Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 79-CE-170-EC 12 ALRB No. 4 (8 ALRB No. 88)

DECISION AND MODIFIED ORDER

On December 15, 1982, the Agricultural Labor Relations Board (Board) issued a Decision in the above-captioned case in which it found, inter alia, that Respondent implemented four wage increases between April 5, 1979 and December 15, 1979, without prior notification to and bargaining with the United Farm Workers of America, AFL-CIO (UFW or Union), the certified bargaining representative of its agricultural employees, in violation of Labor Code section 1153(e) and (a)[1/] (Mario Saikhon, Inc. (1982) 8 ALRB No. 88.) Those findings were premised on the Board's prior findings in Admiral Packing Co. (1981) 7 ALRB No. 43 (Admiral), wherein the Board had determined that a group of employers of agricultural employees, including Respondent herein, had declared impasse on February 21, 1979, when there was in fact no bona fide deadlock in negotiations. Accordingly, in 8 ALRB No. 88, having rejected Respondent's proffered defenses for the unilateral actions, the

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

Board held that the changes in employees' terms and conditions of employment, absent notification to and bargaining with the Union subsequent to the invalid declaration of impasse, constituted a continuation of the bad faith bargaining which Respondent had demonstrated in Admiral.

After the Court of Appeal of the State of California for the Fourth Appellate District reversed the Board's Admiral findings of bad faith bargaining in Carl Joseph Maggio v. Agricultural Labor Relations Board (1984) 154 Cal.App.3d 40, Respondent moved the Board to reopen the record and reconsider its decision in 8 ALRB No. 88 in light of Maggio. The Board evaluated the motion on the basis of whether any, and, if so, which, findings in 8 ALRB No. 88 had been made in reliance on its findings in Admiral. As to certain bargaining related questions in that case which turned on Admiral, the Board granted the motion only with regard to those issues; i.e., the wage increases which Respondent implemented between April 5, 1979 and December 15, 1979. The Board severed those matters from the remainder of 8 ALRB No. 88 and concluded that since the first three of the increases were not in excess of Respondent's last preimpasse bargaining table offer, and since the court had determined that the parties were still at impasse on the dates those increases were implemented, Respondent's actions were not in violation of the Agricultural Labor Relations Act (Act). Accordingly, in its ruling on Respondent's motion for reconsideration, the Board dismissed the complaint in 8 ALRB No. 88 insofar as it alleged that Respondent raised wages on April 5, August 17, and September 20, 1979. (Case No. 79-CE-70-EC.) The Board also found, however, that the increase

in the lettuce harvest piece rate which was implemented on December 15, 1979, exceeded the last wage offer and therefore would be unlawful absent consent of the Union or waiver by the Union of an opportunity to negotiate the proposed change. (Case No. 79-CE-170-EC.) Since Respondent had conceded its lack of prior notification to the Union, the Board concluded that the December wage increase constituted a per se violation of the duty to bargain without regard to whether Respondent had acted in bad faith. (National Labor Relations Board v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) The only question remaining was that of determining an appropriate remedy for the single unilateral change. All parties were invited to brief that issue. Briefs were timely submitted by General Counsel, Respondent, and the UFW.

Pursuant to the provisions of Labor Code section 114.6, the Board has delegated its authority in this matter to a. three-member panel.[2/]

Section 1160.3 requires that upon finding that an unfair labor practice has been committed, the Board shall remedy the violation. When the conduct found constitutes a violation of the duty to bargain, the Board is authorized to direct an employer to make its employees whole by supplementing their normal pay with an amount necessary to equal what their wage rate likely would have been had the employer complied with the statutory obligation to

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

bargain in good faith. This is the so-called contractual makewhole remedy. (See, generally, Adam Dairy (1978) 4 ALRB No. 24.) However, unless the Board finds a failure of the duty to bargain in good faith on the basis of a "totality of circumstances" standard, contractual makewhole within the meaning of section 1160.3 generally is not deemed to be an appropriate remedy for a discrete unilateral change.[3/]

We have reconsidered the parties' negotiating positions in order to determine not whether Respondent violated the Act but whether contractual makewhole is warranted, as the initial premise on which our prior makewhole remedy was based no longer exists and there is a lack of evidence in the existing record to sustain a finding of bad faith or surface bargaining.

Moreover, all parties agree that a single unilateral change in a mandatory subject of bargaining, although, a per se violation of the duty to bargain, need not necessarily constitute an adequate basis for application of contractual makewhole. The UFW believes nevertheless that the particular situation here calls for application of that remedy because the changes were made during the course of a strike and were part of Respondent's "overall scheme" to evade the bargaining obligation altogether. On the other hand, both General Counsel and Respondent argue against application of the

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[3/] At least two members of the Board have indicated a willingness to consider the appropriateness of a contractual makewhole remedy for even a discrete unilateral change violation where, in their view, the change was such that it served to subvert the negotiations process. (See, Holtville Farms, Inc. (1984) 10 ALRB No. 49, fn. 10 by Member Carrillo; William Pal Porto & Sons, Inc. (1985) 11 ALRB No. 13, dis. opn. by Chairperson James-Massengale.)

remedy on the grounds that the change, although clearly unilateral, brought Respondent's wage level up to the then-prevailing rate. They find authority for their position in the Board's Decision in Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36, wherein a two-member majority of the Board found that the respondent in that case had implemented two unilateral increases in wages which constituted per se refusals to bargain within the meaning of National Labor Relations Board v. Katz, supra, 369 U.S. 735. However, the Board declined to grant a remedy other than the standard cease and desist order, primarily on the theory that even though the increases were illegal, they served to bring the affected employees "up to the approximate prevailing wage rate." We' believe that Kaplan's, in its literal sense, presents an overly circumscribed analysis of the effect of unilateral increases in wages. The Board's Decision in that case appears to suggest that unilateral increases in wages will be remedied according to whether they bring employees to "or near" the prevailing wage rate because, ostensibly, employees would benefit rather than suffer harm as a result. Such reasoning, however, fails to comprehend the teaching of Katz, supra, which is based on the principle that unilateral changes as to matters which are the subject of negotiations bypass and undermine the employees' chosen bargaining representative. In Kaplan's, the Board appears to have disregarded the Katz principle and to have essentially fashioned a per se defense to a per se unilateral change wherever an increase in wages "approximates" the prevailing rate. To the extent that Kaplan's may be read to propose that the amount of a unilateral adjustment in wages, in relation to the prevailing rate,

is determinative as to remedy, it is hereby overruled.

Having found that Respondent unilaterally increased wages on December 15, 1979, in violation of section 1153(e) and (a), we shall order Respondent to cease and desist from making such changes without adequate notice to and bargaining with the Union, to rescind the change, should the Union so desire, and to bargain about the change with the Union upon request. We shall also direct Respondent to compensate its employees for any economic losses they may have suffered as a result of the unlawful unilateral change.

ORDER

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

1. Cease and desist from:

(a) Making unilateral changes in employees' wages or terms or conditions of employment without giving the UFW prior notice and an opportunity to bargain concerning such proposed changes.

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

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

(a) Upon request of the UFW, rescind the wage increase which Respondent granted on December 15, 1979.

(b) Make whole its lettuce harvest employees for all losses of pay and other economic losses they may have suffered as a result of Respondent's unilateral wage change, such amount to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

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

(d) 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.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the one-year period following December 15, 1979.

(f) 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.

(g) Provide a copy of the attached Notice to each

agricultural employee hired during the 12-month period following the date of issuance of this Order.

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

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

Dated: March 12, 1986

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Mario Saikhon, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by increasing the lettuce harvest piece rate on December 15, 1979, without first notifying your bargaining representative, the United Farm Workers of America, AFL-CIO (UFW), and giving the UFW an opportunity to bargain about the proposed change. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

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

WE WILL NOT make any changes in your wages, hours, or conditions of employment without first notifying and negotiating with the UFW, the certified bargaining representative of our employees, about such changes.

WE WILL compensate all of our lettuce harvest piece rate employees who may have suffered any economic losses as a result of the wage rate change on December 15, 1979.

Dated MARIO SAIKHON, INC.

By: _____

Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California, 92243. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Mario Saikhon, Inc.
(UFW)

12 ALRB No. 4
(8 ALRB No. 88)
Case No. 79-CE-170-EC

BACKGROUND

In a previous decision in this matter, reported at 8 ALRB No. 88, the Board resolved two of several unfair labor practice charges in that case on the basis of the Board's prior decision in Admiral Packing Company (1981) 7 ALRB No. 43. In Admiral, the Board had found that Mario Saikhon, Inc., while a member of an employer's joint bargaining group which had been a party to the Admiral case, had falsely declared impasse on February 28, 1979. Therefore, all subsequent changes in its employees' terms and conditions of employment were deemed to be violative of the Act and found by the Board to serve as a further indication of the bad faith and/or surface bargaining which had been established in Admiral. After the Court of Appeal reversed the Board's Admiral findings of false impasse and bad faith bargaining by the employers' group, Respondent moved the Board to reopen the record and reconsider its decision in 8 ALRB No. 88.

BOARD DECISION

On January 23, 1985, the Board severed from 8 ALRB No. 88, the two unfair labor practice cases which had been premised on Admiral. Those cases, which are the subject of the present proceeding, concern three unilateral changes which Respondent implemented after February 28, 1979, and prior to December 1, 1979, and a fourth unilateral change which was implemented on December 15, 1979. Since the court had found that the parties were validly at impasse in February 1979, and since the three unilateral changes which Respondent implemented prior to December 1, 1979 did not exceed Respondent's last preimpasse bargaining table offer, those changes could not provide the basis for a finding of unlawful conduct. However, the fourth unilateral change did exceed the preimpasse offer and Respondent conceded that that change was implemented on December 15, 1979, without prior notification to and bargaining with the incumbent Union. Accordingly, the Board concluded that the change constituted a per se violation of the duty to bargain.

REMEDY

Since the Board's 8 ALRB No. 88 remedy of contractual makewhole was premised on a finding of bad faith or surface bargaining which, in turn, was based on a "totality of circumstances" standard, the question now before the Board was that of an appropriate remedy for a single unilateral change on December 15, 1979. The Board concluded that a discrete unilateral change (1) did not permit evaluation of the bargaining conduct under the "totality" standard and (2) there

was insufficient evidence concerning the single wage increase to warrant a finding of bad faith or surface bargaining. Accordingly, the Board imposed standard remedies by directing Respondent to cease and desist from implementing changes in employees' terms and conditions of employment without first bargaining with the certified bargaining representative and to compensate employees for any economic or other losses they may have suffered as a result *of* the unlawful unilateral change.

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

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