Oxnard, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PLEASANT VALLEY VEGETABLE CO-OP, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 82-CE-16-OX 82-CE-128-OX 83-CE-2-OX 83-CE-160-OX 83-CE-160-1-OX 12 ALRB No. 31

DECISION AND ORDER

On November 15, 1984, Administrative Law Judge (ALJ) James H. Wolpman issued the attached Decision in this matter. Thereafter, Respondent, Pleasant Valley Vegetable Co-op (PVVC), General Counsel, and the United Farm Workers of America, AFL-CIO (UFW or Union) each timely filed exceptions and briefs in support thereof. Additionally, General Counsel and the UFW filed reply briefs.

The Board has considered the record and the ALJ's Decision in light of the exceptions, briefs, and reply briefs of the parties and has decided to affirm his rulings, findings of fact, and conclusions of law as modified herein, and to adopt his recommended Order with modifications.

A representation election was conducted among Respondent's agricultural employees on April 9, 1981. Respondent timely filed post-election objections and a hearing on some of those objections was subsequently held. On November 4, 1982, the Board issued its Decision certifying the UFW as the exclusive

bargaining representative of Respondent's agricultural employees. (Pleasant Valley Vegetable Co-Op (1982) 8 ALRB No. 82.)[1/] The conduct complained of herein consists of Respondent's technical refusal to bargain as well as its institution of a number of unilateral changes in working conditions.

Initially, we must respond to Respondent's Motion for Reconsideration of Order Denying Motion to Dismiss. This Motion relates to Charge Number 82-CE-16-OX which alleges various unilateral changes as well as the discriminatory transfer of work to labor contractors in retaliation for union activities. A brief chronology of the history of this charge is warranted.

The charge was filed on March 11, 1982, by the UFW. It was dismissed by the Regional Director on July 28, 1982. However, it was reinstated by a different Regional Director on April 27, 1983, and amended into the instant complaint. In its post-hearing brief to the ALJ, Respondent argued for the first time that amendment of the charge into the complaint violated due process and subjected it to litigation of a stale claim. Respondent also moved to strike the charge from the complaint. The ALJ's Decision

---

[1/]In that case, at p. 12, the Board correctly stated the Ninth Circuit Court of Appeals' prevailing standard for assessing election-related conduct engaged in by nonparties. That standard recognizes that nonparty conduct sufficient to warrant the setting aside of an election must be deemed to be "coercive and disruptive conduct or other action [which] is so aggravated that a free expression of choice of representation is impossible." (NLRB v. Aaron Bros. Corp. (9th Cir. 1977) 563 F.2d 409 [96 LRRM 3261].) However, in 8 ALRB No. 82, at page 17, the Board appears to have inadvertently extended the Aaron Bros. standard to election conduct by a party. Therefore, to the extent that Pleasant Valley adopts and applies Aaron Bros. with respect to party conduct, it is hereby overruled.

issued on November 15, 1984, but did not respond to Respondent's Motion. On November 19, 1984, the ALJ issued an Order Denying Motion to Dismiss. The ALJ's Order was based on National Labor Relations Board (NLRB or national board) precedent which permitted the reinstatement of a previously dismissed charge based on newly discovered evidence. On January 4, 1985, Respondent filed its exceptions to the ALJ's Decision but did not except to the ALJ's Order Denying Motion to Dismiss. On January 11, 1985, the NLRB issued its decision in Ducane Heating Corporation (1985) 273 NLRB 1389 [118 LRRM 1145]. On March 19, 1985, Respondent filed its Motion for Reconsideration of Order Denying Motion to Dismiss. Respondent argued that reinstatement of the charge would violate the six-month limitations period set forth in section 1160.2 and that the NLRB's recent decision in Ducane, supra, required that the charge be dismissed. General Counsel filed a Response to Respondent's Motion on March 25, 1985. The Board subsequently permitted the parties to file briefs concerning the applicability of the Ducane decision to the instant case. General Counsel and Respondent both filed timely briefs in mid-April 1986. In Ducane Heating Corporation, supra, 273 NLRB 1389, the NLRB held that a charge may not be reinstated outside the six-month limitations period absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. Underlying the national board's decision was its concern with the right of a respondent to be assured that, absent the existence of a properly served charge on file, it will not be liable for conduct occurring more than six

months prior to the filing of that charge. The NLRB found that to permit the resurrection of previously dismissed or withdrawn charges is inconsistent with this principle and should be permitted only where a respondent, in effect, forfeits its right to such assurances by engaging in fraudulent concealment.

While we agree with the national board's reasoning and decision in Ducane, supra, 273 NLRB 1389, we must weigh the benefits to be achieved by the NLRB's new interpretation of the law against the detrimental effects of retroactively applying that new rule in the instant case. (See N.L.R.B. v. Bell Aerospace Co. (1974) 416 U.S. 267, 294.)

Here, the General Counsel fully litigated the allegations in the complaint based on what was then a properly reinstated charge. The factual and legal analysis of the ALJ are also based on that charge. The NLRB did not issue its decision in Ducane, supra, 273 NLRB 1389, until two months after the ALJ's Decision in this case issued. It was not until four months after the ALJ's Decision issued that Respondent first argued that Ducane does not permit the reinstatement of Charge No. 82-CE-16-OX. We conclude that the timing of the NLRB's Ducane decision relative to the progress of the instant case through our own hearing and decision process creates special circumstances which we must consider. It is our view that a substantial inequity would result if we retroactively apply the new standard for reinstating previously dismissed charges to this case. (See Gibson v. U.S. (9th Cir. 1986) 781 Fed.2d 1334, 1338-1339; Parker v. Superior Court (1985) 175 Cal.App.3d 1082.) We will therefore not apply the Ducane

standard to the instant case but will proceed to examine the merits of Charge No. 82-CE-16-OX.

There is no factual dispute over whether Respondent transferred the harvest work from its own crews to labor contractors. The parties stipulated that:

> ...commencing with the 1981-1982 harvest season and continuing to the present, Respondent unilaterally began transferring almost all of its head lettuce and a majority of cabbage harvest to labor contractor crews without notifying or offering to bargain with the UFW over this assignment of work. (General Counsel's Exhibit No. 2, "Stipulations of Facts," Item 9.)

We agree with the ALJ that the reallocation of work adversely affected the PVVC harvest crew (H-l crew) in that it resulted in the crew earning less than it would have earned had it continued in the higher paying head lettuce and cabbage harvests. The ALJ concluded from this that Respondent violated sections 1153(c) and (a)[2/] of the Agricultural Labor Relations Act (Act) by depriving the PVVC H-l crew of work in the head lettuce and cabbage harvests and instead assigning the work to labor contractors. Respondent excepts to this conclusion.

We begin our analysis by crediting the extensive evidence presented by the General Counsel of Union activity by most members of the H-l crew, and of management's awareness of that activity. The H-l crew played a significant role in the Union organizational campaign. Respondent did not contest the crew's

---

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

union involvement or its awareness of that involvement.

In establishing a causal connection between the H-l crew's union activity and the alleged discriminatory reallocation of work, the ALJ considered both the timing of the reallocation and Respondent's conduct just prior to the representation election.[3/] The reallocation of lettuce and cabbage harvest work occurred during the season immediately following the representation election. Union organizing activity began in late February 1981. In early to mid-March 1981, Respondent initiated several

---

[3/]We may properly rely on Respondent's conduct just prior to the election even though it occurred more than six months prior to the filing of the charge. On January *1,* 1983, the UFW also filed Charge Number 83-CE-2-OX, in which it alleged that PVVC had been replacing its workers with labor contractor crews, in violation of the Act. The complaint alleges that, beginning around September 1981 and continuing to the present, Respondent transferred the majority of its cabbage and head lettuce harvest work to contract labor in violation of section 1153(a), (c), and (e) of the Act. This allegation in the complaint was originally based on both charges, 82-CE-16-OX and 83-CE-2-OX. Therefore, our consideration of Charge No. 82-CE-16-OX can rely on the allegation in the complaint that the unlawful transfer of work was a continuing violation. Accordingly we can consider the allegation in light of conduct not falling within the six-month limitations period. (See Operating Engineers Local 478 Stone & Webster Engineering Corporation (1985) 274 NLRB No. 81 [118 LRRM 1492].)

Relying on News Printing Co. (1956) 116 NLRB 210 [38 LRRM 1214] and Bowen Products Corp. (1955) 113 NLRB 731 [36 LRRM 1355], Respondent argues that where there is insufficient evidence from within the six-month limitations period to prove motive, motive may not be proved by evidence relating to the antecedent acts. In later cases, however, the NLRB has held that where the motivating reasons for a respondent's conduct are not explained by events within the six-month period, it is free to consider the background evidence outside the six-month period for an explanation. (Paramount Cap Manufacturing Co. (1957) 119 NLRB 785 [41 LRRM 1234], enforced (8th Cir. 1958) 260 F.2d 109; Dan River Mills (1959) 125 NLRB 1006 [45 LRRM 1209].) In Paramount Cap, the national board utilized evidence developed in a prior representation case outside the six-month limitations period to establish the discriminatory motive for an unlawful discharge,

unilateral changes, including a pay increase, a reduced qualifying period for vacation, and the formation of an employee labor relations committee. The ALJ also considered Respondent's shifting explanations for the reallocation (i.e., Respondent's position during the investigation that PVVC had decided to replace its harvest crews with labor contractors and the testimony to the contrary by several PVVC management witnesses that the H-l crew was its preferred crew and that it never intended to eliminate it from the harvesting operations).

Under Wright Line, Inc. (1980) 251 NLRB 1082 [105 LRRM 1169], which we have adopted, the General Counsel has the initial burden of presenting evidence to establish that protected conduct was a motivating factor in Respondent's decision to transfer the harvest work to labor contractors. General Counsel met this burden. The burden then shifted to Respondent to prove that it would have transferred the harvest work to the labor contractor crews even in the absence of its protected union activities.

Respondent advanced a series of justifications for its action. We agree with the ALJ that the majority of these reasons (available work, costs, communications, wishes of the crew) were merely pretextual and based on a distortion of facts. We conclude that while the other justifications for the reallocation offered by Respondent might have been deemed valid had the evidence borne out Respondent's contentions, the testimony concerning Respondent's operations demonstrates that they were not the real

///////////////

reason for the reallocation.[4/] For example, the record does not support Respondent's contention that it was motivated by a desire to avoid scheduling and equipment problems. There is no evidence that Respondent had experienced any interruptions in the flow of work due to scheduling problems. Further, the only evidence regarding equipment failures reveals that labor contractor Greg Cheveres' truck only infrequently had problems in muddy fields but was still moved from one field to another. Finally, Respondent argues that it needed skilled workers for the head lettuce harvest. However, the evidence establishes that Respondent's H-l crew possessed the required skill and Respondent did not contend otherwise. Furthermore, we do not credit Respondent's assertion that it could only obtain skilled workers from the Imperial Valley. While labor contractor Larry Martinez testified that half of his crew came from the Imperial Valley, Respondent did not establish that it could not obtain qualified cutters and packers from the Oxnard area.

Our examination of Respondent's proffered justifications for the harvest reallocation leads us to conclude that Respondent was in fact motivated by anti-union reasons. We find that it

---

[4/]Respondent contends that the ALJ improperly applied the Wright Line test. (Wright Line, Inc., supra, 251 NLRB 1083.) The ALJ did in fact reword the test to require the employer to show it had legitimate business reasons which were so substantial that it would have taken the action despite the forbidden motivation.

In Royal Packing Company (1982) 8 ALRB No. 74, the Board construed Wright Line, supra, as requiring it to make findings on the alleged business reasons asserted by a respondent as justification for its action. In the instant case, the ALJ established the standard to be applied when examining the alleged business reasons. We do not find this standard inconsistent with our application of the Wright Line analysis.

violated sections 1153(c) and (a) by depriving the H-l crew of work in the head lettuce and cabbage harvests and instead assigning the work to labor contractors.

TECHNICAL REFUSAL TO BARGAIN

On November 4, 1982, the Board certified the UFW as the exclusive bargaining representative of Respondent's agricultural employees (Pleasant Valley Vegetable Co-op (1982) 8 ALRB No. 82.) On November 10, 1982, the UFW wrote to Respondent inviting it to commence negotiations. By letter dated November 17, 1982, Respondent informed the UFW that it would refuse to bargain in order to perfect a judicial appeal of the Board's certification of the UFW.

This Board has long applied the NLRB proscription against relitigation of representation issues in unfair labor practice proceedings in the absence of newly discovered or previously unavailable evidence or a claim of extraordinary circumstances. (D'Arrigo Bros. of California (1978) 4 ALRB No. 45; Adamek & Dessert, Inc. (1985) 11 ALRB No. 8; Muranaka Farms (1986) 12 ALRB No. 9.)[5/] As Respondent has not shown any such evidence or claimed extraordinary circumstances justifying relitigation of the representation issues, we will not reconsider our earlier decision in the representation case. (See T. Ito & Sons Farms (1985) 11 ALRB No. 36.) Because Respondent has thus failed to demonstrate that the certification was improperly issued, we conclude that Respondent has violated section 1153(e) and (a) of

---

[5/]See Pittsburgh Plate Glass v. N.L.R.B. (1941) 313 U.S. 146 [8 LRRM 425].

the Agricultural Labor Relations Act (Act) by failing and refusing to meet and bargain with the UFW.

We next consider whether to order a makewhole remedy[6/] for Respondent's refusal to bargain. When an employer refuses to bargain with a labor organization in order to gain judicial review of a Board certification, we consider the appropriateness of a makewhole remedy on a case-by-case basis. (J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1.) We impose a makewhole remedy where the employer's litigation posture is not reasonable at the time of its refusal to bargain or the employer does not seek judicial review of the Board's certification in good faith. (J. R. Norton Company (1980) 6 ALRB No. 26.)

We find that in this case Respondent's litigation posture was reasonable and asserted in good faith. Accordingly, we conclude that makewhole is not an appropriate remedy for the Respondent's technical refusal to bargain.

The Board's Decision and the Dissenting Opinion in the underlying certification decision (8 ALRB No. 82) fully detail the conduct of PVVC employee Alderberto Gomez during the election, as well as the inaction of ALRB representatives in that regard, which gave rise to Respondent's objections in the representation case. Based upon the arguments presented by Respondent in support of its

---

[6/]General Counsel did not request makewhole relief for Respondent's technical refusal to bargain. The Board has previously held that it is not limited to the prayer for relief in the complaint in fashioning remedies for unfair labor practices, (See D. Papagni Fruit Co., and D. P. Farms, Co. (1985) 11 ALRB No. 38.)

objections to the election, and the closeness of the legal issue concerning whether Gomez was acting as an agent of the Union so as to render his conduct attributable to the Union, we conclude that Respondent's pursuit of its judicial challenge to the certification was reasonable.[7/]

In the absence of any evidence which would indicate that Respondent seeks judicial review of 8 ALRB No. 82 for the purpose of delaying its bargaining obligation, we conclude that Respondent's litigation posture was asserted in good faith. In this regard, we have taken into consideration Respondent's early notification to the Union that it would engage in a technical refusal to bargain.[8/]

[7/]The conclusion that Respondent's litigation posture was reasonable is further supported by the fact that an IHE and one Board Member would have set aside the election because they believed the evidence supported the conclusion that Gomez was an apparent agent of the Union and the challenged election conduct interfered with employee free choice. We construe the Supreme Court's rejection of the employer's argument in Robert J. Lindeleaf v. Agricultural Labor Relations Bd. (1986) 41 Cal.3d 861 that a dissent by an appellate court judge established the reasonableness of the employer's position to mean that a dissent may not be determinative of the reasonableness of a respondent's litigation posture. We do not believe that the Supreme Court intended to preclude the Board from considering the fact that a Board Member or judge dissented from a majority opinion as a factor to be examined in evaluating the reasonableness of a respondent's position.

[8/]As will be discussed below, the ALJ found that Respondent violated its duty to bargain by implementing several unilateral changes without first affording the Union an opportunity to bargain over the changes. Although we affirm the ALJ's findings in that regard, we do not consider them to be a factor in assessing the appropriateness of a makewhole remedy for the technical refusal to bargain. Since Respondent asserted its refusal to bargain on the grounds that the underlying certification is invalid, and consequently there is no obligation

(fn. 8 cont. on p. 12.)

UNILATERAL CHANGES

Respondent instituted a number of unilateral changes in its employees' terms and conditions of employment in the period following the election but prior to the Board's Decision and Order of Certification. It is well settled that an employer which implements unilateral changes during the pendency of objections to an election which the union has won, absent compelling economic justification, "acts at its peril" and such changes may be deemed to constitute violations of the duty to bargain. (Mike 0'Connor Chevrolet-Buick-GMC Co. Inc. (1974) 209 NLRB 701 [85 LRRM 1419]; Highland Ranch v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 848, 856.)

Respondent concedes an absence of compelling economic circumstances to justify the changes and, further, that it did not notify the Union and offer to bargain about the proposed changes before implementing them. Accordingly, we conclude that Respondent violated section 1153(e) and (a) of the Act by effectuating the unilateral changes which are described in the ALJ's Decision.[9/]

(fn. 8 cont.)

to bargain with the Union as to any matter, it would be inconsistent for Respondent to then offer to bargain over changes in its employees' terms and conditions of employment. Accordingly, we will remedy the unlawful unilateral changes with the standard remedy by ordering Respondent to cease and desist from implementing unilateral changes, compensating affected employees for any economic loss they may have incurred, and requiring Respondent to rescind the changes should the Union so request.

[9/]Although the election was held on April 9, 1981, it was not until July 29, 1981, that it was clear that the Union had received a majority of the valid votes cast. On the latter date, the Board

(fn. 9 cont. on p. 13.)

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that the Respondent, its officers, agents, successors and assigns shall: 1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified collective bargaining representative of its agricultural employees.

(b) Failing or refusing to provide to the UFW, at its request, information relevant to collective bargaining.

(c) Granting unilateral increases to members of the bargaining unit without first notifying the UFW of the proposed change and affording it an opportunity to bargain about the proposed change.

(d) Failing or refusing to bargain with the UFW over the effects of material reductions in crops, acreage and production.

(e) Failing to notify or bargain with the UFW concerning the decisions to merge employee and labor contractor crews and failing to honor agreements to accord job assignments to employees who are merged into contractor crews.

(fn. 9 cont.)

issued a revised Tally of Ballots following resolution of theretofore outcome determinative challenged ballots. Prior to that time, the "at your peril" doctrine would not have been applicable. We have taken that factor into account in directing the date for commencement of the remedy for the unilateral changes at issue herein.

(f) Transferring cabbage and head lettuce harvesting work away from its own crew and over to labor contractor crews because of the union sympathies and activities of the members of its crew and failing, or refusing, to meet or bargain with the UFW about such transfers of work.

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

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, and supply it with the information requested for bargaining.

(b) Upon request of the UFW, the certified bargaining representative of Respondent's agricultural employees, rescind the unilateral increases in hourly and piece rates granted members of the bargaining unit.

(c) Upon request, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to its decision to merge its celery harvest crew with that of its labor contractor.

(d) Upon request, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to the effects *of* the reductions in celery acreage and

production in the 1981-82 and 1982-83 seasons and the effects of the reduction in cabbage acreage and production in the 1981-82, 1982-83 and 1983-84 seasons.

(e) Restore Joaquin Ricardo to the position of packer in the Martinez celery harvest crew.

(f) Make whole the members of the H-l harvest crew for all losses of pay and other economic losses they have suffered as a result of Respondent's transfer of cabbage and head lettuce harvest work away from that crew for the period from July 7, 1982 to June 4, 1984, and thereafter until such time as Respondent reaches agreement with the UFW as to such other assignment format; such amounts to be computed in accordance with Board precedent, plus interest thereon, computed in accordance with the Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(g) Make whole Joaquin Ricardo for all losses of pay and other economic losses he has suffered as a result of his being assigned to work as a cutter rather than a packer in the Martinez celery harvesting crew beginning December 29, 1983, such amounts to be computed in accordance with established Board precedent, plus interest thereon computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(h) Make whole all agricultural employees who lost work as a result of Respondent's decision to merge its celery crew into that of its labor contractor, for all economic losses suffered by them, such amounts to be computed in accordance with Board precedent, plus interest thereon, computed in accordance

with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, for the period from ten days after the date this recommended Decision becomes final until: (1) the date Respondent reaches an agreement with the UFW regarding its decision; or (2) the date Respondent and the UFW reach a bona fide impasse; or (3) the failure of the UFW to request bargaining about the decision within ten days after the date of issuance of this Order or to commence negotiations within five days after Respondent's notice to the UFW of its desire to so bargain; or (4) the subsequent failure of the UFW to meet and bargain in good faith with Respondent about the matter.

(i) Make whole all agricultural employees, who lost work as a result of its failure to meet and bargain with the UFW with respect to the effects of reductions in celery acreage and production in the 1981-82 and 1982-83 seasons and the effects of the reductions in cabbage acreage and production in the 1981-82, 1982-83, and 1983-84 seasons, for all economic losses suffered by them, such amounts to be computed in accordance with Board precedent, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, for the period from ten days after the date this recommended Decision becomes final until: (1) the date Respondent reaches an agreement with the UFW on these matters; or (2) the date Respondent and the UFW reach a bona fide impasse; or (3) the failure of the UFW to request bargaining about these matters within ten days after the date of issuance of this Decision or to commence negotiations within five days after Respondent's notice

to the UFW of its desire to so bargain; or (4) the subsequent failure of the UFW to meet and bargain in good faith with Respondent about these matters.

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

(k) 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.

(1) 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 in the bargaining unit at any time during the period from July 7, 1982, until Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(m) 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.

(n) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in

all appropriate languages, to all employees then employed in the bargaining unit 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 the bargaining unit in order to compensate them for time lost at this reading and during the question-and-answer period.

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

Dated: December 29, 1986

JYRL JAMES-MASSENGALE, Chairperson[10/]

JOHN P. McCARTHY, Member JORGE CARRILLO,

Member PATRICK W. HENNING, Member

GREGORY L. GONOT, Member

[10/]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.

CHAIRPERSON JAMES-MASSENGALE AND MEMBER GONOT, Dissenting in Part:

We agree with our colleagues that the Decision of the National Labor Relations Board (NLRB) in Ducane Heating Corporation (1985) 273 NLRB 1389 [188 LRRM 1145] is applicable precedent within the meaning of Labor Code section 1148. We differ with them insofar as they perceive certain facts as constituting adequate grounds for rendering Ducane inapplicable in this instance.

In the absence of special circumstances, the NLRB has traditionally applied a new rule of law retroactively to all pending cases. Unlike the majority, we do not believe that the simple fact that a matter was litigated, on the basis of then-controlling precedent which was subsequently determined to be erroneous, constitutes a special circumstance sufficient to preclude application of the Ducane principle. (See Herbert F. Darling, Inc. (1986) 273 NLRB No. 52; Bruckner Nursing Home (1982) 262 NLRB 955 [110 LRRM 1374]; H. & F. Binch Co. (1971) 188 NLRB 72 [76 LRRM 1735].

Although material facts had been litigated in Ducane, the NLRB nevertheless defined special circumstances in that case as constituting "circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation." Since General Counsel stipulated here as to the absence of any facts which could reasonably constitute fraudulent concealment, we would find Ducane dispositive of the issues in this matter. We would therefore find it inappropriate for the Board to review Case No. 82-CE-16-OX and would dismiss the allegations in the complaint which are based on the underlying unfair labor practice charge.

With regard to the ALJ's findings of unlawful unilateral changes, our position on the Ducane question also requires that we dissent, but only as to those changes which were implemented more than six months prior to the filing of Charge No. 83-CE-2-OX on January 7, 1983. (Labor Code section 1160.2.) Dated: December 29, 1986

JYRL-JAMES MASSENGALE, Chairperson

GREGORY L. GONOT, Member

MEMBERS HENNING and CARRILLO, dissenting in part:

We dissent from our colleagues' failure to award makewhole relief to remedy Respondent's unlawful refusal to bargain with the United Farm Workers of America, AFL-CIO (UFW or Union). As explained below, the majority unnecessarily restricts this Board's utilization of its full remedial authority by not awarding makewhole relief. The cease and desist provision of the Board's Order cannot possibly remedy the destruction to the collective bargaining process caused by Respondent's four-year delay in recognizing its employees' collective bargaining representative, much less the economic damage suffered by those employees.

The majority properly refers to the standards set forth in J. R. Norton Company v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, for reviewing technical refusals to bargain and concludes that Respondent's pursuit of its legal challenge was

reasonable . . . "[b]ased upon the arguments presented by

Respondent in support of its objections and closeness of the

issues presented." Absent any discussion or analysis by the majority on how it reached its conclusion, we will proceed to examine Respondent's arguments.

In analyzing technical refusal to bargain cases, we must consider both the legal merit of the employer's election challenge and the employer's motive for seeking judicial review. (J. R. Norton (1980) 6 ALRB No. 26.) The reasonableness of the challenge "... consists of an objective evaluation of the claims in light of legal precedent, common sense, and standards of judicial review, and the Board must look to the nature of the objections, its own prior substantive rulings and appellate court decisions on the issues of substance . . . ." (George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1985) 40 Cal.3d 654.)

Initially, we would reject Respondent's assertion that since an experienced Investigative Hearing Examiner (IHE) recommended setting aside the election and an experienced Board Member agreed, its litigation posture must be deemed reasonable. It is the Board majority which ultimately makes findings of fact (See §1160.3; Sam Andrews' Sons v. Agricultural Labor Relations Bd. (1981) 28 Cal.3d 781, 794), and conclusions of law. In addition, the California Supreme Court has recently rejected this same argument. (Robert J. Lindeleaf v. Agricultural Labor Relations Bd. (1986) 41 Cal.3d 861.)

The Board's representation case at 8 ALRB No. 82 dealt with the conduct of Alderberto Gomez and the failure of ALRB agents to stop that conduct. These events gave rise to

Respondent's election objections. In that Decision, the Board concluded that Gomez was not an agent of the UFW and, therefore, his conduct must be viewed under the standard applicable to nonparties.

Respondent's assertion that Alderberto Gomez was an agent of the UFW hinges primarily on a factual determination. It argues that the facts support its position. Respondent's argument turns on the interpretation of a statement by UFW official Roberto de la Cruz at the preelection conference and on an answer given by Gomez during cross-examination at the representation hearing. The Board's conclusion that Gomez was not an agent was a finding of fact based on its resolution of the testimony. We have previously held that the resolution of inferences drawn from the evidence do not form the basis of a reasonable litigation posture. (Ron Nunn Farms (1980) 6 ALRB No. 41; Robert J. Lindeleaf (1983) 9 ALRB No. 35.[1/]

Respondent also argues that the Board's adoption of the legal standard regarding misconduct by bargaining-unit employees or other third parties found in N.L.R.B. v. Aaron Brothers Corp. (9th Cir. 1977) 563 F.2d 409 [96 LRRM 3261] was inappropriate and

---

[1/]We disagree with the majority's interpretation of this case. In Lindeleaf v. ALRB, supra, 41 Cal.3d 861, 881, the Supreme Court rejected the employer's argument "... that makewhole relief is inappropriate after a lone dissenting hearing officer, Board Member, or appellate judge finds merit in an employer's claim of election misconduct." The court rejected this contention noting that no authority to support it had been cited. The court then reaffirmed the standard established in J. R. Norton v. ALRB, supra, 26 Cal.3d 1. Based on the court's unequivocal rejection of this argument along with its elaboration of what constitutes a reasonable challenge (George Arakelian v. ALRB, supra, 40 Cal.3d 654, we believe the majority's interpretation is contrary to the opinion of the Supreme Court.

provided it with a reasonable litigation posture. We disagree. Adoption of the Aaron Brothers standard was a refinement rather than a reversal of our earlier precedent. Additionally, the factual situation presented in this case is not distinguishable from those considered in previous decisions.

Respondent's contention that Alderberto Gomez' conduct as an employee was sufficient to warrant setting aside the election does not present a reasonable litigation posture as this Board has previously held that almost identical conduct was insufficient. The same can be said of Respondent's argument concerning Board agent misconduct.

While the majority does not refer to General Counsel's exceptions, he excepted to the ALJ's conclusion that Respondent did not present a reasonable litigation posture. General Counsel argued that Respondent's reliance on the "Milchem Rule" was reasonable. (Milchem, Inc. (1968) 170 NLRB 362 [67 LRRM 1395].)

In the certification case, the Board addressed Respondent's contention that we adopt the Milchem rule, and rejected it.[2/] Milchem, Inc., supra, 170 NLRB 362 requires that an election be set aside whenever a party engages in sustained conversations with prospective voters who are in the polling area or in line waiting to vote, regardless of the content of their remarks. However, this rule is applicable only where a party (or his agent) is involved. Therefore, in order for Respondent to

---

[2]This was not the first time the Board rejected the Milchem Rule. (See, e.g., J. R. Norton (1978) 4 ALRB No. 39; J. R. Norton v. ALRB, supra, 29 Cal.3d 1.)

rely on it in asserting its technical refusal to bargain, it must first demonstrate that it had a reasonable expectation of prevailing on the issue of Gomez[1] agency. As discussed above, however, that question was a factual determination and factual findings are entitled to great deference from reviewing courts. (§ 1160.3; Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal.3d 335; Rivcom Corp. v. Agricultural Labor Relations Bd. (1983) 34 Cal.3d 743.)

For the foregoing reasons, we conclude that Respondent's pursuit of its legal challenge to the Board's certification of the UFW as its employees' exclusive collective bargaining representative was not reasonable. The majority's reliance on the "closeness of the legal issues raised" is not sustainable. Respondent's challenges to the election were based, for the most part, on questions of fact. As the Board's factual determinations are entitled to great deference they cannot present "close cases that raise important issues concerning whether the election ..." was properly conducted. (J. R. Norton v. ALRB, supra, 29 Cal.3d. 1, 39-40; see also Ron Nunn Farms, supra, 6 ALRB No. 41; Robert J. Lindeleaf, supra, 9 ALRB No. 35.) The majority errs by not drawing this distinction between factual and legal issues.

Respondent's contention regarding the Board's adoption of the legal standard regarding misconduct of nonparties found in N.L.R.B. v. Aaron Brothers, Corp., supra, 563 F.2d 409, is a legal issue. However as explained above, adoption of that standard was merely a refinement of earlier Board precedent. As such, we conclude that Respondent's argument did not present a close legal

question so as to insulate it from makewhole responsibility for the losses caused by its unlawful refusal to bargain.

As we find that Respondent's pursuit of its legal challenge was not reasonable, we would grant a makewhole award to compensate its agricultural employees for the economic losses they suffered as a result of Respondent's unlawful behavior. Having found that Respondent's litigation posture was not reasonable, it is unnecessary for us to inquire whether or not it was pursued in good faith. However, here again we disagree with the majority's analysis of the issue.

The majority cites Respondent's early notice to the UFW that it would engage in a technical refusal to bargain as the only evidence of Respondent's good faith.[3/] However, the majority fails to consider Respondent's conduct in unilaterally altering wages and working conditions from August 1982 through March 1983, its attempt to set up an employee-management committee just before the election, and the discrimination against its H-l crew. We have previously held that in evaluating an employer's conduct in a technical refusal to bargain case, we can consider other unfair labor practices committed by the employer against bargaining unit members. (See Frudden Produce, Inc., supra, 9 ALRB No. 73.) Respondent's conduct surrounding its refusal to bargain strongly exhibits a strategy motivated by the desire to delay bargaining

---

[3/]While we have previously found that a Respondent's delay in responding to the union's request to bargain is indicative of bad faith (see Frudden Produce, Inc. (1983) 9 ALRB No. 73), it does not necessarily follow that a prompt response evidences good faith, especially in the instant case where this is the only factor relied on by the majority.

and undermine support for the UFW.

Even in the face of these numerous unfair labor practices, the majority finds an absence of evidence to indicate that Respondent sought judicial review of its election objections for the purpose of delaying its bargaining obligation. This short-sighted conclusion ignores the fact that Respondent's unfair labor practices precluded the development of any bargaining relationship between Respondent and its employees' certified representative. (See Frudden Produce, Inc., supra, 9 ALRB No. 73.) How then, can the majority find that Respondent's conduct was not undertaken for the purpose of delaying the bargaining obligation?

The majority's decision not to award makewhole for Respondent's unlawful refusal to bargain does not comport with the Supreme Court's decision in George Arakelian Farms v. Agricultural Labor Relations Bd., supra, 40 Cal.3d 654. The majority has failed to evaluate Respondent's claims in light of court and Board precedent, standards of judicial review, and common sense. Accordingly, we dissent. We can only point out to our colleagues that their ill-conceived analysis does a great disservice to the Act and to the farmworkers who have suffered economically from Respondent's unlawful conduct. Dated: December 29, 1986

PATRICK W. HENNING, Member JORGE

CARRILLO, Member

NOTICE TO AGRICULTURAL EMPLOYEES

A representation election was conducted by the Agricultural Labor Relations Board (Board) among our employees on April 9, 1981. The majority of the voters chose the United Farm Workers of America, AFL-CIO, (UFW) to be their union representative. The Board found that the election was proper and officially certified the UFW as the exclusive collective bargaining representative of our agricultural employees on November 3, 1982. When the UFW asked us to begin to negotiate a contract, we refused to bargain so that we could ask the court to review the election. In addition, we made a number of changes in the wages and working conditions of employees without first notifying and offering to bargain with the UFW. The Board has found that we violated the ALRA by refusing to bargain with the UFW and by making those changes without first telling the union and offering to bargain about them. The Board also found that we violated the law by transferring a portion of the head lettuce and cabbage work away from the H-l crew because of the union sympathy and activity of crew members.

The Board has told us to post and publish this Notice and to take certain additional actions. 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 transfer work away from the H-l crew or in any other way discriminate against agricultural employees because of their union activities.

WE WILL NOT make any changes in your wages, hours, or working conditions without first notifying and bargaining with the UFW.

WE WILL, on request, meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

WE WILL, on request of the UFW, rescind the unilateral increases in hourly and piece rates granted to members of the bargaining unit and make those employees whole for any economic losses suffered as a result of those unilateral changes.

WE WILL make whole members of the H-l crew for all economic losses they suffered as a result of our transferring harvest work away from that crew.

WE WILL make whole employees for economic losses resulting from the reduction in celery production and the merging of the celery crew with the labor contractor crew.

WE WILL restore Joaquin Ricardo to his position as a packer in the Martinez harvest crew and make him whole for all economic losses he suffered as a result of being assigned to work as a cutter rather than a packer in the celery harvest crew.

Dated: PLEASANT VALLEY VEGETABLE CO-OP

By: _____
(Representative) (Title)

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

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Pleasant Valley Vegetable/UFW

12 ALRB No. 31
Case Nos. 82-CE-16-OX
82-CE-128-OX
83-CE-2-OX
83-CE-160-OX
83-CE-160-1-OX

ALJ DECISION

The Regional Director reinstated a previously dismissed charge which alleged that Respondent unlawfully shifted harvest work away from its own crew to a labor contractor. The ALJ denied Respondent's Motion to dismiss the charge and found Respondent's transfer of work to be unlawful. The ALJ concluded that Respondent unilaterally increased the following hourly or piece rates for its employees in violation of section 1153(e) and (a):

1. Hourly wage increase instituted on August 1, 1982;

2. Harvest piece rate increase instituted on September 1, 1982;

3. New piece rate established for endive and escarole harvest in December 1982;

4. New piece rate established for bok choy and napa harvests in December 1982;

5. New piece rate for H-l crew to harvest endive and escarole in November 1983;

6. Piece rate increases for all varieties of lettuce in March 1983.

The ALJ concluded that Respondent violated section 1153(e) and (a) of the Act by failing to notify and offer to bargain with the UFW over its decision to merge the H-2 celery crew into the crew of its labor contractor. He also found that Respondent breached an agreement to permit employee Joaquin Ricardo to continue to work as a packer. The ALJ found that Respondent's repudiation of the negotiated agreement constituted an unlawful unilateral change in violation of section 1153(e).

The ALJ concluded that Respondent violated section 1153(e) and (a) of the Act by failing to bargain over its decision to transfer harvesting work to labor contractors. He found that the transfer involved a mandatory subject of bargaining and that the bargaining obligation extended to the decision as well as to the effects of the transfer.

The ALJ concluded that Respondent unlawfully refused to effects bargain over the following reductions in crop acreages and production

1. The decline in cabbage acreage and production during the 1981-1982 season;

2. The decline in celery acreage and production during the 1981-1982 season;

3. The decrease in cabbage acreage and production during the 1982-1983 season;

4. The decrease in celery acreage and production during the 1982-1983 season;

5. The decrease in cabbage acreage and production during the 1982-1983 season.

Finally, the ALJ concluded that Respondent did not present a reasonable litigation posture in pursuing its technical refusal to bargain. Having made this determination, he found it was not necessary to determine whether it was acting in good faith in refusing to bargain. The ALJ recommended a makewhole award to remedy Respondent's unlawful refusal to bargain.

BOARD DECISION

The Board reviewed Respondent's Motion to Dismiss the reinstated charge under the national board's decision in Ducane Heating Corp. (1985) 273 NLRB 1389. This case established a new standard for reviewing the propriety of reinstating a previously dismissed charge. The Board adopted the reasoning and decision in Ducane but decided not to apply that new standard to this case. The Board also rejected the ALJ's analysis of the technical refusal to bargain. It found, contrary to the ALJ, that Respondent's litigation posture was reasonable and asserted in good faith. The Board therefore did not award a makewhole remedy for Respondent's unlawful refusal to bargain. In all other respects, the Board affirmed the decision of the ALJ. The Board did not, however, adopt the ALJ's proposed status quo ante remedy for Respondent's discriminatory transfer of harvest work.

DISSENTING OPINIONS

Chairperson James-Massengale and Member Gonot dissented from the Board's resolution of the reinstated charge. They would apply the Ducane analysis to this case and dismiss charge number 82-CE-16-OX.

Members Henning and Carrillo dissented from the majority's conclusion that Respondent's technical refusal to bargain was reasonable and in good faith. They analyzed each of Respondent's arguments and found them based mainly on factual issues. They pointed out that the Board's factual determinations are entitled to great deference. They also considered Respondent's other repeated violations and concluded that Respondent was not acting in good

//////////

//////////

faith. Members Henning and Carrillo would award makewhole to remedy Respondent's unlawful refusal to bargain.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case Nos. 82-CE-16-OX
	)	82-CE-128-OX
PLEASANT VALLEY VEGETABLE CO-OP,	)	83-CE-2-OX
	)	83-CE-160-OX
Respondent,	)	83-CE-160-1-OX
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	

Appearances:

Robert P. Roy, Esq.
Oxnard, California
for the Respondent

Juan F. Ramirez, Esq.
Oxnard, California
for the General Counsel

Esteban Jaramillo
Keene, California
for the Intervenor

Before: James Wolpman
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN, Administrative Law Judge:

This case was heard by me on June 4, 5, 6 and 7, 1984, in Oxnard, California. It arose out of a series of charges filed by the United Farm Workers of America, AFL-CIO ("UFW") alleging that Respondent Pleasant Valley Vegetable Co-op ("PVVC") violated the Agricultural Labor Relations Act. (G.C. Ex. 1-A, 1-E, 1-1, 1-J and 1-0.) The original complaint issued December 7, 1982, (G.C. Ex IF); it was amended April 30, 1984 to include additional charges (G.C. Ex 1-T; hereafter referred to as the "complaint"), and was again amended May 16, 1984 to delete one substative allegation (G.C. Ex 1-T, Paragraph 25 and GCX 1-V). At the outset of the hearing two more allegations were deleted (I:7; G.C. Ex 1-T, Paragraphs 15 & 22), and a stipulation was introduced which eliminated the need for further evidence either on Respondent's technical refusual to bargain or on a number of its unilateral changes in working conditions. (G.C. Ex. 2.) Included in the stipulation was an agreement to make tht entire record in the underlying election case (81-RC-4-OX) a part of this record. (G.C. Ex. 2, p. 5.) On the second day of hearing another stipulation was entered into which had the effect of adding one more unilateral change in working conditions to those already alleged. (II:1 and see IV:65.)

Although Respondent conceded its technical refusal to bargain and admitted a number of the unilateral changes in working conditions, it took the position that it had acted reasonably and in good faith; and it denied the allegation that one of the unilateral changes — the tranfer of work away from a harvest crew -- was motivated by a desire to punish the crew for its union activities.

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated that Respondent Pleasant Valley Vegetable Co-op (hereafter "PVVC") is an agricultural employer, that the United Farm Workers of America, AFL-CIO, (hereafter "UFW") is a labor organization, and that the Board certified it as the exclusive collective bargaining representative for all Respondent's agricultural employees on November 4, 1982, in 8 ALRB No. 82. (G.C. Ex. 2.) In addition, Respondent admits that the members of its celery, lettuce and cabbage crews are agricultural employees and that the charges herein were filed and served on the dates alleged in the complaint. (1:6.)

II. RESPONDENT'S OPERATIONS

PVVC is a marketing cooperative made up of independent growers. While it has operations in both the Santa Maria and the Oxnard/Ventura areas, only the latter is involved here. PVVC is run by a Board of Directors which meets monthly. Its chief executive officer is the General Manager; he answers to the Board of Directors and works with its Executive Committee in conducting the co-op's day to day affairs.

Over the years, PVVC has developed a clientele whose needs it seeks to meet. To this end, the General Manager works with the Sales Manager to draw up a yearly master plan designating vegetables to be grown and acreages to be allocated. The plan seeks to take into account the anticipated needs of PVVC's customers and the production capabilities of its growers in a manner which will maximize their financial return.

The mechanism for realizing these crop and acreage goals is the "pool". Pools are nothing more than sign-up sheets, one for each crop, circulated among grower members in order to obtain commitments to plant and cultivate shares of the acreages allocated to each prospective crop. Growers decide for themselves whether or not to participate in a particular pool and, if they decide to do so, the extent of their participation. PVVC's aim is to complete all of its pools and thereby carry out its master plan.

There are a number of pools: cabbage, cauliflower, celery, spinach, head lettuce and romaine. There is also a residual or mixed pool (sometimes referred to as the "mixed lettuce" or "mixed vegetable" pool) which includes varieties such as amesto, bok choy, butter, endive, escarole and napa, the units of which are grown on comparatively small acreages. The composition of the mixed pool and the relative sizes of the other pools vary from year to year.

The master plan is formulated in May and June; sign up sheets are circulated in June, July and August; and by November PVVC has a fair idea of what to expect, although changes sometimes do occur as late as March of the following year.

Individual growers prepare, plant and cultivate their own crops; PVVC then steps in to harvest, pack and ship them. The harvest season usually begins in September or October and lasts until May or June of the following year. Some crops such as mixed, romaine and cabbage are harvested—either regularly or sporadically—throughout the season, while others—head lettuce, for example—are harvested only during one portion of the season.

Day to day decisions as to which crops to harvest and which

fields to harvest them in are made by the General Manager. He confers with his Field Supervisor and the Sales Manager each afternoon to set up a "cut" or "harvest" sheet for the following day. Since only a portion of the orders to be filled are received prior to the day on which they are cut, planning is necessarily flexible. As new orders come in and existing ones are increased or decreased, the Sales Manager will coordinate with the General Manager and the Field Supervisor. The Field Supervisor determines employee and equipment needs, obtains crews, makes the day to day work assignments, and determines when crews should be shifted from one location to another.

PVVC uses both its own harvest crews and those of labor contractors. During the four seasons encompassed in the complaint, PVVC utilized a number of employee crews. The two most involved in this proceeding were Harvest Crew No. 1 (the "H-l" crew) which worked in cabbage, mixed vegetables, romaine and head lettuce, and Harvest Crew No. 2 (the "H-2" or "Celery" crew) which was confined to celery. During the same period, PVVC used two contractors: Larry Martinez and Greg Cheveres. Cheveres had done thinning and hoeing for PVVC prior to 1980, but it was not until March of that year that he began to harvest cabbage, romaine, mixed and head lettuce—an assignment which led to the elimination of a third PVVC crew ("Pastor's Crew"). Since then, Cheveres[1] work has been confined to cabbage, mixed and romaine, with increasing emphasis on cabbage. In February, 1984, he went out of business and was replaced by another contractor, a Mr. Cuevas. Larry Martinez had harvested at PVVC's Santa Maria operation prior to 1980, but it was

not until the beginning of the 1980-81 season that he was brought into the Oxnard/Ventura area. He began harvesting celery and, in March 1981, was assigned the other harvests as well. Since November 1981, his work has been increasingly concentrated in head lettuce and celery to a point where, in 1983-84, he no longer harvested any cabbage, mixed or romaine.

Contractor employees are compensated differently than PVVC employees; their piece rates are comparable, but they receive none of the fringe benefits to which PVVC employees are entitled.[1/]

III. THE FACTS SURROUNDING THE ALLEGED UNFAIR LABOR PRACTICES

The unfair labor practices alleged in the complaint, as amended, fall into three categories: (1) a technical refusal to bargain arising out of PVVC's election objections; (2) unilateral changes in wages and working conditions occurring after the election; and (3) discrimination because of union activity by depriving the PVVC crew most active in the union campaign (the H-l Crew) of better paying assignments in the head lettuce and cabbage harvests and using labor contractors instead.

Although the alleged unfair labor practices occurred over a four year period, they are nevertheless interrelated both factually and legally: factually, because they involve similar motives and business considerations; and legally, because, taken together, they provide the background or context required to weigh and assess the

---

1. All harvest work at PVVC is paid at piece rate, but earnings are not tied to individual productivity. They depend instead on crew productivity. Each employee receives an equal share of the amount obtained by multiplying the piece rate by the number of cartons harvested each day by his or her crew.

individual allegations. This context and the interrelationship of events are best understood by adopting an historical approach and recounting events as they occurred, season by season, from 1981 to 1984.

A. The 1980-81 Season; The Union Campaign and the Election

Although there had been some dissatisfaction on the part of Respondent's employees in earlier years, it did not develop into a demand for unionization until 1981. In late February a considerable portion of the 20 or so PVVC employees in the H-l Crew began campaigning for UFW representation and circulating union literature and authorization cards among themselves and among the other PVVC and contractor crews.

Respondent opposed unionization and, to that end, undertook a number of improvements in wages and working conditions while the campaign was underweight (1) it reduced the number of hours required to qualify for vacation; (2) it granted a wage increase; and (3) it unsuccessfully attempted to set up a joint employee-employer labor relations committee. Although there was testimony from management representatives that these changes had been determined upon beforehand and/or were taken solely in response to economic conditions, Respondent's awareness of the organizing drive, the Directors' minutes describing the changes (G.C. Ex. 11), the written communications to employees (G.C. Exs. 3, 4 & 5), the lack of any established history of regular wage increases, and—most of all -- the timing make it clear that benefits were granted in the hope of defeating the UFW in the election.

On April 2, 1981, the UFW filed its petition for

Certification; on April 9 the election was held; and on July 29, after resolution of a determinate number of challenged ballots, a revised Tally was issued giving 100 votes to the UFW, 71 for no-union, and leaving 20 challenges unresolved. Meanwhile, PVVC had filed its Objections to the election; and, on July 7, 1981, the Executive Secretary issued a Report setting two for hearing and dismissing the rest: one alleging improper electioneering at a polling area and the other asserting Board Agent misconduct in policing that area. On August 11 and 12, a hearing was conducted before an Investigative Hearing Examiner, and on December 3, 1981 — one month into the 1981-82 harvest season — he issued a decision overruling PVVC's claim of Board Agent misconduct, but sustaining its claim of improper electioneering; he therefore recommended that the election be set aside.[2/]

B. The 1981-82 Season

The season began a month before the IHE issued his decision and was marked by significant changes in crop composition and crew allocation.

Because neither PVVC nor its grower members believed cabbage would be a profitable crop, the cabbage pool was much smaller than the previous season. (III:112.)[3/] It dropped 52%,

---

2. It was not until the beginning of the next succeeding season -- 1982-83 -- that the Board issued its Decision reversing the IHE, overruling the electioneering objection, and certifying the UFW as the collective bargaining representative for PVVC's employees and the employees of its labor contractors. (Pleasant Valley Vegetable Co-op (November 3, 1982) 8 ALRB No. 82.

3. General Manager John Srees testified that cabbage had only been a profitable crop in 2 or 3 of the past 15 years, but that in those years it had proven very profitable. (III:111-112.)

from 531.26 acres in 1980-81 to 255.94 acres; or, stated in terms of crop yield, down 43%, from 306,154 cartons to 173,533 cartons. Other things being equal, a drop in cabbage production will result in a decline in income for H-l Crew members because the piece rate they receive for cabbage is pegged at a level which yields greater earnings for a commensurate amount of work than any other crop except head lettuce. (See discussion at page 21, infra.)

The parties stipulated that PVVC did not notify or offer to bargain with the UFW over the effects of the decrease in cabbage acreage or production. General Manager Frees explained that he chose not to do so for this or for the other crop declines because decisions over what crops to grow and what acreages to plant are made by its individual members and not by PVVC.

There was also a decrease in the celery pool, but it was not as pronounced as with cabbage: acreage declined 9%, from 382 acres in 1980-81 to 348.73 acres in 1981-82; or, stated in yields, down 8% from 371,161 to 341,543 cartons. Again the reason had to do with expected returns; Frees explained that celery had not been profitable since 1979. (III:111.)

The decline in celery production meant less work for PVVC's celery crew (the H-2 Crew); yet, as with cabbage, the UFW was not notified or given an opportunity to bargain over the effects of the decline.

The 1981-82 season also marked the beginning of a significant change in the manner in which PVVC assigned and allocated work. There was increased reliance on labor contractors, and it was accompanied by a pronounced shift toward using them,

rather that the H-l Crew, in the cabbage and head lettuce harvests. The H-l Crew was instead assigned more work in the mixed vegetable and romaine harvests. Since the piece rate for head lettuce, like that for cabbage, yields higher earnings than can be obtained from a commersurate amount of work in other crops, members of the H-l Crew could expect reduced earnings as a result of the shift (see p. 21, infra) ; yet, PVVC did not notify or offer to bargain with the UFW over its reallocation of work.

There was considerable testimony as to PVVC's motive for the reallocation. General Counsel maintained that it acted to penalize the H-l Crew for its leadership in the union organizational campaign; while Respondent offered a number of justifications relating to cost, efficiency, equipment and the desire of the crew. These competing explanations are dealt with in Section IV, below.

Two other changes occurred during the 1981-82 Season: On August 1, 1982, hourly rates for tractor drivers, irrigators and 'members of the celery transplant crew were increased; and one month later, on September 1, 1982, piece rates were increased for each harvest crop. (Resp. Ex. 5 & G.C. Exs. 2 & 9.) Both sets of increases were implemented without notification or bargaining with the UFW. According to Respondent, they came in response to complaints from some workers and sought "to complement wages being paid in the area at the time." (III:9.) Frees testified that the UFW was not notified because Respondent believed that the ALRB would accept its IHE's recommendation that the election be set aside. (III:119)

Because of the changes which were made during the 1981-82

season, PVVC is alleged to have committed the following unfair labor practices: (1) a failure to bargain over the effects of the decline in cabbage acreage and production (Complaint, Para. 16); (2) a failure to bargain over the effects of the decline in celery acreage and production (Complaint, Para. 17); (3) a failure to bargain over the increase in the hourly wages instituted August 1, 1982 (Complaint, Para. 18); (4) a failure to bargain over the increase in harvest piece rates instituted September 1, 1982 (Complaint, para. 19); and (5) a shift of higher paying cabbage and lettuce work away from its H-l Crew and over to labor contractors without notifying or offering to bargain with the union and as a means of penalizing the Crew for its support and activity on behalf of the UFW. (Complaint, Paras. 7, 8 & 9.) C. The 1982-83 Season

On November 4, 1982—one month into the new season—the Board reversed the IHE and certified the UFW as the collective bargaining representative of PCCV's employees and the employees of its labor contractors. (8 ALRB No. 82.) A week later on November 10, the UFW requested that negotiations begin and, along with its request, sought information to assist it in bargaining. (Ex A to G.C. Ex. 2.) The request was received November 16 (G.C. Ex. 2, para. 6), and on November 17, PVVC's attorney wrote back explaining that his client intended to challenge the certification in court and therefore would not agree to meet and bargain. (Ex. B to G.C. Ex. 2.)

Meanwhile the season had begun. Once again, there was a drop in the acreage and production of both celery and cabbage

because neither PVVC nor its grower members expected them to be profitable. Cabbage acreage declined 16%, from 255.94 acres in 1981-82 to 215.18 acres, and production dropped 45% from 173,533 to 96,183 cartons. Celery acreage declined 23%, from 348.74 acres to 267.55 acres, and production dropped 50% from 341,543 to 170,734 cartons. And once again, PVVC did not notify or offer to bargain with the UFW over the effects of these lines.

Along with the decrease in cabbage and celery came the addition of four new varieties to the mixed pool -- endive, escarole, bok choy and napa. After surveying going rates for the new varieties, PVVC established a piece rate of $0.80 per carton for bok choy and napa and began paying Larry Martinez[1] crew $0.57 for endive and escarole. (IV:65.) These rates were put into effect in December 1982 when PVVC began to harvest the new varieties, and this was done without notifying or giving the UFW an opportunity to bargain over the new rates. Frees testified, at one point, that this was an oversight on his part (III:128-129) and, at another, that he did not notify the UFW because he did not believe that it represented the workers. (IV:7.)

Although labor contractors did not harvest as large a portion of PVVC's overall output in 1982-83 as they had in 1981-82, they did maintain their predominance in the cabbage harvest and they received an even greater share of the head lettuce harvest than they had had enjoyed the previous season. The H-l Crew continued to be relegated to the mixed and romaine harvests. Crew members were unhappy with the situation and, in February, presented a petition to management seeking more cabbage and mixed lettuce work and fewer

assignments to second cuttings in fields originally harvested by contractor crews. (G.C. Ex. 17.)

A month later, in March 1983, PVVC increased piece rates for all lettuce varieties. (G.C. Ex. 2, Para. 17; G.C. Ex. 7; Resp. Ex. 4.) As with previous increases, this was done without notifying or offering to bargain with the union. According to management, the adjustment was occasioned by the heavy rains during the season which prevented equipment from entering the fields, thereby slowing the pace of the harvest and diminishing the earnings of PVVC' s employees. (III:120.) Frees testified that he was unaware that the union had not been contacted. (III:121.)

PVVC did meet with the UFW to discuss the related issue of payment for the time the H-l Crew spent waiting to begin work due to inclement weather (III:120); and, eventually, crew members received lump sum payments for their standby time. (III:147-148.) Likewise, the UFW was notified and given an opportunity to bargain over a change in the Administrator of the company's pension fund and over changes in the payroll week and the payroll checks and stubs. (Resp. Exs. 7 & 10.)

Based upon those changes which were made without notice or bargaining and upon its refusal to honor the UFW[1]s certification, PVVC is alleged to have committed the following unfair labor practices during the 1982-83 Season: (1) a technical refusal to bargain with or supply information to the certified representative of its employees (Complaint, Paras. 10-14); (2) a failure to bargain over the effects of the decrease in cabbage acreage and production (Complaint, Para. 17); (3) a failure to bargain over the effects of

the decrease in celery acreage and production (Complaint, Para. 16); (4) a continuation of the practice of shifting higher paying cabbage and head lettuce work away from the H-l Crew to labor contractors without notifying or offering to bargain with the UFW and as a means of penalizing the crew for its support and activities on behalf of the union (Complaint, Paras. 7, 8 & 9); (5) a failure to notify or offer to bargain with the UFW in establishing a piece rate for Larry Martinez[1] crew when it began harvesting endive and escarole in December 1982 (G.C. Ex. 2; Para. 18; IV:65); (6) a failure to notify or offer to bargain with the UFW in establishing a piece rate for bok choy and napa, which PVVC first began to harvest in December 1982 (II:2; IV:65); and (7) a failure to notify or offer to bargain with the UFW over the increase in the piece rates of all varieties of lettuce in March 1983 (Complaint, Para 20).

D. The 1983-84 Season

The drop in cabbage acreage and production was even more pronounced this season than in previous years; acreage was down 66%, from 215.18 acres to 95.25 and production declined 44%, from 96,183 to 63,803 cartons. On the other hand, there was a considerable increase in mixed and romaine crops. All of this, taken together with an even more clearly defined reallocation of head lettuce and cabbage production to labor contractors and mixed and romaine production to the H-l Crew, served further to diminish the expected earnings of H-l Crew. Once again, neither the decline in cabbage acreage and production nor the continued shift of work in cabbage and head lettuce to labor contractors was brought to the attention of the UFW.

But that was not the only change. Respondent began to utilize its H-l crew to harvest endive and escarole and, without first notifying or offering to bargain with the UFW, established a piece rate of $0.53 per carton for the two crops. (IV: 65.) The celery acreage again declined (from 267 acres down to 172 acres) and the number of PVVC employees returning to the H-2 Celery Crew dropped to 8 from an average of 10 or 11 during the previous season. Given the nature of the equipment utilized by PVVC, 12 to 14 workers are required if the crew is to work efficiently. PVVC therefore decided to merge the remnants of its H-2 Crew into the Martinez crew. This was done without notifying or offering to bargain with the UFW. When the union learned what had occurred, it objected; and two meetings were held to discuss the merger and its effects. But the UFW was unable to persuade PVVC to retain the H-2 Crew members as employees, and eventually they were transferred over to the Martinez payroll. It did, however, obtain severence benefits for one of the crew members who, because of his weight, was unable to do the bending required by Martinez' method of packing. (Resp. Ex. 9 A-L.)

At the meeting between management and the Crew in which the merger was first announced (November 21, 1983, the day before the first meeting with the union), the three crew members who were cutters were told that, because of their seniority, they would "have the opportunity" to pack in the Martinez crew. (11:10.) Although there is no difference in pay, packing is easier than cutting; this is especially so in the Martinez crew because cutters must bend over to cut the celery rather than having it placed on a table or cart as

was done in the H-2 crew. (II:19-22.) The roost senior of the three, Otoniel Tellez, was immediately assigned to pack; the other two, Joaquin Ricardes, who was next in seniority, and Goldino Espino, who had the least seniority, were assigned to cut. (II:11-12.) When the size of the Martinez Crew was increased the following day, Espino rather than Ricardes was given the packing assignment. (II:13-14.) At the meeting later that day with the UFW, Ricardes complained. (II:14.) Seniority dates were checked, and it was agreed that he was entitled to pack. (II:14.) He then went on to contend that the increase in the size of the Martinez crew was enough so that both he and Espino should be allowed to pack. (II:14.) Management responded that it was not and that Espino must return to cutting. (II:14.) Ricardes acquiesced, saying that it was all right. (II:14.)

The next day he arrived at work to find Espino still packing. (II:15.) He complained to the Martinez foreman, Chato, who told him to remove Espino and take his place. (II:15.) When Ricardes said that it was not his place to remove a co-worker from an assignment, it was agreed that, for the rest of the day, they would split the packing work. (II:15-16.) Subsequently, Ricardes was reassigned to work in another PVVC crew. (II:161.)

It was not until December 5 that he was again returned to the Martinez crew. By that time, Espino was no longer employed, and Ricardes was assigned to pack. (II:17.) He continued to do so until the crew was laid off for lack of work three days later. (II:18.) It was recalled on December 28, but Ricardes notified the company that he was ill and received the day off. (II:18.) When he

returned the next day, he had to wait some time before he was allowed to begin and then was told that he had to work as a cutter. (II:18-19.) Since that time, he has not been allowed to pack. (II:19.)

Because of this and because of the other changes made during the 1983-84 season, PVVC is alleged to have committed the following unfair labor practices: (1) a failure to bargain over the effects of the decrease in cabbage acreage and production (Complaint, Para. 16); (2) a continuation of its practice of shifting higher paying cabbage and head lettuce work away from the H-l Crew to labor contractors without notifying or offering to bargain with the UFW and as a means of penalizing the crew for its support and activity on behalf of the union (Complaint, Paras. 7, 8 & 9); (3) a failure to notify or offer to bargain with the UFW in establishing a piece rate for its H-l Crew when that crew began harvesting escarole and endive in November 1983 (Complaint, Para. 24; IV:65); (4) a failure to notify and offer to bargain with the UFW over its decision to merge and H-2 Celery Crew into the crew of its labor contractor (Complaint, Para. 21); and (5) a failure to honor its agreement to allow cutters with seniority in the H-2 crew to transfer over to the Martinez crew as packers. (Complaint, Para. 23.)

E. Overall Trends

The unfair labor practices which PVVC is alleged to have committed have their factual bases in trends which began in 1981 and continued on through June 1984. There is, first of all, the decline in the sizes of the cabbage and celery pools accompanied by

increases in the size of the romaine pool and in the size and variety of the mixed pool. These shifts are evident in Table 1.

TABLE 1

COMPOSITION OF CROP POOLS FROM 1980-81 SEASON THROUGH 1983-84 SEASON BY ACREAGE PLANTED AND BY CARTONS HARVESTED (Prepared from General Counsel Exhibits #2 and #8; and Respondent's Exhibits #1 A-E and 12 A-E.)

ACREAGE

Crop	1980-81	1981-82	1982-83	1983-84
Mixed	318	273	170	339
Romaine	213	140	170	339
Cabbage	531	256	215	95
Head Lettuce	512	285	207	489
Celery	382	349	268	172

CARTONS HARVESTED

Crop	1980-81	1981-82	1982-83	1983-84
Mixed	123,288	242,759	232,828	269,421
Romaine	81,293	120,736	113,101	135,876
Cabbage	306,154	173,533	96,183	63,793
Head Lettuce	136,219	144,942	85,345	67,085
Celery	375,514	341,543	170,734	109,001

NOTE: There is some inconsistency between exhibits. Where it exists, I have utilized Respondent's figures. None of the discrepancies are large enough to be significant.

Next, there has been increasing specialization in the crop assignments of the various harvesting crews: Martinez' work has become concentrated in head lettuce and celery, Cheveres' in cabbage, and PVVC' s H-l crew in mixed and romaine. This can be seen from Table 2.

TABLE 2

COMPARISON OP CARTONS HARVESTED PER CROP PER SEASON
BY PLEASANT VALLEY CREWS AND CONTRACTOR CREWS

(Prepared from General Counsel Exhibit #8 and
Respondent's Exhibits #1 A-E and #2 A-E.)

Crop	Pleasant Valley	Martinez	Cheveres
	1980-81		
Cabbage	233,688	16,343	56,253
Mixed	70,450	299	52,539
Romaine	32,760	599	47,934
Head Lettuce	73,936	52,200	10,083
Celery	199,167	176,346	-0-
	1981-82		
Cabbage	43,199	10,969	119,365
Mixed	224,566	-0-	18,193
Romaine	80,606	8,154	13,976
Head Lettuce	15,983	128,959	-0-
Celery	112,734	228,709	-0-
	1982-83		
Cabbage	26,888	-0-	69,295
Mixed	202,400	-0-	30,428
Romaine	93,469	556	19,076
Head Lettuce	9,789	75,556	-0-
Celery	44,484	126,250	-0-
	1983-84		
Cabbage	8,276	-0-	55,527
Mixed	260,018	-0-	9,403
Romaine	112,324	-0-	23,552
Head Lettuce	10,521	56,564	-0-
Celery	9,005	99,996	-0-

NOTE: There is some inconsistency between exhibits. Where it exists, I have utilized Respondent's figures. None of the discrepancies are large enough to be significant.

Third, PVVC has continually increased both hourly wages and piece rates so as to remain competitive in the labor market. These trends, together with its decision to contest the UFW's certification and its reluctance, meanwhile, to notify or bargain

with the union over the impact of the trends on the workforce, are the bases for 15 distinct refusal to bargain allegations.

But before considering those allegations, it is necessary to address the related charge that one of the changes -- the decision to confine the H-l crew primarily to romaine and mixed lettuce -- was motivated by a desire to penalize crew members for its involvement in the union organizational campaign.

IV. THE ALLEGED DISCRIMINATORY TREATMENT OF THE H-l CREW; ANALYSIS, CONCLUDING FINDINGS AND CONCLUSIONS OF LAW

There is no question that, starting in 1981 and continuing on through 1984, PVVC transferred a majority of its cabbage and head lettuce work away from the H-l Crew and over to the crews of Cheveres (cabbage) and Martinez (head lettuce). Nor is there a dispute over the significant role which the H-l crew played in the union organizational campaign. General Counsel presented extensive evidence of union activity by most crew members and of management's awareness of their activity. Respondent did not contest the crew's union involvement or the employer's awareness but confined its efforts to establishing that its opposition to unionization did not exceed permissible limits. (Resp. Bf., pp. 82-83.)

There is, however, a threshold dispute as to whether the H-l crew suffered any harm by being deprived of cabbage and head lettuce work. Without adverse treatment there, of course, can be no discrimination. Respondent points out that the H-l crew earns more now than it did before the reallocation of work and further, that the crew earns more and works longer each season than the contractor crews who received the work. (Resp. Bf., pp. 77-81.)

This may well be so, but the real question is whether the

H-l crew would have been better off still if it had retained its share of the cabbage and lettuce work. If it would, then—regardless of what it earned or how it fared in comparison with the contractor crews—it has suffered adverse treatment and the inquiry can move on to examine PVCC's motives for making the change.

I find that the reallocation of work has had an adverse impact on the H-l crew. The testimony of workers that the higher piece rates for cabbage and head lettuce allow them to earn more in those crops than they could for a commensurate amount of work in other crops is corroborated by an analysis of PVVC's production records. (Resp. Ex. 1 A-E.) When payroll periods in which the H-l Crew worked exclusively in cabbage and/or head lettuce are compared with payroll periods in which the crew was confined to mixed and/or romaine, the resulting averages demonstrate that, while fewer cartons of cabbage or head lettuce will be picked in a given time period, the higher piece rate more than compensates for the difference. That being so, the earnings of an H-l crew member (adjusted for the increase in piece rates over the past 4 years) would have been greater if they had been allowed to continue with cabbage and head lettuce.

Respondent's comparison of the earnings and hours of the H-l Crew with those of the contractor crew does establish that, after the shift, the overall earnings and hours of those crews declined. But it does not follow that, had the work remained with the H-l Crew, its hours and earnings would likewise have declined.

That would only have happened if the crew had been confined to cabbage and head lettuce and not been allowed to harvest other crops

when cabbage or head lettuce work was unavailable (as is the case with the contractor crews). But to so confine the H-l crew would have been contrary to PVVC' s announced policy of always giving it the first opportunity to perform available work.[4/] Therefore, had the crew kept its share of head lettuce and cabbage, it would -- unlike the contractors—have continued to harvest mixed and romaine whenever it was not otherwise occupied. That is why comparison with the contractors is inapposite; the proper comparison is between how the H-l crew actually fared without cabbage and head lettuce and how it would have fared with them. (See George A. Lucas & Sons (1984) 10 ALRB No. 33, p. 6.)

Union activity, employer knowledge, and adverse impact are not enough, by themselves, to constitute a violation of section 1153(c) because the transfer of work from one part of the bargaining unit to another, accomplished without layoffs or terminations, cannot be said to be so "inherently destructive of important employee rights" as to eliminate the need to determine whether the Respondent was motivated by "substantial and legitimate business end[s]." (See N.L.R.B. v. Great Dane Trailers, Inc. (1967) 388 U.S. 26, 33-34.)

During the course of the hearing, PVVC's witnesses described a number of factors which they said influenced the decision to transfer the head lettuce harvest to Martinez and the cabbage harvest to Cheveres. The issue of motivation turns on an assessment of those factors. Were they actually relied on? To what

---

4. And had that policy been abrogated, we would here be trying the discriminatory impact of that abrogation.

extent and in what combination? What about the H-l crew's union activities, were they relied upon as well?

It is best to begin that assessment by taking the factors one by one.

1. Available Work. Respondent's witnesses pointed out, quite correctly, that the size of the cabbage and head lettuce harvests have shrunk since 1981. As a result, less work is available in those harvests; and the H-l crew, even if it continued to receive the lion's share of the work, would nevertheless have received much less than before.

The thrust of General Counsel's argument, however, is not that the H-l crew received less work in those two crops than it used to, but that it received less work relative to the amount done by the labor contractors. It no longer had the lion's share. That is so, and it cannot be explained away by pointing to an overall decline in the harvests.

2. Costs. Another factor relied upon by Respondent's witnesses is that it is cheaper to use labor contractors than employees. Respondent's Exhibit 4 A-E contains the figures which were presumably used in making that determination. An examination of the exhibit discloses a distinct difference between the cost advantage of using Cheveres instead of the H-l crew in cabbage and the cost advantage of using Martinez instead of the H-l crew in head lettuce.

Cheveres' rates for mixed, romaine and cabbage were all cheaper than the respective costs for the PVVC crew. This means that -- other things being equal -- PVVC would have realized a cost

saving by completely replacing its crew with that of Cheveres. But that is not what happened; instead, his crew went to work in cabbage and the H-l crew harvested mixed and romaine. So the question becomes: Was that the most cost effective allocation? The answer is no. In 1982-83, for instance, it would have been cheaper to use Cheveres to cut mixed instead of cabbage because the per carton savings from using him in mixed was $0.067 ($0,962-$0.895), compared with a savings of $0.036 per carton by having him cut cabbage ($1.286-$1.250). Moreover, the cost savings from such an assignment would have been further increased by the fact that more mix than cabbage can be cut each hour, thus magnifying the effect of the differential. Notice that this is true even though it would have been cheaper to eliminate the H-l crew altogether and give all cabbage and mix to Cheveres. The same is true for the 1981-82 season and, in all likelihood, for the 1983-84 season.[5/]

With Martinez, it is a different matter. Based on the figures presented at hearing, it appears that it would have been more economical not to have used him at all during the 1981-82 season because both his romaine rate and his cabbage and head lettuce rate exceeded PVVC's. (Resp. Ex. 4.) However, given that he was utilized, it was indeed more economical to have him harvest head lettuce than romaine. This is so because the slight difference between the additional cost per carton using him in romaine ($0.083) instead of head lettuce ($0.0876) is more than offset by the fact

5. We do not have the unit cost of the H-l crew for 1983-84, but unless it declined (which is unlikely) it would have remained cheaper for Cheveres to cut mixed and H-l to cut cabbage.

that less head lettuce than romaine can be picked in a given time period. In 1982-83, his head lettuce rate dropped below PVVC's cost for that crop so the advantage of using him in head lettuce was no longer just a relative one, as it had been the previous season, but became absolute. He was cheaper. There is no reason to believe that the situation changed in 1983-84.

In summary, then, using Cheveres in cabbage was cheaper than using the H-l crew, but even greater savings could have been realized by using him in mixed, so it is hard to say that unit costs justify his assignment. With Martinez, there was no cost justification for using him at all in 1981-82, but given that he was used, his assignment to head lettuce was cost effective. The following year there was a clear and definite cost advantage in having him harvest head lettuce.

It should be noted, however, that cost per unit is only one Kind of economy. There are others: mobility and specialization, for example, can save money by increasing efficiency. And they also were relied upon as justifications for using Cheveres and Martinez to cut head lettuce and cabbage (see Factors #3 and #6, below). Then, too, it is not clear that PVVC knew its precise unit costs in advance. It is conceivable that the decision to use Cheveres in cabbage was made before it was possible to calculate that doing so would cost more per carton than it would to have had the work done by the H-l Crew.

3. Equipment. Both contractors provided, as part of their basic unit charge to PVVC, the equipment and services needed to support their harvest crews. Martinez had his own stitcher and a

bobtail truck to move it; he made the boxes, provided his own metal staples and maintained his equipment.

Some management witnesses mentioned this as an additional reason for using him to harvest head lettuce. (III:88; IV:7-8.) But the cost of providing such equipment and services has already been factored into the cost comparision discussed and relied upon above (see Factor #2: Costs.)[6/] To characterize it as a new and additional reason for using Martinez would be tantamount to "double counting. "[7/]

Cheveres likewise had his own stitcher and a truck to move it from field to field; but his truck was not equipped with front-or four-wheel drive, and so he required assistance from either the grower whose crop he was harvesting or from PVVC to move in and out of muddy fields during poor weather. (11:45-46.) Since cabbage and romaine are grown in larger acreage units than the mixed varieties and therefore require less movement from place to place, there is something to be said for confining him to those two crops—at least during periods when poor weather was expected.

---

6. In Respondent's Exhibits 4 A-E, it is included as a part of the contractor's unit cost and it appears as "stitcher and supplies" in the PVVC crew costs. Since the "stitcher and supplies" rate was simply appropriated from the contractor rate for the equipment (111:28), it presumably includes the cost of the bobtail truck as well.

7. There is also testimony to the effect that PVVC saved money because Martinez had his own hauling arrangement. (II:41; III:122.) But those savings concern the 1980-81 season (G.C. Ex. 40) and have nothing to do with the transfer of work which occurred in the 1981-82 season because, by then, the Teamsters had gained the right to do all hauling involving PVVC crops. (III:122-123.)

4. Scheduling and the Flow of Work. PVVC's operation is one in which last minute orders and changes are commonplace and all orders must be filled promptly. Efficient scheduling to avoid unnecessary interruption in the flow of work is therefore quite important and was another factor relied upon by management witnesses as a justification for not assigning the H-l crew a greater share of the cabbage and head lettuce harvests. PVVC vice-president DeFrau put it this way:

> Well, you'd be transferring. That'd mean you'd be going to the head lettuce. I mean, they're working all week on the mix, all year from November, December, January, February, and here comes [head] lettuce [in March]. Someone's going to have to cut the mix. Mix is basically an easy one. It's a easy commodity to cut. Okay, here's head lettuce. Okay. The[y] both have to be cut. This takes a separate operation. Okay? It was a lot easier to keep our H-l continuously - [in mixed] - Lettuce, I think even the records will show, you're not going to go in head lettuce that possibly cut every day of the week. And you got spots; you got markets more so than the mix. And I think there is statistics that will verify this particular item. So, if we have the mix, and we take the mix and we jump to the lettuce, the lettuce, or we took Martinez and jumped him to the mix, the mix crew, H-l, to the head lettuce, now you got a complete confusion. (III:69.)

General Manager Frees described it this way:

> . . . And to juggle them around in the mix or cabbage or celery or cauliflower, whatever other different items that we had, it would have not, the flow of work probably would have been impeded .... [¶] Plus the fact that usually in head lettuce we are cutting out of one particular field for that particular week versus when we are in mix, we might be working out of two, three, maybe four fields, first cut, second cut. It all depends. (III:124; see also III:125.)

DeFrau's justification is really twofold: He begins by pointing out that the mixed pool is harvested all season, while head lettuce is cut only in March, April and May. From this he concludes that it would be inefficient, come March, to move the H-l crew away

from the mixed pool where it had been working for three months and put it to work in some other crop.

I fail to see how such a change, made once a year at the outset of the head lettuce harvest could, in and of itself, compromise PVVC's efficiency.

The more difficult question—the one which DeFrau goes on to raise and upon which Frees relies—is whether, during the time when mixed and cabbage and/or head lettuce are being cut, scheduling and work flow problems would result if the H-l crew were shifted from crop to crop rather than staying with the mixed pool. They point out that, unlike mix, there is not enough work in either cabbage or head lettuce to keep a crew working full time. Therefore, they conclude, it would be inefficient to use the H-l crew in other crops because doing so would require that the crew be repeatedly moved in and out of the mixed harvest in order to keep it busy full time.

What they fail to appreciate is the significance of the fact that mixed is grown in small acreage units, and therefore, even if a crew stays with the mixed 'pool, it must move frequently from location to location. That circumstance undercuts their conclusion; for, so long as the situation does not arise in which a crew has to be shifted when it is in the midst of harvesting a mixed field that it would otherwise be allowed to complete (an unlikely occurrance because of the small acreage units involved), the use of different crews in different crops does not result in an overall increase in

the number of times crews must be shifted about,[8] and, consequently, there is no greater interruption of work flow.

The use of the H-l crew to harvest more cabbage and head lettuce does, however, complicate the act of scheduling. Under the current arrangement, it is easy to know what to do when a new assignment needs to be made—give it to the crew which specializes in the crop.[9] If, on the other hand, the idea is both to keep the H-l crew busy and also to give it the maximum amount of head lettuce and cabbage work, the scheduler must be mindful of another set of alternatives; i.e., rather than simply having H-l move on to the next field of mixed, it may be time for it to be shifted over to cabbage or head lettuce and a contractor brought in to do the mixed; or, as the week's work in head lettuce (or cabbage) winds down, it may be time to shift the H-l crew over to cabbage (or head lettuce) or back into mix and to layoff the contractor crew. It is fair to conclude, therefore, that while the H-l crew could probably be utilized in cabbage and head lettuce without significant disruption in the flow of work,[10] the person doing the scheduling would have a more difficult time of it. I cannot, however, agree with DeFrau that this would result in "complete confusion" (III:69); it would

---

8. Were the H-l crew assigned work in the head lettuce and cabbage harvests, one would expect more moves for contractor crews, less for the H-l crew, but the same number overall.

9. Unless the H-l crew has nothing to do, in which case PVVC policy dictates that it pre-empt the contractor crews.

10. Note that the discussion here is confined to efficiency as a function of scheduling and work flow. The next section takes up the issue of efficiency as a function of relative skill; i.e., can Cheveres cut mixed as well as the H-l crew? Can the H-l crew cut head lettuce as well as Martinez?

simply have meant a return to the scheduling format which existed prior to the 1981-82 season.

5. Communications. Field Superintendent Olivares raised communications as another factor which influenced him in recommending that the H-l crew be confined primarily to mixed and romaine. (II:42.) Because each variety of mix is grown in small acreage units and because, in completing an order, it is frequently necessary to move on to a second field, a good communications network is important. (II:42.) Olivares explained that he had much better radio communications with PVVC' s own H-l crew than with either Martinez or Cheveres. (II:42-43.)

Under cross-examination, however, he admitted that the problem could easily have been rectified by providing the contractors with the same inexpensive, hand-held equipment used by the H-l crew. (II:54.) This factor is therefore entitled to little or no weight. In fact, Olivares' initial emphasis on it casts some doubt on his overall candor.

6. Skill. There was considerable testimony concerning the specialized character of Martinez' crew. What emerged was this: Approximately half of the crew members came from the Imperial Valley and were especially experienced in cutting head lettuce. (III:203.) Martinez was concerned that they would go elsewhere unless he could provide them with more work. (III:202.) In the Spring of 1981 he conveyed his concern to PVVC management, who took it into account in deciding to give his crew the bulk of the head lettuce harvest the following Spring. (II:70-71; III:125.)

Respondent does not argue that the head lettuce work was

given to Martinez because his crew as more efficient or cost effective than the H-l crew. Neither the production records or the testimony could support such a contention. Rather, the decision was based upon scheduling concerns already discussed and disposed of. (III:125; see Factor-44 above.)

The decision may also have had something to do with the fact that—no matter how the work was allocated—Martinez would be needed to do some of it. Because head lettuce is a crop which requires definite skills, Martinez needed experienced workers. In order to retain those workers he told PVVC he needed a larger share of the harvest than he had been receiving.

I find this last to be a legitimate consideration because the records do indicate a scheduling parttern which necessitates the use, at times, of more than one crew to harvest head lettuce. (Resp. Ex. 1 A-E.)

With Cheveres the skill factor has a different twist. Cabbage is an easy crop to cut—easier than mixed or romaine. His workers, therefore, needed no particular skill. The difficulty came when he was assigned to cut in the mixed harvest; for cutting mixed lettuce does require more judgment than cutting cabbage. (II:75.) Olivares explained that he experienced problems with Cheveres' work in mixed that he had not had with the H-l crew, and that he communicated his concern to PVVC management. (II:77-78.) Under cross-examination, however, he conceded that Cheveres[1] work was not so bad that the crew needed to be replaced. (II:78.)

Because of this, because of the problem with his overall credibility alluded to above, and because there is no indication

that his superiors relied on his concern in shifting the cabbage work away from the H-l crew little weight can be accorded to the "edge" which the H-l crew had over Cheveres in the mixed harvest.

7. The Wishes of the Crew. Finally, there was considerable testimony concerning the preference of the H-l crew. Frees and DeFrau both indicated that their decision had, in part, been influenced by the expressed desire of the H-l crew to confine itself to the mixed harvest. (III;72, 76, 168.) The crew members who testified denied that the crew had ever expressed such a preference and pointed to the petition to the contrary which had been presented to management in February 1983. (IV:14, 38, 60; G.C. Ex. 17.)

There is a gap in respondent's proof on this issue. Vice-president DeFrau stated that PVVC decided to have its General Manager find out what the H-l crew wanted and report back. (III:167.) Frees testified that he went out with Olivares to explain the choice to the crew in February, 1981. (III:168 & 169.) He conceded, however, that the crew did not respond during the meeting. (III:168.) Instead, it was left for Olivares to follow up. Later on, Olivares told him that he had done so and that the crew wanted to stay with the mix. (III:169.) But Olivares failed to testify about any such "follow up" or to any expression of preference by the crew.

Because of this, because of the lower earnings which go along with harvesting work in mixed (supra, p. 19), and because of the testimony of crew members that they had never consented to the assignment and, in fact, had petitioned for more, not less, cabbage

and head lettuce work, I cannot accept management's claim that the crew chose mix over cabbage and head lettuce.

What may have happened was that it was given an entirely different option: Work all year in mix or work three months in head lettuce. That option certainly would have been rejected, but its rejection says nothing about the crew's desire to harvest both mixed and head lettuce, and that is what is at issue here.

Having considered each factor individually, it is appropriate now to summarize and then to move on to an assessment of the role which the factors collectively played in PVVC's decision to reallocate harvest work among the crews.

The considerations which supported the use of Martinez[1] crew in head lettuce are not quite the same as those which supported the use of Cheveres' crew in cabbage. There were two advantages in using Martinez: scheduling was easier (Factor #4), and doing so allowed him to continue to attract the qualified personnel needed in harvesting head lettuce (Factor #5).[11/] With Cheveres, scheduling was likewise easier (Factor #4), and the difficulty of moving his equipment in bad weather was minimized (Factor #3).

However, PVVC's witnesses brought up *a* number of factors which do not stand up to analysis (see comments to Factors #l, #5 &

---

11. Eventually, it also became cheaper to use him, but this advantage did not materialize until the 1982-83 harvest and so could not have shaped PVVC's motivation in 1981. (See Resp. Ex. 4.) The most that could be said at that time was that if Martinez' services were needed (for other reasons), then assigning him to harvest lettuce was more cost effective than utilizing him elsewhere.

#7) and relied upon others which had only limited or qualified application (see comments to Factors #2, f3 & #6). The witnesses also over-emphasized or mischaracterized some of the factors which did support the reallocation; e.g., Frees asserted that Martinez' entire crew was brought up from the Imperial Valley where it specialized in harvesting head lettuce (III:121-122), and DeFrau spoke of the "complete confusion" which would ensue if the H-l Crew were allowed more work in head lettuce and cabbage. (III:69.)

General Counsel contends that these misstatements and mischaracterizations betray the pretextual nature of the entire enterprise, invalidating PVVC's reliance on legitimate factors as well as its reliance on illegitimate ones.

I cannot go quite so far. Legitimate considerations do not loose their legitimacy because they are ranged alongside illegitimate ones. Then, too, some of the distortion which crept into the testimony of PVVC's witnesses can be ascribed to their unfortunate, but not necessarily dishonest, failure to focus clearly on the issues; for example, DeFrau's failure (or inability), to give a coherent explanation of PVVC's economic justification for the reallocation had much to do with his rambling, unfocused approach.

Still and all, there were a number of instances where obfuscation appeared deliberate. Olivares testimony on the communications factor is one (see discussion of Factor #5); the claim that the H-l Crew desired to work in mix is another (see discussion of Factor #7). There were also instances where the witnesses' apparent lack of awareness was suspicious: That it would have been even more cost effective to use Cheveres to harvest mix

than cabbage is one (see discussion, pp. 21-22, supra); the initial cost disadvantage of using Martinez is another (see discussion, pp. 22-23, supra); and the supposed interruption of work flow if the H-l Crew were given more head lettuce and cabbage work is a third (see discussion, pp. 24-26, supra.)

All this suggests that, aside from valid considerations, there was another, undisclosed and more ominous factor—the H-l Crew's union sympathies and activities. Further support for such an inference is to be found in the timing of the reallocation to occur during the season immediately following the election, in the conflicting explanations of the change offered by Respondent's counsel in letters to Board agents and by management witnesses at the hearing (compare G.C. Exs. 15 & 16 with II:47, 67 & 128), and in Respondent's behavior just before the election in altering wages and working conditions and in trying to set up an employee-management committee in an attempt to secure a non-union vote. (See p. 7, supra.)[12/]

My evaluation of the totality of these circumstances leads me to conclude that one of PVVC's motives was to penalize H-l Crew

---

12. Increasing wages and augmenting benefits during the course of a union organizational campaign constitutes a violation of section 1153(a) of the Act. (Merrill Farms (1982) 8 ALRB No. 4; Mission Packing Company (1982) 8 ALRB No. 14; Harry Carian Sales (1978) 6 ALRB No.55.) The same is true of attempting to establish an employee-management committee in the face of a union organizing drive. (Interstate Engineering (1977) 230 NLRB 1; see Superior Farming Co., Inc. (1979)5 ALRB No. 6.) Although these matters all occurred more than six months prior to the filing of the charges here and therefore cannot be found to be independent violations of that Act, they may properly be considered as background evidence which sheds light on the true character of the events which took place within the limitations period. (Holtville Farms (1981) 7 ALRB No. 15; Julius Goldman's Egg City (1980) 6 ALRB No. 61.)

members for taking so active a role in the organizing drive. I do, however, believe that, in making the change, PVVC was also motivated by the legitimate factors described above. That being so, the case is one of mixed motive, and the legal test to be applied is that which the NLRB fashioned in Wright Line, Inc. (1980) 251 NLRB 1083, 1086-89, from earlier Supreme Court's decisions in N.L.R.B. v. Great Dane Trailers, Inc., supra, 388 U.S. at 34, and Mount Healthy City Board of Education v. Doyle (1977) 429 U.S. 274, 287; it recently received Supreme Court approval in N.L.R.B. v. Transportation Management Corp. (1983) 459 U.S. 1014; and it was accepted by our Board in Royal Packing Company (1982) 8 ALRB No. 74. (See Martori Brothers Distributors v. A.L.R.B. (1981) 29 Cal.3d 721, 730.) Under it, once the General Counsel succeeds in proving by a preponderance of the evidence that the employees' protected conduct was a substantial or motivating factor, then the employer can avoid liability by proving, again by a preponderance of the evidence, that it had "legitimate" business reasons which were so "substantial" that it would have taken the action anyway, regardless of the forbidden motivation.

Having determined that there was anti-union motivation and that, in the barrage of justifications provided, there were two legitimate reasons for giving Martinez a greater share of the head lettuce harvest and two legitimate reasons for giving Cheveres more of the cabbage harvest, it now becomes incumbent upon PVVC to prove that those reasons were so substantial that the reallocation would have been made in my event.

The added complication created by having to schedule all of

the crews in all of the crops was a legitimate consideration with both Martinez and Cheveres. But how substantial was it? What it comes down to is this: The person who does scheduling must keep in mind a set of alternatives with which he would not have had to concern himself if each crew stayed with a single crop. It is not a cost factor and would only have cost consequences if the added complexity led to scheduling foulups and resultant interruptions in the flow of work. But there was no indication that such problems occurred during the 1980-81 season when this method of scheduling was being utilized. Without such evidence, it is difficult to say that scheduling was so substantial a factor that, absent anti-union sentiment, the reallocation would have occurred anyway.

With Cheveres, there is an additional factor--his difficulty of moving equipment in muddy fields. Were this a common occurrence, it might well be substantial enough to justify his exclusive assignment to a crop (such as cabbage) which involved less movement from place to place. But there is nothing in the record to indicate that the problem was a persistent one. What testimony there is tends to indicate that occurred only infrequently. (II:56-57.) And even Frees conceded that it was not of "overriding" significance. (III:174.)

With Martinez, the other legitimate reason for using him in the head lettuce harvest was the need to have him maintain a skilled crew. It must be remembered that this need arose, not out of the H-l Crew's inability to do the work, but out of PVVC's concern lest Martinez be unable to assist on those occasions when two crews were required in the head lettuce harvest. But the urgency and gravity

of this concern were never well established. It is difficult to believe that Martinez could only obtain qualified cutters and packers from the Imperial Valley or that he could not field a crew capable of at least providing back-up on those occasions when two crews were required. To the extent that PVVC relied on this factor, it should at least have produced supporting testimony from Martinez. He, after all, was the one who first raised the problem, and he was the one upon whose factual representations PVVC relied. But no such testimony was forthcoming. Without it or like evidence, I cannot conclude that PVVC carried its burden of establishing the factor to be so substantial that the reassignment would have been made regardless of anti-union motivation.

In addition to concluding that PVVC did not meet its burden of proving that each legitimate reason was substantial enough so that reallocation would have occurred regardless of PVVC's anti-union motivation, I also conclude, for the reasons already stated, that PVVC failed to prove that, taken together, either the two reasons offered for assigning Cheveres a greater portion of the cabbage harvest or the two reasons offered for assigning Martinez the greater portion of the lettuce harvest were substantial enough so that the reallocation would have occurred anyway.

I therefore conclude that Respondent violated section 1153(c) and, derivatively, section 1153(a) of the Act by depriving the H-l Crew of work in the head lettuce and cabbage harvests and instead assigning the work to labor contractors.

V. THE TECHNICAL REFUSAL TO BARGAIN

Our Board has adopted the National Labor Relations Board's

proscription against the relitigation of previously resolved representation issues in subsequent related unfair labor practice proceedings, absent a showing of newly discovered or previously unavailable evidence, or other extraordinary circumstances. (Ron Nunn Farms (1980) 6 ALRB No. 41; Thomas S. Castle Farms, Inc. (1983) 9 ALRB No. 14.) As PVVC has presented no newly discovered or previously unavailable evidence and has claimed no extraordinary circumstances, there is no reason to reconsider the issues already raised and disposed of in 8 ALRB No. 82. Accordingly, I conclude that Respondent violated section 1153(e) and (a) by its failure and refusal to meet and bargain collectively in good faith with the UFW. In addition, I conclude that the Respondent also violated those sections by failing to respond or seek to clarify the request for information which accompanied the union's bargaining request. (See Cardinal Distributing Company, Inc. (1983) 9 ALRB No. 36, p. 4.)

The question then arises as to whether make-whole relief should be awarded to the employees in the bargaining unit as a remedy for Respondent's violation. When an employer refuses to bargain in order to gain judicial review of a Board certification, as PVVC did here, the Board considers the appropriateness of make-whole relief on a case-by-case basis. (J.R. Norton Company v. A.L.R.B. (1979) 26 Cal.3d 1.) In doing so:

> . . . the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the Union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. 26 Cal.3d at 39.

On remand, the Board took this language to mean that, to avoid make-whole, the employer's litigation posture at the time of the refusal must have been both reasonable and asserted in good faith (J.R. Norton (1980) 6 ALRB No. 26), and went on to explain:

> . . . that an employer may act in good faith, while not having a reasonable basis for his position. An employer may also offer a reasonable basis, while not acting in good faith as shown by the totality of the circumstances. (Id. at p. 3.)

In applying the Norton standard, the Board has adopted the procedure of first inquiring into the reasonableness of the employer's litigation posture and only proceeding to consider his good faith where the matter cannot be disposed of on grounds of reasonableness.[13/] (Holtville Farms, Inc. (1981) 7 ALRB No. 15.) The place to begin, therefore, is with the reasonableness of PVVC's reliance on its post-election objections.

But even before that, there is a threshold issue to be resolved -- the effect of the failure of the General Counsel to request make-whole.[14/] The absence of such a request in the prayer for relief raises the question of whether the Board may afford relief different from or in addition to that sought by the General Counsel.

---

13. This approach was adopted for reasons of administrative economy. Reasonableness can usually be decided on the record of the representation case; good faith/ on the other hand frequently requires examination of facts outside of the original record. (Id. at fn. 4.)

14. Originally the complaint did request such relief, but it was subsequently amended to eliminate the request. (Compare G.C. Ex. 1-F with G.C. Ex 1-T.)

I conclude that it may. Prosecutorial discretion extends only to the determination of whether there are reasonable grounds for filing a complaint charging the commission of an unfair labor practice and to the presentation of evidence in support of the complaint. Once a complaint issues and the evidence is presented, the Board's expertise is called into play to determine whether the Act has been violated and, if so, how the relationships of the parties are best re-structured to remedy the violation in a manner which best effectuates the purposes of the Act. (Douglas Aircraft Company (1973) 202 NLRB 305; George Banta Company, Inc. v. N.L.R.B. (4th Cir. 1980) 626 F.2d 354, 356-357; I.A.M. v. N.L.R.B. (D.C. Cir. 1982) 675 F.2d 346.) In short, the "prayer" is just what the dictionary says it is: A supplication to the authority to whom it is addressed. It does not limit or restrict that authority.

Turning to the reasonableness of PVVC's post-election objections, we are confronted at once with the fact that they were persuasive enough to produce a favorable IHE Decision and a Dissent from the Board's Decision.

The conduct upon which the critical objections were based involved employee Alderberto Gomez. Gomez was an active member of the union organizing committee at PVVC. On the day of the election, he remained in the voting area from the time the polls opened until they closed (10:00 a.m. to noon). He spent most of the time talking to the voters who were waiting in line to receive their ballots, urging them to vote for the UFW and passing out leaflets supporting the union. Virtually every voter was approached and given one or the other of two UFW leaflets. All of this took place within the

so-called quarantine area, and *some* of it occurred as close as 10 feet from voting booths. Although the electioneering was contrary to the terms of the ALRB election manual, for the most part it was tolerated by the Board Agents who were present.

Had Gomez been an agent of the UFW, the Respondent would be in a stronger position to argue that the election was invalid. (Matsui Nursery, Inc. (1983) 9 ALRB No. 42.) The Board, however, found that he was not. The first question, therefore, is whether PVVC had a reasonable basis for believing that a court would overturn the Board's determination that no agency relationship existed.

Agency involves issues both of law and of fact. On the one hand/ there is the legal criteria to be utilized; and, on the other, there are the facts which go to determine whether or not the criteria have been satisfied.

The legal criteria used by the Board in 8 ALRB No. 82 was neither new nor novel. It was the traditional common law standard of "apparent authority", and it had been applied by the Board as far back as 1979 when, in San Diego Nursery, 5 ALRB No. 43, it held that absent a manifestation from the union that employee members of an organizing committee were authorized to speak for the union, they could not be deemed agents. This standard is clear and well enough established so that an attack upon it does not constitute a reasonable litigation posture. (See D'Arrigo Brothers of California (1977) 3 ALRB No. 37; Tepusquet Vineyards (1979) 4 ALRB No. 102.)

The factual issue -- whether there had been a manifestation of agency by the UFW -- is a closer question. It turns on the

interpretation of certain testimony concerning Gomez' role at the pre-election conference. The IHE and the Dissent interpreted the testimony one way and the Board majority interpreted it another. But it was a factual determination, and that is crucial in deciding whether an attack upon it can constitute a reasonable litigation posture. The Board addressed this issue in San Justo Ranch/Wyrick Farms (1983) 9 ALRB No. 55, and observed that:

> In determining what degree of deference should be paid to administrative decision, the courts have often distinguished between issues of fact and issues of law. (See Hi-Craft Clothing Co. v. N.L.R.B. (3d Cir. 1981) 660 F.2d 910, 914 [108 LRRM 2657].!As to issues of fact, administrative findings are generally paid great deference and overturned only if not supported by "substantial evidence." (Tex-Cal Land Management, Inc. (1979) 24 Cal.3d 335.) Such deference is based on the expertise of the agency (see Tex-Cal Land Management, Inc., supra, 24 Cal.3d 335 at 346) and also on the Board's role as the statutory finder of fact. (Abatti Farms, Inc. v. Agricultural Labor Relations Bd. (1980) 107 Cal.App.3d 317, 336, concurring opinion of Justice Staniforth.) The same deference is not always paid to an adminitrative agency's interpretation of statutory language, common law, or constitutional law, since those subjects are within the expertise of the judiciary. (See Piper v. Chris Craft Industries (1977) 430 U.S. 41; American Ship Building Co. v. N.L.R.B. (1965) 380 U.S. 300 [58 LRRM 2672].)
>
> (Id. pp. 8-9; see also Robert J. Lindeleaf (1983) 9 ALRB No. 35, p. 6.)

Because there is substantial evidence in the record to support the Board's factual finding that Gomez was not an authorized agent, I conclude that PVVC's contrary assertion of such authority does not provide it with a reasonable litigation posture.[15/]

---

15. Respondent also argues that the failure of the ALRB to adopt the NLRB's "Milchem Rule" furnishes it with a reasonable litigation posture"! (See Superior Farming Company (1977) 3 ALRB No. 35.) The Milchem rule requires that an election be set aside

(Footnote continued---)

That determination does not, however, conclude the make-whole inquiry. Even though no agency existed, it is possible that Gomez' conduct as an employee was egregious enough to supply Respondent with a reasonable basis for believing that it would ultimately prevail.

The trouble with such a contention is that in two previous decisions the Board considered almost identical conduct and found it insufficient to warrant setting aside an election. In Chula Vista Farms, Inc. (1975) 1 ALRB No. 23, an employee wearing a UFW button spoke to each of the workers waiting to vote and then ushered each of them into the polling area. While the vote was in progress he stood alongside the card table on which the ballot box was placed and, for a period of 5 minutes or so, had a foot up on the table. The Board overruled the objection, saying that, "In the absence of any evidence of prejudice to the employer by [the employee's] conduct, we cannot find that his activities constituted conduct which would warrant setting aside this election." (Id. at p. 6.) In Tepusquet Vineyards, supra, 4 ALRB No. 102, the IHE found that:

/

/

/

Footnote 15 continued---)

whenever a party engaged in sustained conversations near the polling area. However, the rule only comes into play where a party (or the agent of a party) is involved; and so, for it even to be an issue in the case, Respondent must first demonstrate a reasonable expectation of prevailing on the issue of Gomez' agency -- something it has failed to do.

> . . . after [employee] Martin Alvara voted, at the commencement of the Tepusquet election, he left the polling area. He then returned to the polling area escorting a crew of eight workers, during which time he urged them to vote for the UFW. Once back inside the polling area Mr. Alvara remained there until the end of the election. While in the point area Alvara spoke with 20 to 40 voters waiting in line to vote and urged them to vote for the UFW. Mr. Alvara did not leave the area when requested to do so by an election observed who witnessed his activities. (IHE Decision, p. 15.)

The Board accepted the finding, but ruled that absent evidence that the employee's electioneering had a prejudicial effect on the workers, there was no basis to set the election aside. (Id. at p. 5.)

The only "innovation" to be found in the Board's treatment of electioneering in the PVVC certification decision is its adoption of the test found in N.L.R.B. v. Arron Brothers Corp. (9th Cir. 1977) 563 P.2d 409, 412, that: "To warrant overturning an election, employee conduct most be coercive and disruptive conduct as other action which is so aggravated that the expression of choice of representaiton is impossible."

The adoption of a legal standard is not enough to provide a reasonable litigation posture where, as is the case here, the standard is an elaboration, rather than a reversal, of earlier precedent and there is no real distinction between the factual situation to which it is applied and those considered in previous decisions. I therefore conclude that the electioneering engaged in by Gomez as an employee is insufficient to provide PVVC with a reasonable litigation posture.

I reach the same conclusion with regard to the" related objection that Board Agents were guilty of prejudicial misconduct by

failing to stop Gomez from electioneering in the polling area. While the Board properly criticized them for failing promptly to call a halt to his activities, there is no evidence to suggest that their failure to do so impaired the free choice of voters or created an atmosphere so coercive as to require the setting aside of the election. Without such evidence, there is no more reason to believe Respondent would prevail on this issue than there is to believe it would prevail in its challenge to the conduct itself. (Coachella Growers, Inc. (1976) 2 ALRB No. 17; George A. Lucas (1982) 8 ALRB No. 61.)

Having concluded that there was no reasonable basis for PVVC to believe that it would prevail on its objections, it is unnecessary to determine whether it was acting in good faith in refusing to bargain.[16/] I therefore recommend that make-whole relief be awarded and that the make-whole period begin November 17, 1982 -- the day after the union's request to bargain was received and the day Respondent's counsel replied stating that it would not agree to meet and bargain --and continue until Respondent begins to bargain in good faith and continues such bargaining to contract *of* bona fide impasse. VI. THE UNILATERAL CHANGES IN WAGES AND WORKING CONDITIONS

Having determined that Respondent had no reasonable basis for believing that it would prevail in its post-election objections,

---

16. PVVC's conduct in altering wages and working conditions and in trying to set up an employee-management committee just before the election, as well as its discrimination against the H-l Crew strongly suggests a strategy motivated by the desire to delay bargaining and undermine support for the union.

the numerous changes which it made in employee wages and working conditions without notifying or offering to bargain with the UFW can be considered without differentiating between those instituted before the UFW was certified and those instituted afterwards. PVVC acted "at its peril" throughout. (W.G. Pack Jr. (1984) 10 ALRB No. 22; Highland Ranch v. A.L.R.B. (1981) 29 Cal.3d 848, 856.)[17/] Its subjective good faith is therefore irrelevant and the changes can be justified only upon a showing of "compelling economic circumstances". (Thomas S. Castle Farms, Inc. (1983) 9 ALRB No. 14.)

All totaled, 14 changes were alleged as per se violations of section 1153(e). Since respondent conceded that the changes had been made, that the UFW had not been notified and that there were no compelling circumstances,[18/] the only issue left open is whether they concerned mandatory subjects of bargaining.

The changes can be divided into four categories. The first consists of 5 alleged violations, all of which concern the failure

---

17. In Highland Ranch, the Supreme Court explained the reasoning behind the "at peril" rule by quoting from the NLRB's decision in Mike O'Connor Chevrolet (1974) 209 NLRB 701:

> Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending ..." (Id. at 856.)

18. Justifications were offered for the changes, but Respondent's counsel represented that they were being introduced only to establish PVVC's "good faith" and not to prove "compelling circumstances." (III:12-13.) General Counsel relied upon the representation in refraining from offering rebuttal evidence.

to bargain over the effects on bargaining unit personnel of various reductions in crop acreages and production.

Respondent argues that because it is the individual growers who ultimately decide whether or not to grow a crop, the decision is beyond PVVC's control and, hence, beyond its duty to bargain.

The argument overlooks the fact that PVVC, and not the individual growers, limited celery and cabbage production by shrinking the size of the "pools" it established for those crops-Growers may have been able to further limit those pools by failing to sign up, or by signing up for reduced acreage, but they could not expand the size of the pools without securing PVVC's agreement. PVVC does, therefore, have a role in determining crop size. Then, too, there is no question of requiring PVVC to bargain over the decision to establish pools for a certain size. (Cardinal Distributing Company, Inc. (1983) 9 ALRB No. 36.) The only concern is with implementation, and then only to the extent that unit employees were directly effected, as they were when the cutback resulted in their assignment to lower paying work (as was the case with cabbage) or when it resulting in a reduction in crew size or in the merger or elimination of crews (as was the case with celery). These are matters which do affect wages and working conditions and are therefore a proper subject for bargaining. I therefore conclude that Respondent violated section 1153(e), and derivatively section 1153(a), by: (1) failing to bargaining over the effects of the decline in cabbage acreage and production during the 1981-82 season (Complaint, Para. 16); (2) failing to bargain over the effects of the decline in celery acreage and production during the 1981-82

season (Complaint, Para. 17); (3) failing to bargain over the effects of the decrease in cabbage acreage and production during the 1982-83 season (Complaint, para. 17); (4) failing to bargain over the effects of the decrease in celery acreage and production during the 1982-83 season (Complaint, Para. 16); and (5) failing to bargain over the effects of the decrease in cabbage acreage and production during the 1983-84 season (Complaint, Para. 16).

The second category of unilateral changes consists of 6 alleged violations, all involving increases in hourly or piece rates for PVVC employees and, in one instance, for contractor employees—all of whom are members of the bargaining unit.

Wages are obviously a mandatory subject of bargaining. Since the increases were not in accord with any established yearly or seasonal pattern (N.A. Pricola Produce (1981) 7 ALRB No. 49), I conclude that Respondent violated section 1153(e), and derivatively section 1153(a), by: (1) failing to bargain over the increase in hourly wages instituted August 1, 1982 (Complaint, Para. 18); (2) failing to bargain over the increase in harvest piece rates instituted September 1, 1982 (Complaint, Para. 19); (3) failing to notify or offer to bargain with the UFW in establishing a piece rate for Larry Martinez' Crew when it began to harvest endive and escarole in December 1982 (Complaint, Para. 18; IV:65); (4) failing to notify or offer to bargain with the UFW in establishing a piece rate for bok choy and napa when PVVC began to harvest those crops in December 1982 (II:1; IV:65); (5) failing to notify or offer to bargain with the UFW in establishing a piece rate for its H-l Crew when it began to harvest endive and escarole in November 1983

(IV:65); and (6) failing to notify or offer to bargain with the UFW over the increase in piece rates for all varieties of lettuce in March 1983 (Complaint, Para. 20).

The third category of unilateral changes involved 2 alleged violations, both arising out of the merger of the H-2 Celery Harvesting Crew into Martinez' crew.

The decision to merge an employee crew into that of a labor contractor has important ramifications on wages, seniority and other employee working conditions? it therefore involves mandatory subjects of bargaining. While the matter was eventually discussed with the UFW, those discussions did not occur until after the decision had already been made and implemented (G.C. Ex. #2, Para. 19); by then it was too late. (Highland Ranch and San Clemente Ranch (1979) 5 ALRB No. 54, aff'd 29 Cal.2d 848; Harry Carian Sales (1983) 9 ALRB No. 13.) I therefore conclude that Respondent violated section 1153(e), and derivatively section 1153(a), by failing to notify and offer to bargain with the UFW over its decision to merge the H-2 Celery Crew into the crew of its labor contractor. (Complaint, Para. 21.)[19/]

The other alleged violation growing out of the crew merger was the failure to allow cutters in the H-2 Crew to transfer over to

---

19. Although Respondent did not argue in its brief that the decision to merge the crews was beyond its bargaining obligation, its counsel did take that position in the letters he wrote to the UFW at the time. (Resp. Exs. 9 A-L.) Because the contractor crews are part of the bargaining unit (Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85; Cardinal Distributing Company, Inc., supra) and because the consolidation of crews is not the fundamental restructuring of operations with which the NLRB was concerned in Otis Elevator Company (1984) 269 NLRB No. 162, "decision" bargaining is appropriate here.

the Martinez Crew as packers. (See pp. 15-16, supra.)

On November 22, 1983, an agreement was reached between the UFW and the company to permit such as transfer, but that agreement was repudiated on December 29 when Joaquin Ricardes returned to work to find that he would no longer be allowed to pack. The fact that the foreman who deprived him of the agreed upon assignment worked for Martinez and not PVVC makes no difference. Martinez was a labor contractor and his crew was part of the bargaining unit. PVVC's agreement was therefore binding on Martinez, and Martinez[1] foreman was acting on behalf of PVVC when he failed to abide by an agreement to which his ultimate principal had acceded.[20/]

While layoff, discharge or failure to transfer a worker does not, in and of itself, constitute a unilateral change in working conditions (D'Arrigo Brothers Company, Inc. (1983) 9 ALRB no. 30); when such action arises out of a repudiation of a negotiated agreement, it does constitute a violation. I therefore conclude that Respondent violated section 1153(e), and derivatively section 1153(a), by failing to honor its agreement to allow Joaquin Ricardes to transfer over to the Martinez crew as a packer. (Complaint, Para. 23.)

The final alleged violation concerns the transfer of work which gave rise to the previously discussed section 1153(c) discrimination violation. The facts surrounding the transfer of

---

20. The understanding which was reached between PVVC and the UFW did not accord Goldino Espino, the cutter with the least PVVC seniority, any immediate right to be assigned to pack. During the negotiation of the agreement, Ricardes raised that issue, but management specifically rejected the proposal. There was, therefore, no violation as to Espino. (II:14.)

work have already been explained and analyzed. (Supra, pp. 10, 12-13, 14.) Because of the impact which it had on worker earnings (see p. 19, supra), I conclude that it involved a mandatory subject of bargaining. Furthermore, because the work was transferred from one part of the bargaining unit (PVVC's H-l Crew) to another (Cheveres[1] and Martinez' Crews), there is no question of subcontracting and so the bargaining obligation extends to the decision as well as to the effects of the transfer. (Tex-Cal Land Management, Inc., supra; Charles Malovich (1983) 9 ALRB No. 64.) I therefore conclude that Respondent violated section 1153(e), and derivatively section 1153(a), by failing to bargain over the shift of higher paying cabbage and lettuce work away from the H-l Crew and over to labor contractors which began in the 1981-82 season and continued on through the 1983-84 season. (Complaint, Para. 7.)

REMEDY

Having found that Respondent violated the Act in a number of respects, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

With respect to the merger of PVVC' s celery crew with that of Larry Martinez, it would be inappropriate under the guidelines laid down by the Board in Cardinal Distributing Company, Inc., supra, 9 ALRB No. 36, pp. 18-20, to order a return to the status quo ante. It will likewise be inappropriate to order full backpay for those affected by the merger. I have therefore adopted the modified backpay formula utilized by the Board in Cardinal. Similar considerations lead me to recommend the same type of orders to

remedy Respondent's failure to bargain over the effects of the various reductions in crop acreage and production.

In fashioning this and the other affirmative relief delineated in the following order, I have taken into account the entire record of the proceedings, the character of the violations found, and the nature of Respondent's operation.

ORDER

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

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified collective bargaining representative of its agricultural employees.

(b) Failing or refusing to provide to the UFW, at its request, information relevant to collective bargaining.

(c) Granting unilateral increases to members of the bargaining unit without first notifying the UFW of the proposed change and affording it an opportunity to bargain about the proposed change.

(d) Failing or refusing to bargain with the UFW over the effects of material reductions in crops, acreage and production.

(e) Failing to notify or bargain with the UFW over the decisions to merge employee and labor contractor crews and failing to honor agreements to accord job assignments to employees

Who are merged into contractor crews.

(f) Transferring cabbage and head lettuce harvesting work away from its own crew and over to labor contractor crews because of the union sympathies and activities of the members of its crew and from failing, or refusing to meet or bargain with the UFW about such transfers of work.

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

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, and supply it with the information requested for bargaining.

(b) Rescind, upon request of the UFW, the certified bargaining representative of Respondent's agricultural employees, unilateral increases in hourly and piece rates granted members of the bargaining unit.

(c) Upon request, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to its decision to merge its celery harvest crew with that of its labor contractor.

(d) Upon request, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with

respect to the effects of the reductions in celery acreage and production in the 1981-82 and 1982-83 seasons and the effects of the reduction in cabbage acreage and production in the 1981-82, 1982-83 and 1983-84 seasons.

(e) Restore the method of assigning cabbage and head lettuce harvesting work to the H-l harvesting crew which was utilized prior to the 1981-82 season.

(f) Restore Joaquin Ricardo to the position of packer in the Martinez celery harvest crew.

(g) Make whole its present and former members of the bargaining unit for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW and to supply it with requested information, such makewhole amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with the Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, the period of said obligation to extend from November 17, 1982 until June 4, 1984, and continuing thereafter, until such time as Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(h) Make whole the members of the H-l harvest crew for all losses of pay and other economic losses they have suffered as a result of Respondent's transfer of cabbage and head lettuce harvest work away from that crew to provide the UFW with requested information and its refusal to bargain over mandatory subjects of bargaining, for the. period from the beginning of the 1981-82 season to June 4, 1984, and thereafter until such time as Respondent

restores the method of assigning cabbage and head lettuce harvesting work as provided in 2(e) or until it reaches agreement with the UFW as to such other assignment format; such amounts to be computed in accordance with Board precedent, plus interest thereon, computed in accordance with the Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(i) Make whole Joaquin Ricardes for all losses of pay and other economic losses he has suffered as a result of his being assigned to work as a cutter rather than a packer in the Martinez celery harvesting crew beginning December 29, 1983, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(j) Make whole all agricultural employees who lost work as a result of Respondent's decision to merge its celery crew into that of its labor contractor, for all economic losses suffered by them; such amounts to be computed in accordance with Board precedent, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 for the period from ten days after the date this Recommended Decision becomes final until: (1) the date Respondent reaches an agreement with the UFW regarding its decision; or (2) the date Respondent and the UFW reach a bona fide impasse; or (3) the failure of the UFW to request bargaining about the decision within ten days after the date of issuance of this Order or to commence negotiations within five days after Respondent's notice to the UFW of its desire to so bargain; or (4) the subsequent failure of the UFW to meet and bargain in good faith with Respondent about the matter.

(k) Make whole all agricultural employees who lost work as a result of its failure to meet and bargain with the UFW with respect to the reductions in celery acreage and production in the 1981-82 and 1982-83 seasons and the effects of the reductions in cabbage acreage and production in the 1981-82, 1982-83, and 1983-84 seasons, for all economic losses suffered by them; such amounts to be computed in accordance with Board precedent, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 for the period from ten days after the date this Recommended Decision becomes final until: (1) the date Respondent reaches an agreement with the UFW on these matters; or (2) the date Respondent and the UFW reach a bona fide impasse; or (3) the failure of the UFW to request bargaining about those matters within ten days after the date of issuance of this Decision or to commence negotiations within five days after Respondent's notice to the UFW of its desire to so bargain; or (4) the subsequent failure of the UFW to meet and bargain in good faith with Respondent about those matters.

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

(m) 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.

(n) 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 in the bargaining unit at any time during the period from 1981 until Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

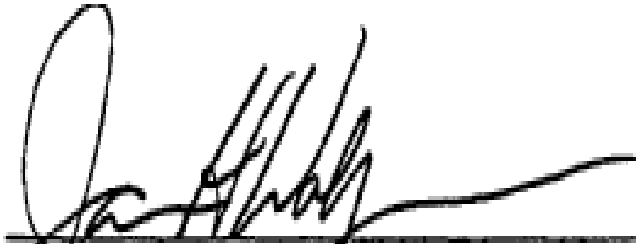
(o) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for sixty (60) days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(p) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit 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 the bargaining unit in order to compensate them for time lost at this reading and during the question-and-answer period.

(q) 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: November 15, 1984



JAMES H. WOLPMAN
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

A representation election was conducted by the Agricultural Labor Relations Board (Board) among our employees on April 9, 1981. The majority of the voters chose the United Farm Workers of America, AFL-CIO (UFW), to be their union representative. The Board found that the election was proper and officially certified the UFW as the exclusive collective bargaining representative of our agricultural employees on November 3, 1982. When the UFW asked us to begin to negotiate *a* contract, we refused to bargain so that we could ask the court to review the election. In addition, we made a number of changes in the wages and working conditions of employees without first notifying and offering to bargain with the UFW. The Board has found that we violated the ALRA by refusing to bargain with the UFW and by making those changes without first telling the union and offering to bargain about them. The Board also found that we violated the law by transferring a portion of the head lettuce and cabbage work away from the H-l Crew because of the union sympathy and activity of crew members.

The Board has told us to post and publish this Notice and to take certain additional actions. 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 union;
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, on request, meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

WE WILL NOT make any changes in your wages, hours, or working conditions without first notifying and bargaining with the UFW.

WE WILL reimburse each of the employees employed by us on or after November 17, 1982, during the period when we were refusing to bargain with the UFW, for any money which they may have lost as a result of our unilateral changes and our refusal to bargain, plus interest.

WE WILL NOT transfer work away from the H-l crew or in any other way discriminate against agricultural employees because of their union activities.

WE WILL restore the harvest work which we took away from the H-l crew and we will reimburse the crew members for any pay or other money they lost as a result of the transfer of work away from them.

DATED: PLEASANT VALLEY VEGETABLE CO-OP

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 528 South A Street, Oxnard, California 93030. The telephone number is (805) 486-4475.

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

DO NOT REMOVE OR MUTILATE.