McFarland, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ROBERTS FARMS, INC. Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos . 82-CE-168-D 82-CE-168-1-D 84-CE-92-D 13 ALRB No. 14

DECISION AND ORDER

This matter has been submitted to the Agricultural Labor Relations Board (ALRB or Board) pursuant to section 20260 of the Board's regulations. (Cal. Admin. Code, tit. 8, § 20100, et seq.) Charging Party, the United Farm Workers of America, AFL-CIO (UFW or Union), Respondent, Roberts Farms, Inc. (Roberts), and the General Counsel have filed a stipulation of facts and have waived an evidentiary hearing before an administrative law judge.

Pursuant to the provisions of Labor Code section 1146,[1/] the Board has delegated its authority in this matter to a three-member panel.[2/]

Findings of Fact

All parties agree that there is no dispute concerning the

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

[2/] The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority.

facts set out below.

The UFW is a labor organization, and Roberts is an agricultural employer, within the meaning of the Agricultural Labor Relations Act (ALRA or Act). On June 28, 1978, the UFW was certified by the Board as the exclusive representative of Roberts' agricultural employees in its McFarland and Porterville divisions.

In early 1982, Roberts reclaimed a section of 200 acres of grapes which it had previously leased to another grower, and, in May of that year, it directed Roberts foreman Juan Teran and his crew to perform preharvest work on the property. On or about July 11, 1982, Teran and his crew were laid off, and the harvesting of the grapes was subsequently completed by a labor contractor. After the grape harvest, labor contractors were used to perform additional work on other crops, including work which the Teran crew had performed in the past. The Teran crew was not rehired, although Teran himself made two attempts to be rehired in July 1982. Respondent did not provide the UFW with either written or oral notice of the subcontracting.[3/]

[3/]The parties did stipulate that,

> ... if Hollis Roberts were called and sworn, [he] would testify that sometime before he ordered the lay off of the Teran crew, he received phone calls from people in the McFarland area who questioned why Roberts did not hire the unemployed workers in McFarland instead of bringing a Porterville (Teran) crew to McFarland. Further, Hollis Roberts considers that he gave the UFW notice that the Teran crew was going to be laid off as he received a call from someone who he believes was a union worker or a representative of the union who told

(fn. 3 cont. on p. 3)

Subsequent to the hiring of labor contractors, Respondent mechanized its nut tree operations, giving the Union no notice of that change.

In May 1983, the UFW sent a letter to Roberts requesting bargaining pursuant to the Board's decision in 9 ALRB No. 27.[4/] The parties exchanged no other correspondence between May 23, 1980, and February 1985.

On July 7, 1983, Respondent decided to sell the 400-acre Poplar Ranch. At the time of sale, December 30, 1983, only one employee -- a tractor driver -- worked on the property. Respondent did not notify or bargain with the UFW over the effects of the sale.

On September 7, 1982, the UFW filed a charge alleging that Roberts Farms had violated section 1153(a) and (c) by discriminatorily laying off the Teran crew. On April 6, 1983, Roberts Farms sent information to the General Counsel which he had requested, including data on subcontracting. In May of 1983, the UFW amended its charge to include an allegation that Roberts had violated section 1153(a), (c), and (e) by its subcontracting

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(fn. 3 cont.)

him that the caller did not want the Teran crew working in McFarland. Mr. Roberts does not know who he talked to or when the conversation took place.

It was further stipulated that the UFW denies knowledge of "any person from the Union contacting Hollis Roberts or anyone associated with Roberts Farms regarding the Teran crew from May through July 1982."

[4/] In that decision the ALRB found that Roberts Farms had violated Labor Code section 1153(e) and (a) when it unjustifiably declared impasse and unilaterally raised wages in May 1980.

activity.

On May 10, 1984, the DFW filed another charge, alleging violations of section 1153(a), (c), and (e), based on Roberts' refusal to rehire the worker who was laid off from the Poplar Ranch and on its failure to negotiate over the effects of the sale on the bargaining unit.

On February 28, 1986, the Regional Director issued an amended complaint, alleging that Roberts Farms had violated Labor Code section 1153(a) and (e) by: (1) unilaterally laying off the Teran crew without notifying or bargaining with the UFW; (2) subcontracting and mechanizing bargaining unit work without notifying or bargaining with the UFW;[5/] and (3) selling the Poplar Ranch without notifying or bargaining with the UFW over the effects of the sale.

Waiver

Respondent's primary defense to all of the 1153(a) and (e) allegations is that the Union waived its right to bargain. For the sake of convenience, we will consider that defense prior to a discussion of the various unilateral changes. Respondent states:

> ... the union at least from the time of lay-off, had knowledge of that action, since the union filed the unfair labor practice charge with the Board, and later amended it in 1983...However, at no time did any union agent contract the Respondent, in writing or orally, to

[5/]In the Complaint, the General Counsel treats the layoff and subcontracting as two separate violations. However, in the briefs submitted by the parties, the two actions are treated as one event. Consistent with applicable case law, we analyze the actions as one event. (See, e.g., Fibreboard Paper Products Corp. (1964) 379 U.S. 20.3.)

> request bargaining or even to enquire about the lay-off or contracting.... When a union has received notice of a change in the terms and conditions of employment, and fails to request bargaining on the issue, it waives the right to complain that the employer violated the Act.... (Respondent's Brief pp. 3-6.)

The waiver doctrine is well established. When a union has sufficiently clear and timely notice of an employer's proposed changes in terms and conditions of employment, and thereafter makes no protest or effort to bargain about the plan, the union waives its right to complain that the employer acted in violation of its obligation to bargain. (Medicenter, Mid-South Hospital (1975) 221 NLRB 670 [90 LRRM 1576]; Clarkwood Corp. (1977) 233 NLRB 1172 [97 LRRM 1034].) However, a finding of waiver requires proof of clear and unequivocal notice such that the union's subsequent failure to demand bargaining constitutes a "conscious relinquishment" of the right to bargain. (NL Industries, Inc. (1975) 220 NLRB 41, 43, affd., NL Industries, Inc. v. NLRB (1976) 536 F.2d 786.) And such notice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining. (International Ladies Garment Workers Union v. NLRB (1972) 463 F.2d 907.) If the union receives no notice at all, waiver cannot be inferred from the union's failure to request bargaining about the change. (Fountainhead Development Corporation, dba Blu-Fountain Manor (1984) 270 NLRB 199 [116 LRRM 1219] .)

The burden of proving waiver is on the party alleging it.

(Litton Microwave Cooking Products Division/ Litton Systems/ Inc. (1987) 283 NLRB No. 144.) We find that Roberts Farms did not meet that burden here. There is no indication that the Union had notice of the decisions to use a labor contractor, to mechanize, or to sell the Poplar Ranch prior to their implementation.[6/] The record in this case therefore does not support a finding that the Union consciously and unequivocally waived its right to bargain about these decisions.

Having determined that the Union did not waive its right to bargain, we must determine whether Respondent's decisions affected mandatory subjects of bargaining. Section 1155.2(a) of the Act, which tracks section 8(d) of the National Labor Relations Act (NLRA),[7/] generally defines the areas of mandatory bargaining as follows:

> ... to bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment....

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[6/]Even if we were to find that Hollis Roberts discussed a layoff with a union representative, our decision would be unaffected. There is no claim that subcontracting was mentioned.

[7/]Section 8(d) of the NLRA states, inter alia:

> ... to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment....

Section 1148 of the ALRA mandates that NLRA precedent be relied on where applicable. (Superior Farming Co., Inc. v. ALRB (1984) 151 Cal.App.3d 100 [198 Cal.Rptr. 608].)

Use of a Labor Contractor

In Fibreboard Paper Products Corp., supra, 379 U.S. 203, the Supreme Court affirmed a National Labor Relations Board (NLRB) determination that the decision to subcontract constitutes a mandatory subject for bargaining. Fibreboard involved the classic type of contracting out --the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions.

In First National Maintenance Corp. (1981) 452 U.S. 666, the Supreme Court again had occasion to address the duty to bargain in subcontracting situations. There, the Court reiterated that employers have a duty to bargain over Fibreboard-type subcontracting. (First National, supra, at p. 680.)

It is well established in ALRB precedent that the use of labor contractor employees, to perform tasks customarily performed by employees directly hired by the employer, may constitute a unilateral change, and that a prima facie violation of section 1153(e) and (a) is established if an employer implements the change without giving the union prior notice and an opportunity to bargain over the decision.[8/]

[8/] Our analysis of an employer's shift to a labor contractor is somewhat different than a subcontracting analysis under the NLRA. Under our statute, farm labor contractors are not agricultural employers. Rather the agricultural employees provided to an employer by a labor contractor immediately become additional members of the employer's bargaining unit because they are defined as employees of the employer for all purposes under the Act. (§ 1140.4(c).) Therefore, as we determined in Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85, the hiring of a labor contractor does not necessarily constitute "contracting out" of bargaining unit work. However, it has the same general effect: namely to deprive the traditional work force of work they customarily performed.

(Tex-Cal Land Management Inc., supra, 8 ALRB No. 85; D'Arrigo Brothers Company of California (1983) 9 ALRB No. 3; Robert H. Hickam (1984) 10 ALRB No. 2; Tex-Cal Land Management, Inc. (1986) 12 ALRB No. 26.)

Accordingly, we conclude that Respondent's reallocation of bargaining unit work to labor contractor employees constituted a mandatory subject of bargaining, and that by failing to notify the Union and provide it with an opportunity to bargain over this matter/ Respondent violated section 1153(e) and (a) of the Act.

Mechanization

Where an employer decides to make a change in operations which may be amenable to collective bargaining, but such a change cannot be shown to have a significant impact on the continued availability of employment, the employer is not obligated to bargain over that decision or the effects of that decision. (First National Maintenance, supra, 452 U.S. 666; Tex-Cal Land Management, Inc. (1985) 11 ALRB No. 31.)

While the impact on the bargaining unit of using a labor contractor is readily apparent, the impact of mechanization is not. The factual stipulation submitted by the parties states merely that: "Subsequent to the subcontracting, Respondent mechanized its operations in its nut-tree operations" and, "There was no notice regarding mechanization." (Stip., pp. 3-4.) Thus, the record provides no basis for us to assess the impact

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of mechanization on the bargaining unit.[9/] Without such evidence, we are unable to determine whether the decision was a mandatory subject of bargaining. Therefore, we dismiss the allegation that Respondent violated section 1153(e) and (a) by failing to notify the Union and bargain over the effects of its decision to mechanize.

Partial Sale of Business

The remaining allegation is that Respondent violated its duty to notify the Union and bargain over the effects of its decision to sell the Poplar Ranch. At the time of the sale, there was only one employee, a tractor driver, assigned to work on the property. However, other employees (e.g., seasonal workers) may also have been affected by the transaction.

In First National Maintenance, supra, 452 U.S. 666, the Supreme Court firmly established that, while an employer need not bargain over-an economically motivated decision to close part of its business, it must bargain over the effects of that decision. Similarly, we have long held that a decision to close or sell a business requires that management bargain over the effects of the decision on the wages and working conditions of the employees. (Highland Ranch and San Clemente Ranch, Ltd. (1979) 5 ALRB No. 54, enforced sub nom. Highland Ranch v. ALRB (1981) 20 Cal.3d 848; Pik'd Rite Inc., and Cal-Lina Inc. (1983) 9 ALRB No. 39; Holtville Farms, Inc. (1984) 10 ALRB No. 49.)

[9/]Absent are any facts which indicate whether mechanization had a positive impact (e.g., more jobs), a negative impact (e.g., reduction of jobs), or no impact at all on the continued availability of employment.

The record contains no indication that Respondent gave notice of the sale to the Union at any time prior to the transfer of the property. We find, therefore, that Respondent violated section 1153(e) and (a) by its failure to afford the Union timely notice and a meaningful opportunity to bargain over the effects of the sale. Summary of Findings

We find that Roberts Farms, Inc. violated its obligation to bargain with the UFW on two occasions. Initially, Respondent violated section 1153(e) and (a) when it changed employment conditions, by using labor contractor employees to perform tasks customarily performed by its own crew, without notifying or bargaining with the Union over the decision. Respondent further violated section 1153(e) and (a) when it sold part of its business without bargaining with the Union over the effects of that decision. Remedy

Respondent contends that, should a violation of its duty to bargain over subcontracting be found, the limited backpay award used by this Board in Cardinal Distributing Company, Inc. (1983) 9 ALRB No. 36 would be appropriate. We disagree.

In Cardinal, supra, 9 ALRB No. 36, the employer, who provided produce for wholesale and/or retail consumer markets, decided to discontinue growing parsley, cabbage, onions, and beets. However, Cardinal continued to pack and market beets grown by a neighbor to whom it leased the land on which the beets were grown. We characterized this change as a "subcontracting of that

portion of its business" and found that the decision to subcontract the beets was subject to mandatory bargaining. We noted that "the purpose of our remedial orders is to place the injured party or parties in a position that it or they would have been in but for Respondent's violation of the Act." We then determined that "to provide full backpay to those employees who suffered losses would not be equitable because such provision could not realistically have resulted from any negotiations which would have taken place between [Cardinal] and the [UFW]." We also did not order restoration of the status quo ante as a part of the remedy.[10/]

Unlike the situation in Cardinal, however, Respondent here has made no change in the structure of its business. Respondent itself continues to grow the grapes and other crops in which the Teran crew worked. The employees supplied by the labor contractor perform the same work at the same location as Respondent's Teran crew had previously performed. This type of matter is traditionally amenable to resolution through the collective bargaining process; in a typical decision to use a labor contractor, the principal motivating factor concerns employment costs -- a matter over which a union has considerable influence. Thus, unlike the situation in Cardinal, continued employment may well have resulted from good-faith negotiations.

[10/]In Cardinal Distributing Co. v. Agricultural Labor Relations Board (1984) 159 Cal.App.3d 758 [205 Cal.Rptr. 860], the Board's decision was reversed on the issue of subcontracting. The court found that the employer's decision to discontinue the crop was not tantamount to subcontracting and thus not a mandatory subject of bargaining.

The traditional remedy for failure to bargain over the decision to make a unilateral change includes, inter alia, an order to bargain upon request from the Union, and reimbursement of employees for all economic losses flowing from the change. (See, e.g., Tex-Cal Land Management, Inc., supra, 8 ALRB No. 85; D'Arrigo Brothers Company of California, supra, 9 ALRB No. 3; Pennsylvania Energy Corp. (1985) 274 NLRB 1153.) This remedy, designed to insure meaningful bargaining and to promote the policies of the Act, is appropriate here.

ORDER

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

1. Cease and desist from:

(a) Unilaterally changing its hiring practices by contracting out bargaining unit work to labor contractors and/or subcontracting out any bargaining unit work to other agricultural employers without first notifying the United Farm Workers of America, AFL-CIO (UFW) and affording it an opportunity to meet and bargain about the proposed changes.

(b) Refusing to notify and bargain in good faith with the UFW regarding the effects of a decision to sell any land holdings upon which its employees perform agricultural work.

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed them in 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 (1) restore the method of hiring used for those operations in which the Teran crew had worked prior to its replacement by labor contractor employees, and (2) meet and bargain with the UFW concerning any proposed changes in those conditions of employment of its agricultural employees or in any other proposed changes that are subject to mandatory bargaining.

(b) Offer to the Teran crew employees immediate and full reinstatement to their former or substantially equivalent positions, in accordance with the hiring system that was in effect at the time of their unlawful displacement, without prejudice to their seniority or other employment rights or privileges, and make whole such employees for all losses of 'pay and other economic losses they have suffered as a result of Respondent's contracting out work historically performed by them since July 11, 1982; such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Upon request, bargain collectively with the UFW with respect to the effects of the sale of its Poplar Ranch operation, and reduce to writing any agreement reached as a result of such bargaining.

(d) Reimburse those employees who performed work at its Poplar Ranch operation and who were on its payroll on or about

December 30, 1983, the date Respondent sold its Poplar Ranch operation, for all economic losses for a period commencing five days after issuance of this Order and continuing until: (1) the date it reaches an agreement with the UFW about the impact and effects on its employees of its decision to sell its Poplar Ranch operations; or (2) the date it and the UFW reach bona fide impasse in negotiating such an agreement; or (3) the failure of the UFW either to request bargaining within five days after the date of issuance of this Order or to commence negotiations within five days after Respondent's notice of the UFW to meet and bargain collectively in good faith with Respondent. In no event shall the backpay period for any Poplar Ranch employee exceed the period necessary for that employee to obtain alternative equivalent employment; provided, however, that in no event shall the backpay award to any employee be less than he or she would have earned for a two-week period at the rate of his or her usual wages when last in Respondent's employ. Such amount shall include interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc., supra, 8 ALRB No. 55.

(e) 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 and makewhole period and the amount of the backpay and makewhole due under the terms of this Order.

(f) Sign the Notice to Agricultural Employees

attached hereto and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purposes set forth in this Order.

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from July 11, 1982 until December 30, 1984.

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

(i) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its 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 piece-rate wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(j) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms and make further

reports at the request of the Regional Director until full compliance is achieved.

Dated: September 28, 1987

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member

GREGORY L. GONOT, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office by the United Farm Workers of America, AFL-CIO (UFW), the certified bargaining agent of our employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Roberts Farms, Inc., had violated the law. Following a review of the evidence submitted by the parties, the Board has found that we did violate the law by hiring labor contractors to do the work previously done by our other employees without bargaining with the UFW over this decision, and by failing to bargain with the UFW over the effects of our decision to sell a portion of our operations. The Board has told us to post and mail this Notice. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives you and all 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 to obtain a contract covering 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 or 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 do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT hire crews of labor contractors over our seniority employees without first notifying and bargaining with the UFW over that decision.

WE WILL NOT carry out *a* decision to sell part of our business without first notifying and bargaining with the UFW over the effects of that decision.

WE WILL offer to those members of the Juan Teran crew who were unlawfully displaced by employees of a labor contractor, immediate and full reinstatement to their former or substantially equivalent positions in accordance with the hiring system that was in effect at the time of their displacement.

WE WILL reimburse those seniority employees who were unlawfully displaced for any pay or other money they have lost because of their discharges, plus interest.

WE WILL pay the agricultural employee(s) who were employed by us at the Poplar Ranch on December 30, 1983, no less than the normal

wages, plus interest, that they would have earned for a two-week period when last in our employ.

Dated: ROBERTS FARMS, 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 711 North Court Street, Suite A, Visalia, California 93291. The telephone number is (209) 627-0995.

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

Roberts Farms Inc.
(UFW)

13 ALRB No. 14
Case Nos. 82-CE-168-D
82-CE-168-1-D
84-CE-92-D

BOARD DECISION

This case was submitted directly to the Board. The parties filed a stipulation of facts and waived an evidentiary hearing before an administrative law judge.

The Board found that Roberts Farms violated its obligation to bargain with the United Farm Workers of America, AFL-CIO (UFW) on two occasions. Initially, Respondent violated section 1153(e) and (a) when it changed employment conditions, by laying off directly hired employees and replacing them with the employees of *a* labor contractor without notifying the UFW and offering to bargain with the Union over the decision. Respondent further violated section 1153(e) and (a) when it sold part of its business without bargaining with the UFW over the effects of that decision. The Board determined that the UFW had not waived its right to bargain because there was no indication that the Union had notice of either decision (to use a labor contractor or to sell part of Respondent's business) prior to implementation.

The Board dismissed the allegation that Roberts Farms violated section 1153(e) and (a) by failing to notify the Union and bargain over the effects of its decision to mechanize. The Board stated that for an employer to be required to bargain over the effects of a change in operations, it must be shown that the change has a significant impact on the continued availability of employment. The Board determined that no such impact had been shown.

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