Holtville, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

LU-ETTE FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 79-CE-125-EC, 79-CE-199-EC, 80-CE-38-EC; 12 ALRB No. 3 (8 ALRB No. 91)

MODIFIED DECISION AND ORDER

In 8 ALRB No. 91, the Agricultural Labor Relations Board (Board) found that Respondent, Lu-Ette Farms, Inc., had violated section 1153(a) and (e) of the Agricultural Labor Relations Act (Act). The violations were based on Respondent's failure and refusal to meet and bargain with the United Farm Workers of America, AFL-CIO (UFW or Union), the certified bargaining representative, concerning certain wage increases it instituted unilaterally in the absence of a genuine bargaining impasse, the effects of its implementation of changes in its melon harvesting methods (specifically, the introduction of harvesting machinery in its reorganized operations) and its reinstitution of a pay advance system in contravention of the 1977-79 collective bargaining agreement. Our conclusions in regard to the wage increases were based upon findings made in a prior case, Admiral Packing Co. et al. (1981) 7 ALRB No. 43. In Admiral Packing, we determined that, during the course of collective bargaining negotiations, this Respondent, as a participant in "industry group" bargaining with the UFW, had declared a false

impasse on February 28, 1979, leading to a breakdown in negotiations which constituted an unlawful refusal to bargain. The wage increases under consideration were implemented in subsequent months and the UFW was actually notified of them on September 26, 1979. In addition to the customary cease and desist order and posting and mailing remedies, we imposed a makewhole award in 8 ALRB No. 91 which, as noted therein, overlapped the makewhole remedy previously ordered in Admiral Packing.

Thereafter, in Carl Joseph Maggio v. ALRB (1984) 154. Cal.App.3d 40, the Court of Appeal, Fourth Appellate District, Division One, reversed our Admiral Packing Decision and annulled our Order. It specifically found there was no substantive evidence to support the Board's conclusion that the industry bargaining group's declaration of impasse was a false one. To the contrary, the court stated that, in actuality, "the parties [including this Respondent] had reached an impasse" in negotiations as of February 28, 1979. (Carl Joseph Maggio, supra, 154 Cal.App.3d at 62.)

Following the Maggio decision, the Board sought remand of the instant case, then pending before the court,[1] for reevaluation in light of that decision. The motion for remand was granted on August 17, 1984.

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

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[1] A petition for writ of review had been filed in this case on January 19, 1983. Respondent moved that the court place this matter in abeyance until the ruling in Maggio issued.

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

member panel.[3/]

After an impasse in negotiations has been reached, an employer is at liberty to institute unilateral changes in wages and working conditions consistent with its preimpasse bargaining proposals. (Atlas Tack Corp. (1976) 226 NLRB 222 [93 LRRM 1236] enforced (1st Cir. 1977) 559 F.2d 1201 [96 LRRM 2660]; Taft Broadcasting Co. (1967) 163 NLRB 475 [64 LRRM 1386], affd. (D.C. Cir. 1968) 395 F.2d 622 [67 LRRM 1408]; cf. Sam Andrews' Sons (1983) 9 ALRB No. 24.) As the Maggio court found that an impasse in negotiations did, in fact, exist prior to Respondent's unilateral implementation of the wage increases in question here, and as all of the increases unilaterally implemented, except for the lettuce harvest piece rate, were at the levels of its last proposals, our previous finding that Respondent violated section 1153(e) by unilaterally increasing wage rates of tractor drivers, irrigators, and lettuce weeders and thinners, is reversed. However, the unilateral increase of the lettuce harvest piece rate, which substantially exceeded Respondent's preimpasse wage proposal, remains a violation of section 1153(e). (See, generally NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].)[4/]

[3/] The signatures of Board members in all Board decisions appear with the signature of the chairperson first, if participating, followed by the signatures of the participating Board members in order of their seniority. Member Carrillo took no part in the consideration of this matter.

[4/] In the instant case, no bargaining sessions, and hence no wage discussions, were held between February 28, 1979 and October 30, 1979. On the October date, the parties met, ostensibly to discuss Respondent's proposal of September 26, 1979 to raise certain wages

(fn. 4 cont. on p. 4)

The additional violations of section 1153(e) found in 8 ALRB No. 91 are unaffected by the Maggio decision. These refusals to bargain over the effect of the utilization of melon harvesting machinery, and the reinstitution of a pay advance system, were based on findings that the Union was not notified or given the opportunity to bargain over such matters before the changes were made. An impasse in negotiations will excuse unilateral changes in working conditions where those changes have been proposed in the course of collective bargaining. However, where changes in working conditions are not discussed before their implementation, a finding of impasse can have no bearing on section 1153(e) violations resulting therefrom.[5]

In sum, reevaluating our Decision in 8 ALRB No. 91 as a result of Carl Joseph Maggio, supra, 154 Cal.App.3d. 40, we find that Respondent violated section 1153(a) and (e) of the Act by unilaterally increasing its lettuce harvest piece rate substantially

(fn. 4 cont.)

to the level contained in Respondent's preimpasse offer to the Union. However, wages were not discussed at that meeting.

In July 1979, Respondent raised the wages of its tractor drivers and irrigators to a level commensurate with its preimpasse proposals, but to levels somewhat less than it had proposed the previous February. In October of that same year, Respondent raised the wages of lettuce weeders and thinners, but again did not exceed the preimpasse proposal for those job classifications. At the beginning of the 1979-80 lettuce harvest season, Respondent raised the piece rate to 75 cents per box, an amount clearly in excess of the preimpasse proposal of 61 cents per box. The lettuce harvest piece rate is the only unilateral wage increase not affected by the court's decision in Maggio.

[5] As discussed above, impasse only provides a defense to unilateral changes which are consistent with preimpasse proposals. If a change is not proposed, its implementation a fortiori provides a basis for an 1153(e) violation, the impasse finding notwithstanding.

in excess of its preimpasse wage proposal; by failing to notify the Union and refusing to bargain about the effects of its decision to use melon harvesting machinery in October 1979; and by reinstituting its pay advance system without notification to or bargaining with the Union.[6]

As noted above, we imposed a bargaining makewhole remedy in 8 ALRB No. 91 for the violations found, which overlapped the remedial makewhole Order in Admiral Packing, supra, 7 ALRB No. 43, subsequently annulled by the Court of Appeal in Maggio. The Board does not customarily award full contractual makewhole in cases where discrete section 1153(e) violations based on unilateral changes are found (i.e., changes not instituted during active collective bargaining). (See Holtville Farms, et al. (1984) 10 ALRB No. 49 (wage increases and delay in notifying about business closure); Lu-Ette Farms, Inc. (1985) 11 ALRB No. 20 (failure to make health plan payments, discontinuation of bus service and failure to pay standby time); Bruce Church, Inc. (1983) 9 ALRB No. 75 (wage increase in the absence of bargaining impasse).)

The record here does not permit finding a "course of conduct" which would, under a totality of circumstances standard, indicate bad faith or surface bargaining by Respondent. Accordingly, we conclude that a full contractual makewhole remedy would

[6] In addition to the defense of impasse, Respondent raised other defenses to the unilateral changes in 8 ALRB No. 91 (strike violence, loss of the Union's majority), which were rejected by the Board therein. No reason appears for overturning those conclusions, particularly in light of the Maggio court's findings that despite evidence of "serious strike misconduct which might have excused a suspension of negotiations," Respondent continued to meet and bargain with the Union during the course of such misconduct.

not be appropriate for the unilateral changes in this case.

(Holtville Farms, supra, 10 ALRB No. 49.) Instead, we shall order Respondent to make whole its employees for the losses they may have suffered as a result of the unlawful unilateral changes[7] and the effects of the decision to use melon harvesting machinery.

ORDER

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

1. Cease and desist from:

(a) Making unilateral changes in employees' wages or terms or conditions of employment without giving the United Farm Workers of America, AFL-CIO (UFW) prior notice and an opportunity to bargain concerning such proposed changes.

(b) Failing or refusing to give the UFW notice and, on request, an opportunity to bargain over the effects of the decision to use machinery in its melon harvest.

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

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[7] The wage increase brought Respondent's harvester rate to 75 cents, the well-publicized "Sun Harvest" and arguably "prevailing" wage rate for that classification. If Respondent's wage increase, in fact, brought its employees up to the then prevailing rate, no monetary amount would be due them because of the wage increase. However, such matters are best left for resolution at the compliance proceedings.

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees regarding the effects of the decision to utilize melon harvesting machinery and regarding other unilateral changes in said employees' wages and working conditions, and embody any resulting understanding in a signed agreement.

(b) Upon request of the UFW, rescind the wage increase of the lettuce harvest piece rate which Respondent granted in the 1979-80 harvest season.

(c) Make whole its agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's unilateral wage change, reinstitution of its pay advance system, and failure to bargain over the effects of its decision to use machinery in its melon harvest, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(d) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the makewhole period and the amounts of makewhole and interest due under the terms of this Order.

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

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between December 1, 1979 and November 30, 1980.

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

(h) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

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

compensate them for time lost at this reading and during the question-and-answer period.

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

Dated: February 25, 1986

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member