 1984 more than a month after the close of the hearing.

To justify a new hearing, the evidence must have been in existence at the time of the hearing. See Jacob E. Decker and Sons 97 NLRB 3179, 569 F.2d 357 (5th Cir. 1978).

Accordingly, I find that the evidence that Respondent seeks to introduce is in respect to events that occurred after the hearing closed and therefore a granting of a motion to reopen to permit such evidence to be presented is inappropriate.

In view of my findings of Respondent's waiver of its right to reopen and the fact the evidence is concerning events posterior to the closing of the hearing, I deny Respondent's Motion to Reopen.

ORDER

Respondent, United Farm Workers of America, AFL-CIO, its officers, agents, and representatives shall:

1. Cease and desist from:

(a) Failing and refusing, upon request, to bargain collectively and in good faith with respect to rates of pay, wages, hours of work, and other terms and conditions of employment with the Employer, Maggio, Inc., on behalf of its agricultural employees.

(b) Failing and refusing to meet at reasonable intervals with said Employer.

(c) Failing and refusing to respond to proposals by said Employer.

(d) Failing and refusing to submit its own proposals to said Employer.

2. Take the following affirmative action which is to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with said Employer, with respect to rates of pay, wages, and other terms and conditions of employment for its agricultural employees and, if an understanding is reached, embody such understanding in a signed contract.

(b) 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.

(c) 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 Maggio, Inc., or its legal successor(s) at any time during the period from January 1, 1982, until the date on which the said Notice is mailed; the UFW shall seek the cooperation of Maggio, Inc. or its legal successor(s) in obtaining the names and addresses of the employees to whom said Notice shall be mailed.

(d) Post copies of the attached Notice in all appropriate languages, in conspicuous places at all its offices and Union halls throughout the State of California for 60 days, the times(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(e) With the consent of Maggio, Inc., or its legal successor(s), arrange for a representative of the UFW or a Board

agent to distribute and read the attached Notice, in all appropriate languages, to all its (their) 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 to answer any questions the employees may have concerning the Notice and/or their rights under the Act. The UFW shall reimburse Maggio, Inc., or its legal successor(s), for the employees' wages during this reading and question-and-answer period. The Regional Director shall determine a reasonable rate of compensation to be paid by the UFW to Maggio, Inc., or its legal successor(s) and relayed by it (them) to all nonhourly wage employees in order to compensate them for time lost at this reading during the question-and-answer period.

(f) Provide Maggio, Inc., or its legal successor(s), copies of the attached notice so the employer can deliver a copy of such notice to each new agricultural employee it hires for a period of 12 months following issuance of this decision or its enforcement if necessary.

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

DATED: June 14, 1985

Arie Schoorl

ARIE SCHOORL
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by our conduct, in failing and refusing to bargain in good faith with your employer, MAGGIO, INC., in that we failed and refused to meet at reasonable times with your employer to negotiate a collective bargaining agreement to contract and delayed and failed to present counterproposals and proposals of our own.

The Agricultural Labor Relations Act is law that gives you and all other farm workers in California these rights:

1. To organize themselves;
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 thes things.

WE WILL NOT fail, delay or refuse to bargain in good faith with your employer, MAGGIO, INC., in respect to reaching an agreement or a collective bargaining contract.

WE WILL bargain collectively in good faith on your behalf with your employer MAGGIO INC. with respect to rate of pay, wages, and other conditions of employment and if an understanding is reached, we will embody such understanding in a signed contract.

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, Californa 92243.

DATED: UNITED FARM WORKERS OF AMERICA, AFL-CIO

By: _____
Representative Title

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

DO NOT REMOVE OR MUTILATE.